

Legal briefing

20 July 2023

Embedded contractors

Introduction

AGS has developed this checklist to assist managers of embedded contractors to identify legal issues that are important for managing these personnel.

There are a large number of *embedded contractors* working in Commonwealth entities. These are individuals engaged under a contract to perform work within an entity who are not employees of the entity but may perform similar functions to employees often using entity IT systems. They may perform a wide range of roles ranging from providing routine support to more senior or specialist advice.

The contracts used to engage embedded contractors should deal with all matters relevant to managing their engagement. Managers of embedded contractors should also be familiar with the terms of their contract and manage these personnel in accordance with the contract.

1. Is the person an employee or a contractor?

- A person who is performing work in a Department of State or Executive Agency¹ can only be an employee of the Commonwealth if they are employed under the *Public Service Act 1999* (Cth) (PS Act), or some other Act (PS Act, s 6(1)).² If the person is not so employed, they must be engaged on a different basis (i.e. a contractor).
- The same applies to both non-corporate and corporate Commonwealth entities that, by reason of their enabling legislation, can only engage employees under the PS Act.
- Where a statutory entity does not engage employees under the PS Act, its power to engage employees comes from its enabling legislation. These entities will typically have a statutory power to employ persons and a statutory power to engage contractors/consultants. Generally, the person will only be an employee if they are engaged under the employment power. Although, it will be important to analyse the statutory entity's enabling legislation, as sometimes a consultant can be engaged as an employee.
- Some statutory entities have 'dual' employment powers, in that they can employ persons under the PS Act or another specific statutory power. Again, the person will only be an employee if they are employed under the PS Act or the other statutory power.

¹ An executive Agency is one established by the Governor-General under s 65 of the PS Act.

² See also s 67 of the Constitution and *Re Australian Industrial Relations Commission and Another; Ex parte Commonwealth* [2005] FCAFC 204 (Arends). Similar to Departments of State, a person working in a Department of Parliament will only be a Commonwealth employee if they are employed under the *Parliamentary Service Act 1999* (Cth), or some other Act (s 6(1)).

- Commonwealth companies are generally in a different position. Commonwealth companies are companies incorporated under the *Corporations Act 2001* that the Commonwealth controls. These bodies do not ordinarily engage employees under statute (although some do). They normally engage employees in the same way that an ordinary corporation would. In these circumstances, the common law test for determining whether a person is an employee or contractor will apply: see *ZG Operations Australia Pty Ltd v Jamsek* (2022) 398 ALR 603 and *CFMMEU v Personnel Contracting Pty Ltd* (2022) 398 ALR 404 where the High Court reiterated its preference for determining the existence of an employment relationship by reference to the rights and duties created by the written agreement.

Accordingly, it is important to be clear in the contract on the status of the personnel.

2. What law governs the management of embedded contractors as compared with employees?

Embedded contractors are engaged under a contract for services and have a different legal status to employees. They are primarily managed in accordance with the contract for services under which they are engaged. However, certain legislation will also apply to embedded contractors, including federal anti-discrimination legislation, the *Fair Work Act 2009* (FW Act) (to a very limited extent) and the *Work Health and Safety Act 2011* (WHS Act). The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and Rule (PGPA Rule) may also apply to embedded contractors in certain circumstances (see further below).

In contrast, the FW Act (including the National Employment Standards) applies to all APS and non-APS employees. Management of APS employees is also governed under the *Public Service Act 1999* and subordinate public service legislation. Industrial instruments (such as enterprise agreements) and/or terms and conditions determined under legislation (e.g. s 24(1) of the PS Act) or applying through contract may also govern the employment relationship. The PGPA Act, the PGPA Rule, and the WHS Act will also apply.

3. What is the difference between a fixed term contract and a contract for services?

A person may be engaged as an *employee* (including an APS employee) under a *fixed term contract* (subject to any applicable legislative limits on the length of the term). In this case, their work is governed by employment law for the term of their fixed term contract, as it is for other employees. This is different to a person who is engaged under a contract for services, as they will be a *contractor* and not an employee, and their work will primarily be governed by the contract for services. It is important for managers to be clear on the status of their personnel.

4. What should a contract for embedded contractors cover?

The contract should clearly state that the person is engaged to provide certain services, and should cover all aspects relevant to the engagement. Important provisions include:

- workers' compensation
- insurance
- work health and safety
- intellectual property
- moral rights
- confidentiality
- security
- information handling
- use of IT systems
- compliance with policy
- superannuation
- payroll tax
- key personnel
- replacement personnel
- payment
- performance measurement
- termination.

5. Is an embedded contractor entitled to superannuation?

If the contract is wholly or principally for their labour (or certain other circumstances apply), they may be covered by the *Superannuation Guarantee (Administration) Act 1992* even though they are not an employee. The contract should address superannuation to make it clear which party is responsible for paying superannuation under the superannuation legislation.

6. What are the Work Health and Safety duties for entities engaging embedded contractors?

Both the company providing the embedded contractor (if there is one) and the host entity are responsible for making sure a risk assessment of potential hazards is undertaken and appropriate safety measures are put into place. The individual worker also has an obligation to look after their own and others' health and safety in the workplace. The company providing the embedded contractor (if there is one) must provide workers' compensation coverage for its workers and ensure their health and safety in the workplace. The host entity has an obligation to ensure the safety of embedded contractors and ensure that they are not exposed to risks in the host's workplace.

7. How is performance managed?

Managers should be familiar with the requirements specified in the contract and require the embedded contractor to meet these requirements. These should include that the embedded contractor be required to follow the reasonable directions of the agency. In the event that contractual requirements are not met, formal steps may need to be taken under the contract.

8. How is an embedded contractor terminated?

Legal advice should be obtained before terminating a contract as this raises legal risk for an agency. The right to terminate will be governed primarily by the contract so the relevant contract provisions will need to be carefully reviewed and all formal steps properly followed. In dealing with the personnel who are performing the contract there may also be legislative obligations to consider such as compliance with work health and safety and anti-discrimination laws.

9. Are embedded contractors ‘public officials’ under the *National Anti-Corruption Commission Act 2022 (NACC Act)*?

Yes. Embedded contractors are ‘public officials’ for the purposes of the NACC Act and also ‘staff members’ of the agency with which they are embedded.

10. Can an embedded contractor make a Public Interest Disclosure (PID) under the *Public Interest Disclosure Act 2013*?

Yes, in certain circumstances the embedded contractor may make, or be the subject of, a PID.

11. Is an embedded contractor subject to the APS Code of Conduct and APS Values?

No. However, equivalent obligations may be included in the contract.

12. Is an embedded contractor required to comply with the policies of the entity?

Only if an obligation to do so is included in the contract.

13. Can embedded contractors give instructions to lawyers?

It is important to confirm whether an embedded contractor is authorised by the entity to give instructions to lawyers, and, if so, the scope of their authority. If there are issues of significance to the entity, they should be raised directly with the responsible APS official.

14. Can embedded contractors access information and data in the same way as officials?

Generally, embedded contractors should only be given access to the information that they need to perform their role by applying the ‘need to know’ principle. This avoids the risk of improper access to, or use of, entity information. The contract should also cover information handling requirements including confidentiality, security of official information, security of classified information (if relevant), and requirements for dealing with information when the contract ends.

15. What limits need to be placed on the activities of embedded contractors?

As embedded contractors are not officers or employees of the Commonwealth, the scope of their activities will need to be managed. For example, if the entity is subject to confidentiality obligations, limitations under end user licences, or export control arrangements, they may not be authorised to do what APS officials can do.

- **What are export control considerations?** If information is subject to export controls, the Commonwealth entity will need to check and confirm that sharing with embedded contractors is permitted in accordance with the authorisations/agreements in place. Sharing with embedded contractors may constitute a re-transfer and may require additional authorisation from the exporting country or additional arrangements to be put in place.

- **How should third party material be handled with embedded contractors?** Some suppliers seek to limit the Commonwealth's ability to share their information with other Commonwealth embedded contractors (including embedded contractors) under their supplier contract. Any confidentiality arrangements with suppliers should be negotiated to allow entities to share supplier information with embedded contractors (and other contractors). Before giving supplier-provided information to embedded contractors, it is important to check the supplier contract to ensure that the confidentiality provisions permit this.

16. What is a labour hire arrangement?

Labour hire laws differ across states and territories. Some laws apply to labour hire arrangements generally (subject to minor exceptions), while other jurisdictions have narrower categories of work that is covered. Generally, labour hire workers are workers who are directly employed or contracted by a labour hire company that then 'on-hires' them to perform labour for an entity. The first company is responsible for payment to the worker (including any employee or other entitlements). The second entity directs the worker's tasks.

17. What are the additional requirements for labour hire arrangements?

There are labour hire licensing laws in the ACT, Queensland, Victoria and South Australia. Some other jurisdictions are also considering enacting labour hire laws. Generally, these laws create an obligation for the hosting entity to ensure that the labour hire company is licensed under the applicable state or territory law, unless a relevant exception applies. It is important to check the requirements under the relevant state or territory law before engaging labour hire personnel in these places as these laws are not uniform. Certain secondments may also constitute labour hire. The labour hire agreement should include an obligation for the company to maintain the licence for the duration of the labour hire placement.

18. What is payroll tax and who is responsible for paying it for embedded contractors?

Payroll tax is levied by states and territories on wages paid or payable by an employer to its employees. Labour hire firms are generally liable for state or territory payroll tax on workers that they hire out. However, laws differ across state and territory jurisdictions. This liability should be discussed with the labour hire firm before engaging labour hire staff and should be covered in the contract.

19. Who is responsible for PAYG withholding tax?

Responsibility for withholding tax from certain payments and remitting this to the ATO should also be determined before entering a contract. If the labour hire company employs the worker, then they will generally have to withhold tax amounts from payments made to their employee. However, if the worker is a contractor, the labour hire company would generally not withhold amounts from payments made to that contractor (unless the contractor requests withholding by entering into a voluntary agreement). See ATO guidance: [Payments you need to withhold from | Australian Taxation Office \(ato.gov.au\)](https://www.ato.gov.au/ATO/your-support/resources/Payments-you-need-to-withhold-from).

20. Engagement of the embedded contractor by the entity

Where an embedded contractor is engaged by a Commonwealth entity, this is likely to be treated as a procurement under the Commonwealth Procurement Rules (CPRs).

Division 2 of the CPRs would not apply where the embedded contractor's remuneration is below the threshold of \$80,000 for Non-Commonwealth Entities (NCEs) or \$400,000 for prescribed Corporate Commonwealth Entities (CCEs), or if an exemption in Appendix A of the CPRs applies. The contracts for labour hire exemption at paragraph 14, Appendix A of the CPRs only applies to procurement classified as contracts for labour hire which is specifically defined in the CPRs as being contracts to engage individuals directly or 'through a firm which primarily exists to provide the services of only that individual', and includes contracts for the appointment of an eminent individual to an Accountable Authority or governance committee, but excludes the engagement of consultants.

Where a Minister makes an appointment using the executive power (such as appointing a person to an advisory board), this would not be treated as a procurement under the CPRs (CPR 2.9(h)). However, s 71 of the PGPA Act would need to be considered for the approval of expenditure related to the appointment. In some cases, the Minister might make the decision in relation to the appointment and the expenditure but the contract would be entered into between the agency and the relevant person.

21. Does it matter whether embedded contractors are engaged individually or through a company, partnership or trust?

There are practical and legal considerations to take into account when deciding whether to engage embedded contractors individually or through a service provider. For instance, individuals may not:

- be registered for GST
- hold appropriate insurances
- have workers' compensation coverage
- have the means to cover the liability, if they become liable to the entity or a third party.

The appropriateness of the contracting model should be carefully considered in the context of the purpose and risks associated with the relevant engagement. Careful legal consideration will also be needed if it is proposed that an embedded contractor is to be engaged under a contract with a partnership or trust.

22. When can embedded contractors be prescribed as officials and given delegations?

Ordinarily, embedded contractors are not 'officials' of a Commonwealth entity for PGPA purposes. However, in certain limited circumstances, embedded contractors are 'officials' of an NCE (but not a CCE) and can be delegated powers, functions or duties under the PGPA Act, PGPA Rule or the *Financial Framework (Supplementary Powers) Act 1997* (FFSP Act).

For other legislation, in determining whether embedded contractors can have certain powers or functions devolved to them, the terms of the legislation will need to be considered, along with a range of policy considerations.

- **How do I check if a particular embedded contractor is an ‘official’ of an NCE?** An embedded contractor will be an official of an NCE if they meet all of the requirements of item 1A of the table in section 9(1) of the PGPA Rules. They will be considered an official if all of the following questions are answered ‘yes’:
 - a. Is the person an individual who is engaged as a consultant or independent contractor (or an employee of a person engaged as a consultant or independent contractor) to provide services to the entity?
 - b. Do the services require the exercise of a particular power, the performance of a particular function, or the discharge of a particular duty, conferred on any person by the PGPA Act (or a rule made under it) or the FFSP Act?
 - c. Is the individual capable of being identified by name by the accountable authority of the entity in relation to the exercise of the power, the performance of the function or the discharge of the duty?

- **How can I give an embedded contractor a delegation under the PGPA Act or FFSP Act?** Check whether all of the following questions (based on guidance in RMG-212) are answered ‘yes’:
 - a. Does the contract of engagement with the embedded contractor specify:
 - that the individual will be an official of the entity?
 - the process for informing the individual of their duties as an official?
 - the relevant powers that the individual’s services require them to exercise under a delegation of power or powers?
 - how the individual is to be identified (so that they are capable of being identified by name)?
 - the processes for changes to the embedded individual's contract? (This is not relevant where the NCE has directly engaged the individual as an independent embedded contractor. Rather, it is relevant where the contract is with a non-individual legal entity (e.g. a labour hire company) and the contract needs to contain provisions notifying of any change to the employee of the entity who is providing the services.)
(The contract should also specify consequences if they do not properly discharge their duties as an official.)
 - b. Has the accountable authority of the NCE issued a delegation instrument which delegates to the contracted individual specified powers, functions or duties that the contracted individual is required to exercise, perform or discharge? (It is recommended that the delegation instrument refer to the contracted individual by name, rather than by their position.)

- **What considerations do I need to keep in mind if an embedded contractor falls within the meaning of an ‘official’ of an NCE?**
 - a. If an embedded contractor falls within the meaning of an ‘official’, they will be:
 - subject to the general duties of officials under the PGPA Act while they provide the relevant services
 - subject to the systems of internal control in the entity, including accountable authority instructions, and
 - required to exercise the particular powers, functions or duties in the PGPA Act, PGPA Rule, or FFSP Act that are delegated to them in accordance with the delegation instrument.
 - b. In practice, it’s expected that an accountable authority would only ever rely on this mechanism where it’s not practicable for an existing official of the entity to exercise or perform the relevant powers, functions or duties.
 - c. Importantly, if a client is considering a possible delegation to non-APS staff, care should be taken to ensure that the delegation is permissible under the PGPA Act/PGPA Rule to avoid any potential issue with an embedded contractor acting on behalf of the Commonwealth without proper legislative authority.

23. **How should conflicts of interest be managed with embedded contractors?**

Where entities engage embedded contractors to assist in conducting agency functions, the risk of conflicts of interest should be carefully managed.

For example, an individual embedded contractor may be assisting the agency on a procurement process, while at the same time the individual's employer organisation is providing other services to a bidder in that procurement process. The following is an example of steps that may be taken to assess such a conflict of interest risk.

a. Identify whether an actual, potential or perceived conflict might exist

- All individuals involved in the procurement should be required to provide a conflict of interest declaration. There should be a continuous disclosure requirement for written declarations.
- A corporate declaration from the embedded contractor organisation should also be obtained.
- If known, a list of the potential tenderers can be attached to the conflict of interest declaration form. If they are not known initially, the list should be circulated when known, and consequential updates to individual and corporate declarations should be requested (although if the list of tenderers is sensitive it may not be appropriate to disclose it to the embedded contractor organisation).
- Establish and maintain a conflict of interest register to record declared conflicts and steps taken to manage them.

b. Determine the level of risk in each case

- The key risk to the agency is that the individual embedded contractor will be unable to, or will be seen as unable to, perform their procurement role objectively and impartially, due to their organisation's connections to one or more bidders, or, that they (or others in their organisation) may get access to information about the project that could assist bidders, giving them an unfair advantage.
- The more influence the embedded contractor will have over the outcome of the procurement process, the higher the risk that their involvement could be seen to compromise the fairness and independence of that process.
- To determine the level of risk, you need to consider:
 - What is the scope and nature of the individual's role in the procurement? Will they have access to sensitive information about the procurement process, that will not be available to all bidders?
 - What is the nature and extent of the work that the embedded contractor's employer does for the bidder:
 - Is the organisation advising on, or part of, a bid in this procurement process?
 - If the organisation is instead doing work on other projects for a bidder, does that work comprise a significant portion of the organisation's business?

c. Consider the appropriate steps to take to manage the risk

- These measures will differ depending on the circumstances.
- Management measures can include:
 - removing the individual from the procurement role
 - prohibitions or restrictions on embedded contractors being involved in bid preparation by their employer organisation or any other work for bidders by the employer organisation
 - physical and electronic separation measures, e.g. measures to ensure that information about the procurement held by embedded contractors advising the agency cannot be accessed by personnel from other parts of their employer organisation
 - requiring individuals to agree that they must not disclose any information about the procurement to other personnel in their organisation or store any information about the procurement on their employer's computer systems
 - requiring a senior office holder of the employer organisation to confirm that ethical walls are in place to ensure the separation of the conflicting activities of the organisation
 - having an independent review of the embedded contractor's work to ensure there is no evidence of bias
 - removing the embedded contractor from certain activities e.g. accessing tenders before tender closing.
- If there is a team of people who are embedded contractors, agencies will need to ensure that embedded contractors are not making decisions about how to handle their own conflicts and these are referred to an APS officer.
- Consider any agency-specific policies on handling conflicts of interest.

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