

Contracting with Staff and Consultants in the Information Industry

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A. Introduction – The Advantages of a Written Agreement

There are very few cases in which the law requires an employment contract to be in writing. There are, however, many reasons why it is desirable to conclude a written employment agreement or for the services of an independent contractor. To select but a few:

1. Uniformity of terms
2. Ease of reference
3. Protection of confidential information and trade secrets:-
It can be very difficult to determine precisely what information an employer is entitled to regard as confidential or a trade secret. An agreement allows for a clear statement of matters which the employer considers require protection from unauthorized use or misappropriation by the employee or consultant.
4. Intellectual property:-
In many circumstances a written agreement is necessary to affect the transfer to the employer or engaging party of copyright material, patentable inventions and industrial designs

developed by the engaged party.

5. Protection of the employer/commissioning party after termination of employment/engagement through restraint of trade provisions.
6. Excluding or overriding statutory rights or obligations:-
Many statutory entitlements apply regardless of agreement to the contrary: for example, the obligation of the employer to deduct and remit group tax. Other statutory obligations may be excluded or overridden by agreement: for example, certain rights to compensation for unfair dismissal or periods of notice as to termination of employment.
7. Limitation of liability of the engaging party to third parties.
8. Contracting through service companies:-
In the absence of any properly drafted agreement between the engaging party and the service company, the obligations of the service company in relation to tasks performed by employees of that service company can be most unclear.

9. Long-term agreements:-
Personnel change over time. The relevant personnel officer of the employer may no longer be available to give evidence of the terms that were orally agreed. A written agreement avoids this problem.

10. Third party rights:-
When an agreement confers rights on a third party it should be in writing for their benefit.

B. Contractor or Employee – "Contract of Service" and "Contract for Services" Distinguished

The term "contract for services" is used to distinguish work carried out by an independent contractor from work performed by an employee as part of his "contract of service".

The traditional test to distinguish the two situations is called the "control test". It is necessary to determine, as a matter of fact, whether:

- (a) the person employed is under the direction and control of the employer as to the manner in which he should carry out his work; or
- (b) whether he was employed

to exercise his skill, and achieve an indicated result in such manner as he should, in his own

judgment, determine.

In the former case the person employed would be regarded

as an employee and in the latter an independent contractor.

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HIGH TECHNOLOGY AND THE INVASION OF THE KILLER BEES

An article carried in the Sydney Morning Herald earlier this year concerned killer bees and their planned invasion of the United States sometime next year.

It appears that the US Department of Agriculture

has spent a considerable amount of money devising ways of averting the attack. Solar cells developed by the makers of the MX missile will be glued to the bellies of thousands of killer bees. These chips will transmit an infra-red signal which can be

picked up over a kilometre away.

As the SMH pointed out, the tricky part will be holding the bee still while the chip is glued to its belly.

