



# Independent Contractor Or Employee?

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## **INTRODUCTION**

It is not always clear whether a worker is an employee or a contractor.

This Guide is designed to assist small, medium and large sized businesses operating in the residential building and construction sector to understand if your worker is an employee or an independent contractor.

Whether a worker is an employee or independent contractor can vary depending on many factors. The process can result in your worker being an independent contractor for one purpose and an employee for another.

This guide will provide a cursory analysis of:

1. Common Law           - Judge made law
2. Federal Law           – PAYG, Superannuation, Payroll.
3. State Law             – Payroll tax, workers compensation, long service leave.

Useful contacts for more information are:

Housing Industry Association  
Workplace Adviser 1300 650 620  
hia.com.au

Australian Taxation Office  
ato.gov.au

State Workers Compensation Regulators

State OH&S Regulators

State Revenue Offices

Portable Long Service Leave Board / Corporation

## **1. Common Law Factors – what the courts have to say**

The High Court of Australia<sup>1</sup> has determined that when considering whether an employment relationship exists, it is not just the level of control which should be considered but the **totality of the relationship**. To this end the courts have established indicia of an employment relationship which are at **APPENDIX A**.

It is important to note that the common law only recognises individuals as employees. Companies and other bodies corporate (eg. partnerships) cannot be employees under the common law.

### **Who is a contractor?**

As a guide to decide if someone is an independent contractor and not an employee they should have all or most of the following:

- A written contract (HIA has a range of trade contract agreement that you can use);
- Be paid on invoice;
- Have an ABN;
- Have the right to perform work for others;
- Have the right to engage others to help do their work;
- Bear the risk of rectifying faulty work and have the opportunity for profit; and
- No right to usual employee entitlements such as annual leave and sick leave.

### **A contractor may not always be treated as a contractor**

If you have correctly determined if your worker is a contractor at common law, there are Commonwealth laws which prevent contractors from being deemed employees under State industrial relations laws.

However, this does not mean that other laws, both Federal and State, may still result in a contractor being treated like an employee.

These type of laws generally apply to contractors where the contract is wholly or principally for the contractor's labour or if the contractor almost exclusively works for one principal.

These laws, generally referred to as deeming provisions, can result in a contractor being deemed as an employee for the purpose of that law.

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<sup>1</sup> Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA1

## **2. Commonwealth Laws and independent contractor status**

### **Superannuation**

The superannuation law defines employee to have its' ordinary meaning at common law. If your worker is an employee at common law then you must pay superannuation contributions on their behalf. However, the superannuation law also expands the meaning of employee to also include **a person who works under a contract that is wholly or principally for the labour of the person.**

The flow chart in **APPENDIX B** is designed to assist you in determining whether you have to pay superannuation contributions on behalf of contractors.

### **Pay As You Go (PAYG)**

Employers must withhold PAYG tax from salary and wages paid to employees based on a common law assessment of the relationship. If a worker is an independent contractor, a principal is still required to withhold tax under the PAYG system where the contractor:

- Has entered into a voluntary agreement with the principal for PAYG withholding;
- Has not quoted their Australian Business Number (ABN) to the principal; or
- Is earning Personal Services Income but is not a Personal Services Business - **APPENDIX C.**

The ATO has an online decision tool, developed specifically for the building and construction sector, which is designed to assist you in understanding your Commonwealth taxation and superannuation obligations in relation to an individual worker. You can access the decision tool by:

1. going to the ATO website – [www.ato.gov.au](http://www.ato.gov.au)
2. searching – “construction decision tool”

or by clicking here <http://www.ato.gov.au/businesses/content.asp?doc=/content/66716.htm>

### **Independent Contractors Act**

#### **Is it illegal to force an existing employee to be a contractor?**

You cannot knowingly or recklessly force an existing employee into a sham contract arrangement. Employees forced into a sham arrangement can ask the Federal Magistrates Court to:

- declare that they are really an employee;
- reinstate them (if they have been sacked); and
- order back payment of wages and entitlements.

There are also deeming provisions with respect to fringe benefit tax and anti-discrimination laws.

### **3. State Laws and independent contractor status**

Similar to the Commonwealth laws, each State and Territory also has laws which may deem certain independent contractors as workers/employees for the purposes of a particular issue.

#### **Workers Compensation**

Each State and Territory has an independent Workers Compensation Scheme.

Each Scheme requires employers to cover to their employees against injury and illness. The Schemes also require a principal provide cover to “workers” which may include independent contractors.

The test for determining who is a worker differs depending on the State or Territory you are working in. Generally, your independent contractor will be deemed a worker where the contract is substantially for labour only or where the contractor fails to satisfy the results test.

Contact your State Workers Compensation Department or your HIA Workplace Adviser on 1300 650 620 for Workers Compensation requirements specific to your region.

#### **Pay-roll tax**

Each State and Territory has an independent pay-roll tax system. In recent years all States and Territories, with the exception of Western Australia, have harmonised their payroll tax legislation.

Payroll tax is a State or Territory tax on wages paid. You must pay pay-roll tax if your total wages exceed the exemption threshold that applies in your State or Territory. In general, wages include salaries, commissions, bonuses, allowances, directors fees, fringe benefits, payments and superannuation contributions.

Payment to independent contractors, employment agencies and to other third parties may be deemed wages depending on what State or Territory you are in. The flow chart in **APPENDIX D** is designed to assist you in determining whether payments made to contracts are deemed wages for the purpose of payroll tax in all States and Territories other than Western Australia.

If in doubt employers should seek clarification from your State Revenue Office or HIA Workplace Adviser on 1300 650 620.

#### **Long Service Leave**

Each State and Territory has a portable long service scheme for workers in the building and construction industry.

You are required to register with the Portable Long Service Leave Board or Corporation in your State or Territory and advise it of your employee’s details.

An employee is entitled to receive long service leave payment once they have worked in the industry (not just for you) for the prescribed time. The prescribed time differs slightly from State to State but is generally 7 years.

Independent contractors may be covered by the scheme in your State or Territory.

If in doubt, contact your Board or Corporation or HIA Workplace Adviser on 1300 650 620.

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**APPENDIX A**

<b>Indicia</b>	<b>Employee / Employer relationship</b>	<b>Independent contractor relationship</b>
<b>Lawful authority to command</b>	The employer has the right to direct the way in which the work is done (contract of service).	The contractor works on his/her own account to achieve the contracted results (contract for service).
<b>Performance</b>	Tasks are performed at the request of the employer.	The contractor maintains a high level of discretion and flexibility.
<b>Risk</b>	Bears little or no commercial risk. Is not responsible for rectifying their defective work.	Bears commercial risk, stands to make a profit or loss on the job, responsible for rectifying their defective work.
<b>Location</b>	Performs work tasks on the employer's premises.	Performs work at a number of locations.
<b>Hours</b>	Works standard or set hours.	Sets their own hours of work.
<b>Leave entitlements</b>	Receives annual leave, long service leave, sick leave and other benefits and allowances.	No leave entitlements.
<b>Payment</b>	Paid an hourly rate, piece rate or award rates.	Based upon performance of contract.
<b>Expenses</b>	Reimbursed for expenses incurred in course of employment.	Responsible for own expenses.
<b>Appointment</b>	Recruited through an advertisement by the employer.	Advertises their services to the public at large.
<b>Termination</b>	Reserves the right to dismiss an employee at any time (subject to law)	Contracted to complete the task.
<b>Delegation</b>	No inherent right to delegate tasks to another.	May delegate some or all tasks to another person and may employ others
<b>Plant &amp; equipment</b>	Provided by employer.	Provided by contractor unless the contract specifies payer to provide.
<b>Scheduling of work</b>	Employer determines the time frame within which the work is to be performed.	Work is performed in accordance with agreed schedules and consistent with the contract obligations.
<b>Expectation of work</b>	Has an ongoing expectation of work.	Engaged for a specific task.
<b>Method of payment</b>	Paid according to award or employment agreement.	Invoices the payer for their services in accordance with the contract.
<b>Taxation</b>	Employer pays PAYG tax on behalf of the employee	Deals with their own tax.
<b>Relationship to the business</b>	Integral part of employer's business.	Accessory to the payer's business.
<b>Ability to accept other work</b>	Full time employee is restricted to work for one employer during normal business hours.	Can accept as many contracts as they wish.
<b>Right to refuse work</b>	Does not have the right to continually refuse a reasonable task.	Agrees to the task beforehand. The contract governs the task.

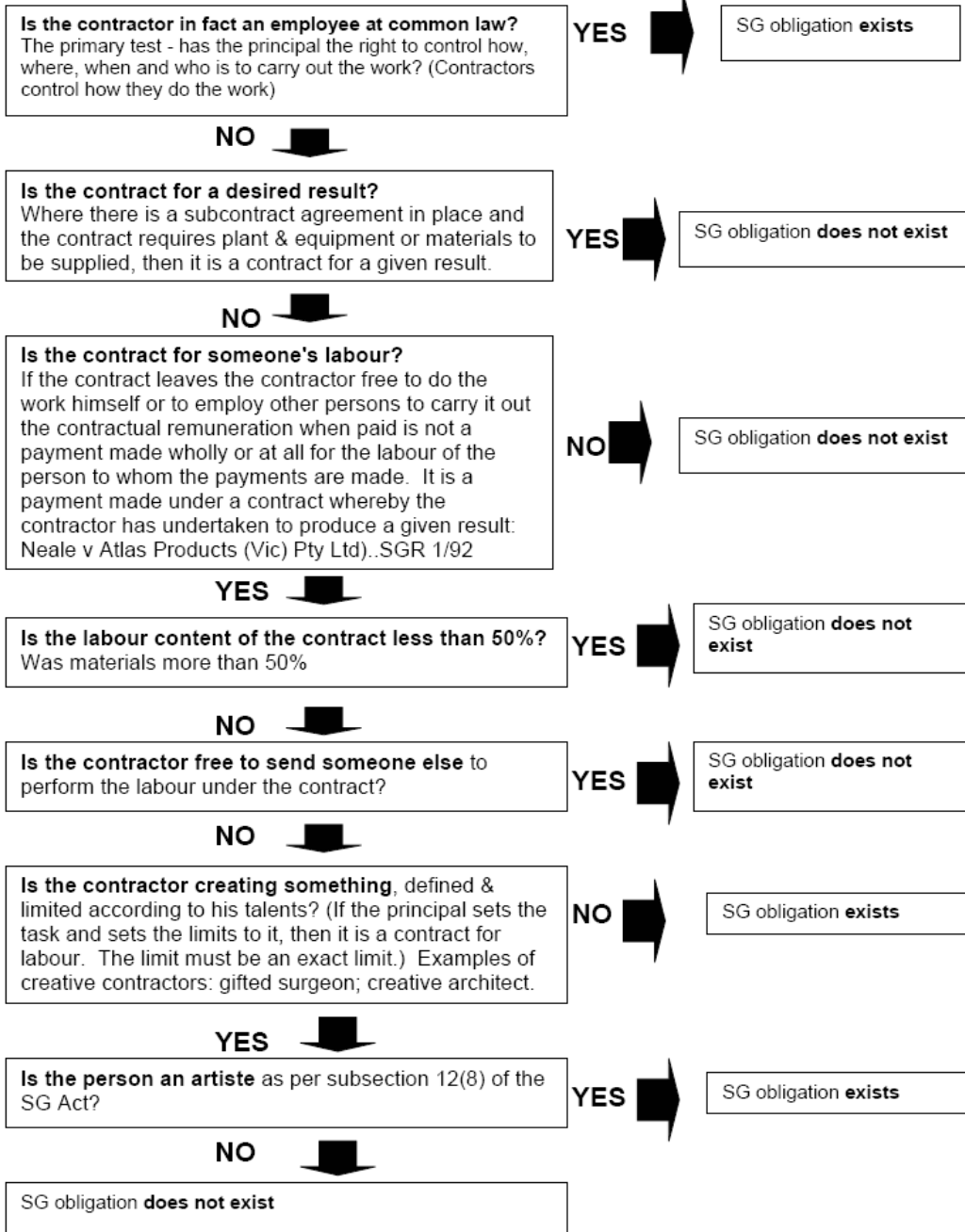
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**APPENDIX B**

**SUPERANNUATION GUARANTEE:**

Do contractors have to be covered?

(THIS CHART SUPPLIED BY AUSTRALIAN TAXATION OFFICE)

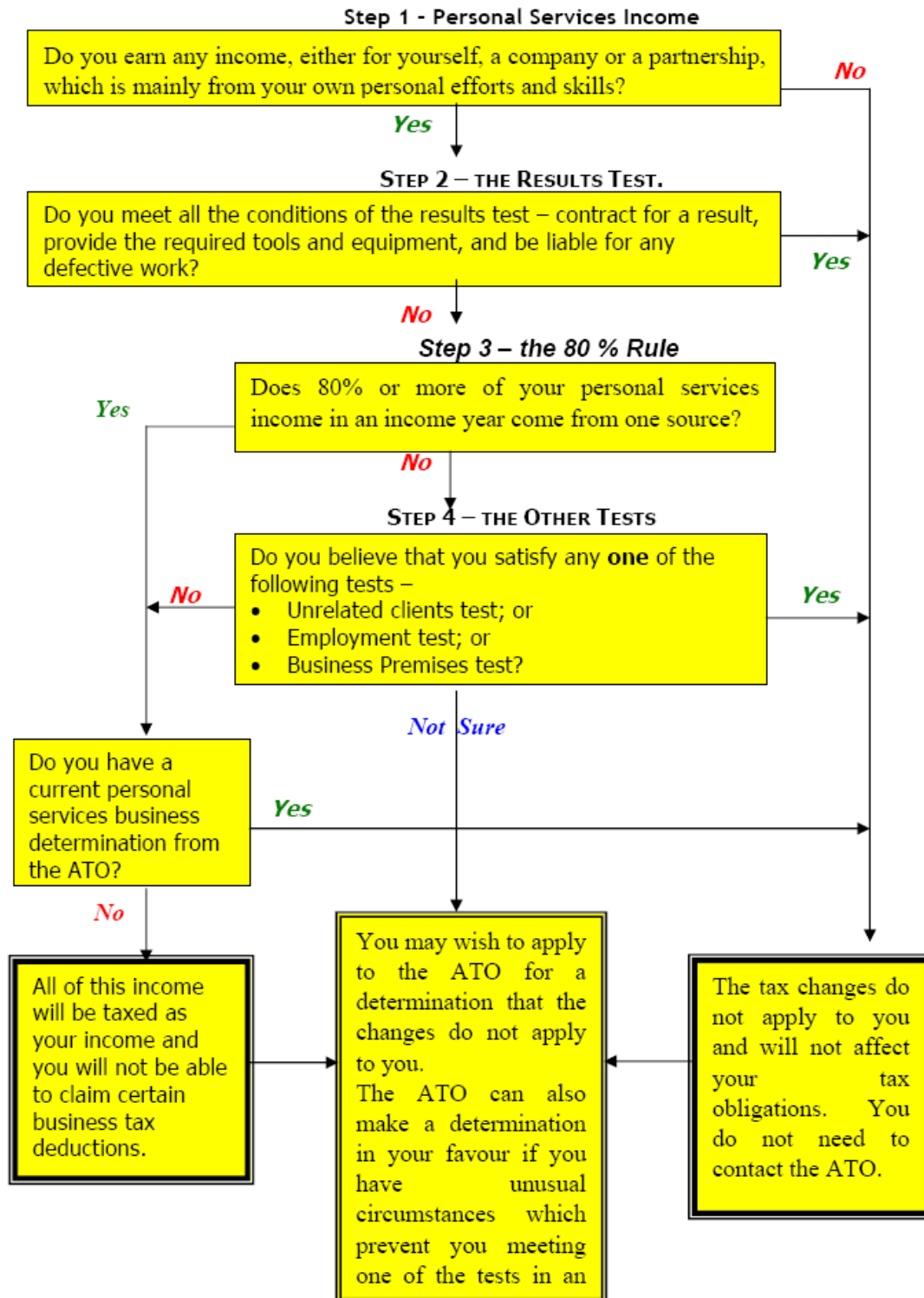


NOTE:- The principal does not have to cover incorporated contractors subject to Section 27 of the SG Act and IT2121. This draft information paper is not a legal document and does not have the force of law. Each decision made by the ATO is made on merits of each individual case, having regard to relevant rulings and the views expressed in information papers

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**APPENDIX C**

**Diagram Showing How You May Be Affected by the New Personal Services Income Tests:**



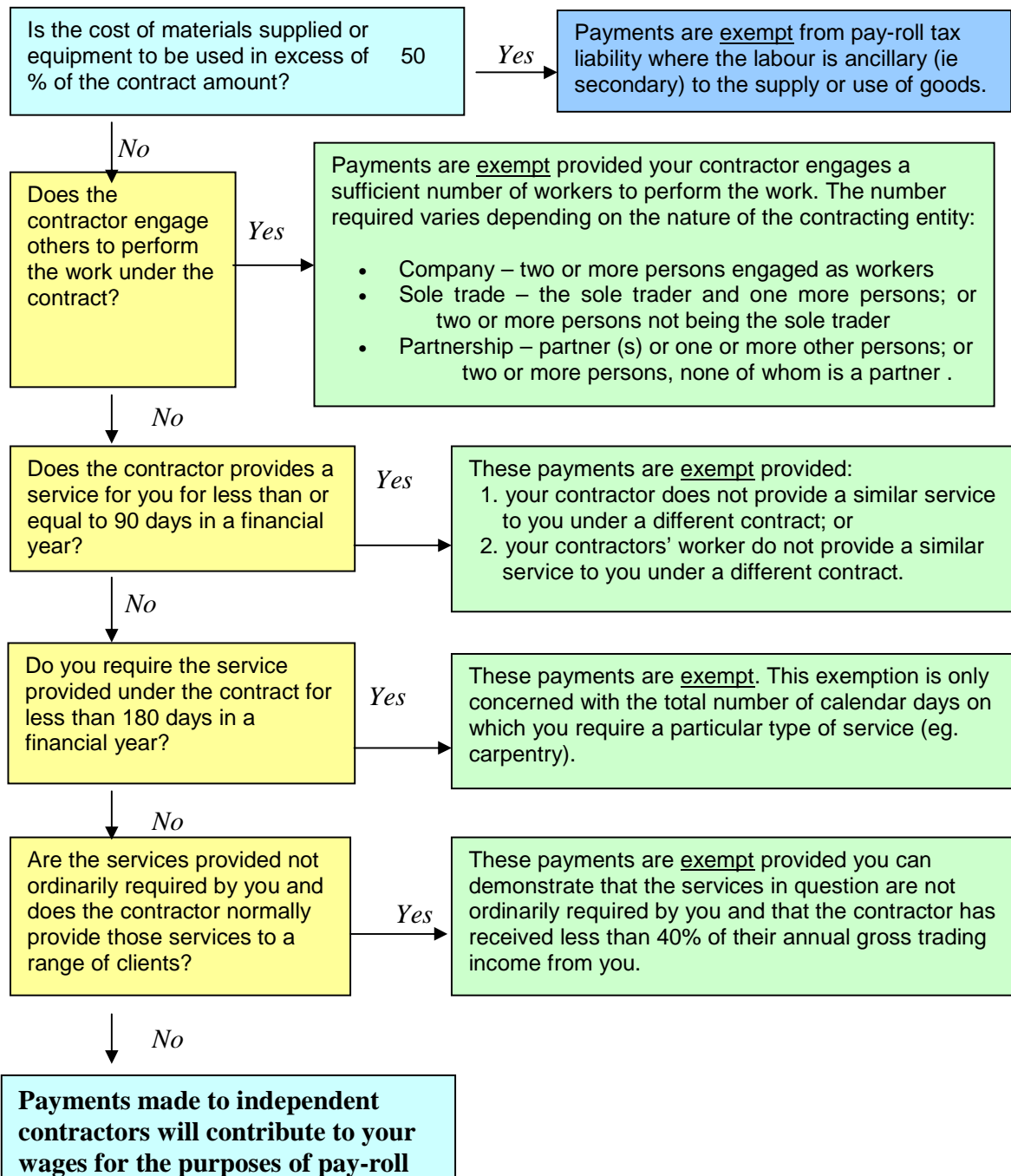
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**APPENDIX D** – Relevant in all States and Territories other than Western Australia

**Do payments to independent contractors contribute to your pay-roll tax liability?**

In general, all payments made to an independent contractor for the performance of essentially labour services are liable to pay-roll tax. In certain circumstances, however, payments made to independent contractors may be exempt from pay-roll tax liability. The onus is on the employer who receives the goods and services to prove one of the exemptions exist. The guide below is to be used as a summary only.



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