

Guidance Note

Pty Limited Independent Contractor Agreement

NOTE: As noted at the outset of the template contractor agreement, the High Court of Australia handed down the decision of CFMMEU v Personnel Contracting Pty Ltd (**Personnel Contracting**) in March 2022 which called into question the ongoing legality of "Odco" style arrangements. An "Odco" arrangement involves a labour hire agency providing a contractor to a client, with no contractual relationship between the contractor and the client. As a result of the High Court decision, there is now a significant risk that any "Odco" style arrangements, where the services are being provided by an individual contractor, would result in a finding that the contractor is in fact an employee of the labour hire agency. The High Court decision did not consider the relationship between a firm and an incorporated contractor. While it is likely that there is less risk of a finding that a key person or other worker providing services through an incorporated contractor in an "Odco" arrangement is an employee and this type of engagement is much preferable to one where the firm contracts with an individual contractor, we cannot advise definitively that the arrangement contemplated in this template would survive the scrutiny of a court. Accordingly, we **strongly** recommend any member who wishes to contract via an "Odco" arrangement seek legal advice prior to using this template.

CLAUSE	AREA	COMMENTS
A-D	Background	<p>This paragraph describes the triangulated on-hire relationship between the Firm and the Client (a commercial supply arrangement) and the Firm and the Independent Contractor (a contracting relationship). It also explains that the Pty Ltd Contractor will provide their services through a nominated individual (referred to as the 'Key Person'), who is employed by the Pty Ltd Contractor. Following the introduction of labour hire licensing in ACT (from 27 November 2021), Victoria, Queensland and SA, we recommend also stating in contracts with clients and candidates that the Firm is appropriately licensed.</p> <p>It is also important that your arrangements with your Contractors match your arrangements with your Clients and that any provision relating to guarantees, risk transference or which contemplates contractual recourse is synchronised to those arrangements. If you are unsure about this aspect of your business documents you should seek assistance of a lawyer who practises in this area and is familiar with the laws of your jurisdiction.</p>
2	Term	This clause provides for three types of engagements which can be tailored to the particular commercial arrangements, being:

		<ul style="list-style-type: none"> • Option A – where the services are needed for a particular client project without a defined end date; • Option B – where the services are needed for a maximum period with a start and end date; and • Option C – where there is a need for an ongoing contract akin to an umbrella agreement and the Contractor will be engaged as and when required. <p>It is important to determine the requirements for each engagement and that the correct term is selected and Schedule 2 is updated accordingly. Where Option C is selected, Appendix A (Engagement Offer) should also be included. This document sets out the specific terms relevant to an engagement, including the name of the client, the services to be provided, and the service fees payable. An Engagement Offer will be issued to the Contractor for each engagement.</p>
3	Engagement	<p>In order to separate the relationship between the Pty Ltd Contractor and Key Person and also allow for the Key Person to be more easily replaced from time to time, the Key Person is not a party to the agreement but is specified in Schedule 2 and is required to execute a Deed Poll in the form in Schedule 3 to bind them to their obligations (i.e. ensuring confidential information and intellectual property is protected).</p> <p>Note that, under the APSCo Au Code of Conduct, Members must not knowingly or recklessly assist, encourage or induce a person to breach a term of a work contract or contract for the supply of services. This provision is designed to bring to light any engagement that the Contractor may have made with a third party, which could interfere with the performance of the Contractor’s duties or the Firm’s ability to recover a fee.</p>
4	Relationship	<p>This clause confirms that the relationship between the Firm, Contractor and Key Person is an independent contractor relationship and not an employment relationship. NOTE: The Courts will look in the first instance at the written contractual agreement between the parties to determine its nature. In circumstances where the parties conduct is inconsistent with the agreement, or the terms of the agreement do not support the nature of the agreement being truly one of principal and independent contractor, a Court may decide that a relationship is an employment relationship notwithstanding that the parties have called it something else. All forms of sham arrangements should be strictly avoided. Please refer to APSCo Au’s compliance resources to ensure you are correctly classifying your contractors and using the right contract template.</p>

5	Supply of services to others	<p>The ability to assign or transfer work is an important indicator of a genuine independent contracting relationship. The Client's and the Firm's discretion as to whether to agree to a delegation is preserved in this clause.</p> <p>If the Contractor wishes to replace the Key Person, then it is critical that a new Schedule 2 is issued with their details and that a Deed Poll is executed in accordance with Schedule 3.</p>
6	Contractor's obligations	<p>The provisions in sub-clause (b) are adapted from the <i>Australian Consumer Law</i> and are applied here to the Contractor's supply of services in order to set an objective standard of quality and performance capable of operating within the scope of a genuine arrangement for the supply of services.</p> <p>Clauses 6.4 and 6.5 have been included to indemnify members in respect of any losses they suffer by having to comply with regulatory or legislative requirements arising from the provision of services, including all employment related payments and entitlements.</p> <p>NOTE in light of the High Court decision of Personnel Contracting (which was critical of a principal exercising control over how a contractor provides the services, suggesting that such control is indicative of an employment relationship), the template deliberately does not require the contractor or the Key Person to comply with the lawful and reasonable instructions of the Firm or the Client. Rather, any particular requirements around where, when or how the Services should be provided are better set out in the description of the Services in Schedule 2 and should accurately reflect careful and detailed discussions with the Client. In turn, the template requires the contractor to perform the Services to the reasonable satisfaction of the Firm.</p> <p>Specific instruction should be given as to the contractor's obligations. This may also include the complying with the APSCo Au Code of Conduct.</p>
8	Payment for Services & Invoicing	<p>NOTE that the Template contemplates that there will be arrangements in place between you and your Client by which the Client is to approve the Contractor's claims for hours worked.</p> <p>If you utilise time sheet recording, you might add a provision such as:</p> <p><i>The Contractor shall complete a timesheet [insert frequency] and, following approval by the Firm's Client, submit the timesheet to the Firm by [insert submission</i></p>

		<p><i>details – time method etc]. Failure to complete timesheets on time or in accordance with this contract may result in delays in payment by the Firm.</i></p> <p>Note also, that the payment formula excludes remedial work which is to the Contractor’s cost.</p>
9.5	GST	Use this clause if any payments under the Agreement are calculated by reference to revenue (e.g. commission arrangements).
11	Insurance	<p>Insurances may include: appropriate workers’ compensation insurance, public liability insurance and professional indemnity insurance. It may be necessary to specify the amount of cover in some cases and to ensure the suitability of cover – i.e. that it matches the obligations under arrangements you have made with the Client. You should take advice from your insurance broker as to the level of insurance recommendable. The responsibility for insurances must be carefully considered in each case. For example, the party who is responsible for having workers’ compensation insurance in place operates as a matter of law rather than choice.</p> <p>Sometimes (perhaps rarely) the Client will take out cover that may extend to contractors. Such arrangements should be identified and their conditions assessed to ensure that the arrangements struck with your Contractor do not compromise the Client’s cover.</p> <p>The clause recognises the possibility that, in some cases, insurance arrangements may be necessary to maintain professional registration or licensing.</p>
12	Work Health & Safety	<p>The provisions in this clause cover the health and safety obligations that apply to the Contractor to the extent that is reasonably practicable, which is a statutory defined term.</p> <p>The obligations arise from the Contractor’s relationship with the Firm and also take into account the possibility that there may be third-party PCBUs e.g. Clients; or in the case where contractors are on-hired to a Client who is performing work for one of its customers, especially if the work is to be performed on the customer's site; or where several PCBUs are active at the one facility. There may be a number of other cases in which there will be third-party PCBUs.</p> <p>The requirements of consultation, cooperation and coordination extend to the involvement of all duty holders with respect to the work that is being performed.</p>

		The work that is to be performed pursuant to Schedule 2 or, if Option C is selected, the relevant Engagement Offer, may be influenced by, impact upon, or be impacted by work which other duty holders are responsible for and give rise to a number of different consultants, co-ordinating relationships.
13	Confidential Information	The definition of Confidential Information (as set out in Schedule 1) should accurately reflect the types of commercially sensitive information a Contractor and/or Key Person may be exposed to during the engagement.
14	Privacy	<p>Members might wish to develop a confidentiality and privacy document that they would require their Contractors and any Key Person to sign. You will need to have a good understanding of the privacy obligations of the Firm, Contractor and Client, and ensure your contracts and other compliance resources reflect relevant law.</p> <p>This clause sets up an obligation on the part of the Contractor to execute documents and undertake further actions that may be required to provide assurance of privacy and confidentiality. Such documentation, wherever it is required, should be drafted by a lawyer who is familiar with privacy laws of that jurisdiction.</p> <p>APSCo Au also provides privacy resources to help you understand the relevant obligations.</p>
15	Copyright and Intellectual Property	Again, the definition of Intellectual Property will need to accurately reflect the types of works and materials that a Contractor may develop in the course of providing services to a client. The current definition, set out in Schedule 1, is intended as a catch-all, however if there are specific works or materials you wish to protect, you may wish to consider obtaining legal advice in order to ensure the definition adequately covers these works or materials.
17	Termination	Depending on the Service Period adopted in clause 2, you may wish to include an option to terminate the agreement with notice. There are also options for immediate termination depending on the Contractor and Key Person's conduct.
18	Restraint	You may wish to include a provision to restrain the contractor from directly providing services to a Client or soliciting other contractors following the termination of the engagement. It is important to ensure that the period selected is reasonable and does not go beyond your legitimate business interests, otherwise it may be unenforceable. You should obtain legal advice to ensure

		it is enforceable and tailored to the particular engagement.
Schedule 1	Group	The template is currently drafted on the basis that the obligations of the Contractor are primarily owed to the Firm, not a group. If the Firm is part of a corporate group, then the template will need to be amended to provide adequate protection to the Group (not just the Firm) in respect of confidentiality, intellectual property and restraints. You should obtain legal advice to ensure the template is appropriate for your circumstances.