

Employee or contractor?

The distinction between an employee and an independent contractor has never been clear cut but is an issue that has important consequences for the building industry.

Businesses that employ contractors need to be aware that changes in the way courts, industrial tribunals and the Australian Tax Office (ATO) define these terms may impact significantly on their workplace obligations. These obligations may extend to areas such as workplace health and safety, workers' compensation, superannuation, and taxation.

In addition, while employees are not required to be licensed, the *Queensland Building and Construction Commission Act 1991* requires that a person who contracts to carry out or supervise building work over a certain value must have an appropriate licence. (In most cases the threshold is \$3,300, but where health and safety is an issue, such as plumbing and drainage, gas fitting, pest control, and fire protection, a licence is required to perform work of any value.)

Unfortunately, there is no single, objective and universally accepted test that can be applied to quickly and conclusively determine whether a person is an employee or an independent contractor. The High Court of Australia and other tribunals, such as the Australian Industrial Relations Commission, together with government bodies such as the ATO, have all emphasised that each case must be considered on its merits and requires a detailed assessment of the terms of engagement and the employment relationship.

Some of the many factors which the courts and other relevant bodies have considered in determining the employment status of a worker have included:

- arrangements concerning appointment and termination
- the degree of control exercised by an employer/head contractor over the worker (generally, the greater the degree of control exerted over a worker, the more likely they are to be an employee)
- the obligation to work, place of work, and hours of work
- the timing and manner of payment (e.g. fortnightly for hours worked, or only at certain pre-arranged stages in the job as detailed in a written agreement)
- the deduction of income tax (contractors are usually responsible for paying their own tax whereas employees have it deducted)
- leave entitlements
- the provision of equipment and materials (generally contractors must provide these)
- payment of expenses (an employee is generally reimbursed for expenses incurred in the course of their employment)
- responsibility for risk in relation to the work performed (a contractor usually bears the risks, including liability for defective work)
- ability to delegate work (an employee generally has no inherent right to delegate all or part of their tasks).

This fact sheet is not legal advice, and should not be relied upon as such. Any person seeking advice as to whether they are exempt from licensing under the QBCC Act, or any other obligations associated with their employment, should consult a solicitor.