

INDUSTRIAL RELATIONS

Independent Contractor or Employee?



By Grace Kusuma -
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Business owners often engage independent contractors to help them out in busy times or to do jobs they may not be able to do (e.g. a plumber, their accountant or perhaps even a fencing contractor or crop sprayer).

Those independent contractors might be sole-traders, partnerships or even private companies and generally issue invoices, have an ABN and charge GST for their services.

Many farm owners also use independent contractors to perform on-farm work such as shearing or operating harvesters. The legal distinction between someone who is engaged as an independent contractor and someone who is an employee is very important.

Based on our experiences at NSW Farmers it appears that some business owners believe that if they engage someone as an independent contractor (or at least call them an independent contractor) then they will not have to pay additional costs usually associated with employing staff (e.g. superannuation, workers compensation and payroll tax).

Farmers need to be careful. A work arrangement between a business owner and a so-called independent contractor could still be considered by Courts to be a relationship between an employer and employee (even if both the parties believed they were in a contracting arrangement).

In a recent case in the Federal Court of Australia (On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3) [2011] FCA 366 (13 April 2011), the Honourable

Justice Bromberg dealt with an Appeal against the Australian Taxation Office that had required the particular business in question to pay superannuation guarantee charges for a huge number of workers. The business had not paid the superannuation contribution because they insisted they were independent contractors. The Court disagreed. The Judge decided that the interpreters and translators engaged by this Agency (that had been classified as independent contractors) were in fact casual employees.



The case is useful because it neatly summarises some important points for readers to consider. Justice Bromberg said in his decision the following:

"Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:

Viewed as a "practical matter":

- (i) Is the person performing the work an entrepreneur who owns and operates a business; and,*
- (ii) In performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?"*

If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent

contractor. If no, then the person is likely to be an employee." (At paragraph 208)

Case precedence shows that courts have consistently adopted the approach of reviewing the relationship NOT based on the arrangement agreed by the parties, but on the work arrangement and practices in reality. Parties cannot deem their relationship to be something it is not.

"The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck". (Per Gray J in Re Porter; re Transport Workers Union of Australia (1989) 34 IR 179 at 184

Mistakenly characterising an employee as an independent contractor may prove to be costly. It must also be realised that the questions about whether someone is engaged as an independent contractor or an employee might be asked by any number of Government bodies (e.g. WorkCover in relation to workers compensation premiums, the ATO in relation to the superannuation and perhaps even the Office of State Revenue in relation to payroll tax).

Should I be worried?

Business owners need to take care when seeking to engage a person as an independent contractor. It is easier to distinguish an independent contractor who operates as a company or partnership. When the person engaged operates as a sole trader, and the contract is substantially for labour that cannot be delegated by the person to someone else, it is quite possible the relationship is one of employment rather than independent contracting.

Further questions

Members are advised to call the NSW Farmers IR Team on 1300 794 000.

Workplace Health and Safety

Effective from 1 January 2012, nationally harmonised Workplace Health and Safety legislation will replace the current Occupational Health and Safety Act 2000. NSW Farmers Industrial has been awarded funding through the WorkCover Assist program to roll out training initiatives on the new legislation.

Information seminars will be available for members and non members to attend in regions across NSW. The seminars will provide an overview of the new legislation and how it will impact on businesses and individuals.

Additional seminars will be delivered in the first half of 2012, when Regulations and Code of Practice for the Legislation have been finalised.

DATES & VENUES FOR WHS SEMINARS:

Tuesday, 27 September 2011
Venue: Bourke Bowling Club
Address: Richard St, Bourke NSW 2840
Time: 10:30 - 13:00

Wednesday, 5 October 2011
Venue: Lismore Workers Club
Address: 231 Keen St, Lismore NSW 2480
Time: 19:30 -22:00
Venue: Wagga RSL - "Pacific Lounge"
Address: Dobbs St, Wagga Wagga NSW 2650
Time: 10:30 - 12:30

Wednesday, 12 October 2011
Venue: West Diggers Leagues Club
Address: 58 Phillip St, West Tamworth, 2340
Time: 10:00 -14:00

Thursday, 13 October 2011
Venue: West Dubbo Bowling Club
Address: 82 Whylandra St, Dubbo, NSW 2830
Time: 15:00 -17:00
Venue: Rafters Restaurant
Address: 87 Malpas St, Guyra, NSW, 2365
Time: 9:30 -12:00

Tuesday, 18 October 2011
Venue: Parkes Service Club
Address: 9- 14 Short St, Parkes, NSW, 2870
Time: 8:30 - 11:00

Wednesday, 19 October 2011
Venue: Orange Field Day Venue
Address: 563 Borenore Rd, Borenore NSW 2800
Time: 9:00 - 12:00

Monday, 24 October 2011
Venue: Mittagong RSL
Address: Cnr Hume Hwy & Bessemer St, Mittagong NSW 2575
Time: 13:00 - 15:00

Wednesday, 9 November 2011
Venue: Batlow RSL
Address: Mayday Road, Batlow, NSW 2730
Time: 9:30 - 12:00

Should you wish to attend any of these seminars, please contact us on (02) 8251 1870.

For those who cannot attend training seminars, NSW Farmers' Industrial will provide online webinars & telephone training. Please watch this space for further information.

Chemical Card™ Course Online

Do your chemical use accreditation training at home

Here is what satisfied participants say about the online Chemical Card™ course presented by NSW Farmers:

"Thank you for organising this course. It was a great way to do the retraining as I would be travelling a 100Km round trip and spending all day in town to do the course otherwise. The presenter was very practical and concise with what we needed to know. The information provided was relevant and timely."

- Colin McCrabb, Wanganella

"Great way to do the refresher!"

- Ben McInnes, Robertson

"Impressed with the workshop. Definitely the most convenient way to do the refresher course."

- John Hopmans, Aberdeen

"Thank you for a trouble free and easy learning environment. The trainer was excellent and I had a good experience. I have done this course so many times now I think I could be the trainer!! It's a great way to keep the accreditation going."

- Scott Gough, Macksville

Register now for Initial or Refresher on one of these dates:

Wed 14 September

Thursday 13 October

Tuesday 15 November

Thursday 8 December

Phone the Member Service Centre 1300 794 000 and ask for Chemical Card™

www.nswfarmers.org.au

Toorale Station must be returned to production

NSW Farmers believes the Bourke community in the State's Far West would be revitalised if agricultural production was allowed to resume at Toorale Station, and supports the Western Division Council in its calls for the property to be returned to a productive agricultural enterprise.

The 91,000 hectare grazing and irrigation property near Bourke was jointly purchased by the Commonwealth and NSW Governments for \$24 million in 2008.

The Commonwealth saw an opportunity to buy back a large parcel of water under its Restoring the Balance in the Murray Darling Basin program, while the property was made a National Park.

NSW Farmers Western Division Council Chair Jim Maynard says the sale, although touted as a strategic buy-back, had a negative effect on the Bourke community.

"Many people lost their jobs as a result of the decision to shut down the Station, causing the township of Bourke to lose some of its hardy vitality. We believe restoring it to a working farm would significantly benefit the community and reverse the impacts that have occurred in the past three years since the sale," Mr Maynard said.

The Western Division Council believes there is a solution to benefit both the local community, as well as the environment.

"We believe areas within the old Toorale Station that are deemed 'iconic' should remain under National Park status. However, extensive grazing areas that make up a large portion of Toorale should be sold or leased back to return the Station to an agricultural enterprise," Mr Maynard said.