

# Volunteer, employee or independent contractor?

Legal information for New South Wales community organisations



## This fact sheet covers:

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- ▶ the important differences between a volunteer, employee and independent contractor, and
  - ▶ the importance of being clear about the way you engage a volunteer.
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### **At times, determining whether a person is engaging with your organisation as an employee, contractor or volunteer can be difficult.**

It is critical to consider the true nature of the relationships your organisation has with its workers, as employees and contractors are owed many legal rights under various laws (such as minimum rates of pay) that are not owed to volunteers. Some people may even have multiple relationships with the one organisation (eg. an employee on a Monday to Wednesday and a volunteer on a Friday).

The question of whether a person is an employee, independent contractor or volunteer under law depends on the entire relationship between the person and organisation, rather than the name that you give that relationship.

There are times when the way you engage a volunteer may actually give rise to an employment relationship, even though you intended to engage and label them as a volunteer. This fact sheet will help you to understand the key differences between these categories of workers so that your organisation, and its volunteers, are clear about the nature of the relationship or relationships that exist.

The term 'workers' in this fact sheet is used to describe all people who undertake work for the organisation, whether paid or unpaid.

There are a number of key issues to consider when assessing the nature of a working relationship and the three main issues are covered briefly in this fact sheet. For a more comprehensive resource, see Not-for-profit Law's Employee, contractor or volunteer? Guide on the Information Hub at [www.nfplaw.org.au/employees](http://www.nfplaw.org.au/employees).

## The importance of distinguishing between different kinds of workers

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It is important that your organisation is aware of the different categories of workers it is responsible for. In particular, your organisation should be aware that:

- your organisation can be legally responsible for the safety of its volunteers and also the consequences of their actions, so you need to know who they are and what they are doing

- the volunteer should understand the basis on which they are engaged (eg. so they are aware of their legal entitlements and insurance and safety risks)
- whether or not someone is covered by your organisation's insurance may depend on their status, and
- there are laws that apply differently to volunteers, or some laws that do not apply at all. As a result, different legal entitlements apply to different categories of people your organisation engages, as illustrated by the following table. For more information about the various laws and how they apply to people in your organisation, see Not-for-profit Law's fact sheet on What laws apply to your organisation and volunteers? on the Information Hub at [www.nfplaw.org.au/volunteers](http://www.nfplaw.org.au/volunteers).

Note that distinguishing between members and volunteers is also important. See our fact sheet on this topic on the Volunteers page of the Information Hub at [www.nfplaw.org.au/volunteers](http://www.nfplaw.org.au/volunteers).

Indicators	Volunteer	Employee	Independent contractor
Is the worker paid?	✗ (note honorarium, discussed further below)	✓	✓
National Employment Standards apply?	✗	✓	✗
Superannuation accrues?	✗	✓	✗ (some exceptions)
Workers' Compensation applies?	✗	✓	✗ (some exceptions)
Work Health and Safety applies?	✓	✓	✓
Paid sick and annual leave accrues?	✗	✓	✗
Paid long service leave?	✗	✓	✗
Unfair dismissal laws apply?	✗	✓	Contractual
Redundancy rights apply?	✗	✓	Contractual

## EXAMPLES

In the case of *Mr and Mrs Morris* (see summary below), the court found that Mr and Mrs Morris were employees as caretakers of a property, while the organisation alleged they were volunteers. The Court found that based on the care-taker award rate the couple had been underpaid, and were awarded superannuation and annual leave to the value of approximately \$80,000.

In the case of *Dickinson* (see summary below), the court found Ms Dickson was a volunteer rather than an employee when she was injured by a car. This means that she was unable to make a claim for workers compensation, which is only available to employees.



# What is a volunteer?

In Australia, there is no legal definition of a volunteer but the following definitions are useful.

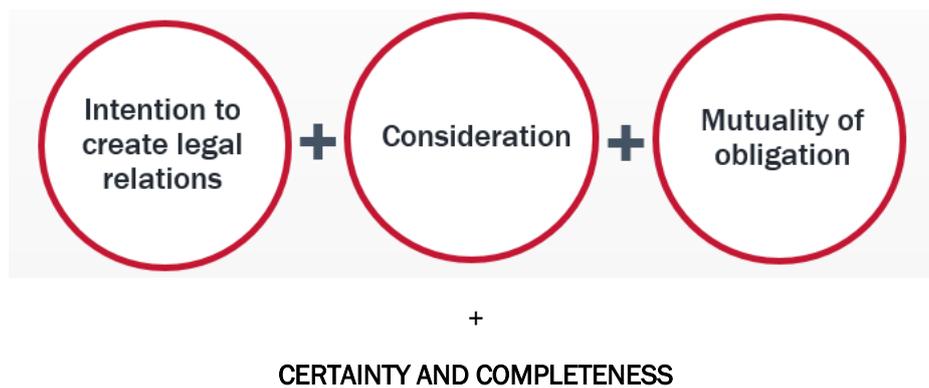
Volunteering Australia and state volunteering peaks use the non-legal definition: “Time willingly given for the common good and without financial gain.” Volunteering Australia has also released guidelines around this definition that can be found on its website. For more information go to [www.volunteeringaustralia.org](http://www.volunteeringaustralia.org).

The Fair Work Ombudsman has identified the following characteristics of a genuine volunteering arrangement, based on its own review of (limited) case law (judge-made law) in this area:

- a volunteer is someone who does work for the main purpose of benefiting someone else
- the organisation and individual did not intend to create a legally binding employment relationship
- a volunteer is under no obligation to attend the workplace or perform work, and
- a volunteer does not expect to be paid for their work.

## 1. Is there an intention to create a legally binding agreement?

Generally, when a worker’s relationship with an organisation is being assessed, the Fair Work Ombudsman will look at four key factors to establish whether there was an intention to create a legally binding agreement. If these factors are in place, the relationship is unlikely to be considered a volunteering relationship.



Questions that help assess whether each of these four factors are in place are set out below.

### 1. It there an intention to create legal relations?

- do the facts and circumstances point to an intention of both parties to have a legal relationship and that your arrangement could be enforced?
- under the arrangement, can the organisation and individual be compelled to do something? This differs from a non-contractual relationship where either party can walk away at any time without challenge.

## 2. Is there consideration?

- does each party agree to provide a benefit or reward to the other party?
  - for the worker, this will usually be their labour, and
  - for the employer, this will usually be monetary but may also be a commitment to offer training, experience or other non-monetary benefit.

## 3. Is there mutuality of obligation?

- is the commitment by the individual to perform work provided in exchange for whatever benefits or experience the employer is offering?

## 4. Is there certainty and completeness?

- is there an agreement on all the essential terms to make the contract workable and are those terms certain and clear in meaning?

### NOTE

A legally binding agreement does not have to be in writing. It can be formed verbally through conversations, through communication such as a string of email correspondence or even inferred from the conduct of the people involved.



### CASE EXAMPLE: MR AND MRS MORRIS

Anglican Community Services (ACS) acquired a property in South Australia that they then hired out to various groups for camps and retreats. Morris and Morris (husband and wife) were asked by ACS's camp manager Mr Brandenburg (who they knew because Mr Brandenburg was Mrs Morris' uncle) to act as caretakers of the relevant property. They did so for a period of three years, at the end of which they made a claim for unpaid wages. ACS argued that Mr and Mrs Morris were volunteers and therefore not entitled to wages.

Mr Brandenburg had passed away before Court proceedings were commenced, however Mr and Mrs Morris had a letter written by him to them outlining the nature of their role. This letter described Mr and Mrs Morris as being 'appointed' to the position of caretaker of the property. The initial appointment was for six months, which would then be reviewed and could be extended. Their duties were clearly set out and relatively onerous. They included cleaning, light maintenance work, inspecting the condition of the building and facilitating building inspections for prospective groups. In return they were to receive free rent, power, water, a telephone and have all council rates paid for them. The onerous nature of these tasks required them to be present at the property seven days a week. During the course of their duties Mr and Mrs Morris were reimbursed for various expenses incurred.

The judge found that Mr and Mrs Morris were employees not volunteers as the parties intended to create legal relations. This was demonstrated by several factors. Firstly, they were under the instruction of Mr Brandenburg who would inform them when groups were coming to stay and when the premises would need to be cleaned and inspected. Secondly, the nature of the agreement created mutual expectations between the parties (ie. free rent and amenities in exchange for labour) which could be legally enforced. Thirdly, the regularity of their appointment was indicative of employment, as was the inclusion of the initial provisional period which the trial judge said would be unusual in a volunteer context because volunteers can be dismissed at will. As a result, they were awarded compensation for unpaid wages.

You can read the detailed decision here: [Morris and Morris v Anglican Community Services \[2000\] SAIRC 6](#)



## CASE EXAMPLE: DICKINSON



Tropical Fruits was a not-for-profit (incorporated) gay and lesbian social club, which held dance parties for members in NSW. On 31 December 2003, it held an event at which Ms Dickinson was engaged as a car park attendant. Tropical Fruits' engagement process involved their work crew coordinator (Ms Benham) contacting members, or people who had expressed interest, and asking if they would like to provide assistance. Their shifts were then determined and their duties explained. On the date of the event, helpers checked in with Ms Benham, were given an ID arm band and instructed as to their duties and shift times. They were not remunerated but were always allowed to attend the party free of charge at the end of their shifts.

During the course of her duties, Ms Dickinson was struck by a car. She made a claim for workers compensation asserting that she was an employee at the time of the injury. The Workers Compensation Commission of NSW found that Ms Dickinson was in fact a volunteer. This conclusion was reached due to the lack of evidence supporting any intention to establish legal relations, the absence of a contractually binding promise, and nothing to suggest that admission to the party was given in return for the duties performed.

The Commission stated that in the absence of an intention to create legal relations, allowing entry to the party was merely a reward or gift in return for volunteering to help out. There was also no correlation between the cost of the ticket and the hours worked by Ms Dickinson.

You can read the detailed decision here: [Dickinson v The Tropical Fruits Incorporated \[2006\] NSWCCPD 331](#)

### Does the volunteer expect to be paid for their work?

Some payments to volunteers are acceptable. It is common, and appropriate, for volunteers to be reimbursed for authorised expenses they incur while performing their role and sometimes organisations provide some kind of monetary reward or other recognition to show gratitude for a volunteer's contribution.



Some organisations provide benefits to volunteers that they may call an honorarium, allowance or one-off payment. However, if these payments are comparable to wages, then this may point to an employment relationship, and such payments should not be made to volunteers. The following are examples where a payment or pattern of payments appears to be a wage or payment for services:

- if a payment is calculated with reference to time with the organisation or hours worked
- if an allowance far exceeds the expenses actually incurred or is paid on a regular basis, or
- a lump sum payment is in exchange for services provided.

## EXAMPLES



### Gratuitous payment

An organisation runs camps for children with intellectual disabilities just outside of Lismore. All volunteers who work at these camps receive a (gratuitous) payment of \$500 each week, in addition to reimbursement of any travel, accommodation and other 'out-of-pocket' expenses they incur.

This is quite a significant payment and close to the minimum wage. The organisation is exposed to a claim for unpaid wages and other entitlements.

### Allowance

An organisation based in Broken Hill provides services to its elderly residents focusing on social inclusion and wellbeing. It sends volunteers to their homes for social visits, and arranges outings in the community. The volunteers use their own cars to drive to homes and transport clients. The organisation has decided to provide an allowance to their volunteers for travel and other out-of-pocket expenses. This payment is made ahead of time and deposited into their bank account on a weekly basis, to avoid the administrative hassles associated with processing reimbursement claims.

There is a risk this payment could be categorised as wages (if it is not directly referable to reimbursement of expenses) and the organisation exposes itself to a risk of a claim for unpaid wages and entitlements.

It would be preferable for the organisation to process reimbursements of expenses with reference to actual travel undertaken and receipts provided by the volunteers for out-of-pocket expenses.

### Profit share

An Op Shop in Newcastle pays 'bonuses' to its volunteers, based on the number of days they work in the shop and when the shop makes a surplus. The organisation views these payments as incentives for volunteering and increasing sales.

If the payment is more than a token amount based on the hours that they have worked in the shop, and this payment is expected when the organisation makes a profit, then this arrangement will start to look more like an employment relationship or an independent contractor arrangement and less like a volunteer.

### Gift/reward

In the case of *Dickinson* (above), the Commission found that allowing entry to the event was merely a reward or gift in return for volunteering to help out. There was also no correlation between the cost of the ticket and the hours worked by Ms Dickinson.

## NOTE

Payments to volunteers are only one factor that may point to the existence of an employment relationship. If you are making payments to volunteers and are concerned about whether they may be construed as wages/a payment for service, you should consider obtaining legal advice.



# Clarifying the volunteer relationship

The best way to be clear about the relationship between your organisation and a volunteer is to write it down in a Volunteer Agreement.

Our tips for drafting a Volunteer Agreement:

- 💡 be clear that you have engaged the person as a volunteer
- 💡 include a statement that the parties do not intend to enter into a legally enforceable contract
- 💡 be clear and consistent in the use of 'non-employment' type language
  - ✓ use terms such as 'volunteer reimbursement' and 'we would be pleased if you would'
  - ✗ avoid terms such as 'pay, payment, salary, contract, work, appointment' or 'you must'
- 💡 be clear that the volunteer will not be receiving payment for work but may receive reimbursement for reasonable expenses. Any other non-monetary benefits provided to the volunteer are done so on a gratuitous basis only and are not payment in lieu of salary
- 💡 outline what the volunteer can expect from the organisation (eg. an induction, supervision and applicable insurance coverage)
- 💡 outline what the organisation expects from its volunteers (eg. compliance with policies and procedures including WH&S, privacy, confidentiality and other workplace behaviours), and
- 💡 ask the volunteer to notify you if they are unable to work their allocated shifts and demonstrate a certain amount of flexibility.

## FURTHER READING

For a sample Volunteer Agreement, go to [www.nfplaw.org.au/volunteers](http://www.nfplaw.org.au/volunteers).

## CAUTION

Even if it is made clear in writing that the person is a 'volunteer', if the true nature of the relationship is that of an employer and employee, your organisation cannot rely on the label of 'volunteer' or the existence of a volunteer agreement as proof of this arrangement.



In order to make sure your volunteers are true 'volunteers', it may be useful to complete the following check list. We note this is a not an exhaustive checklist and there may be other relevant factors to consider in particular circumstances.

	<b>Factors indicating a volunteer relationship</b>	<b>Factors indicating an employee/employer relationship</b>	<b>Factors indicating an independent contractor relationship</b>
Was there an intention to create a legally binding agreement?	<input type="checkbox"/> No	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes
Is the individual motivated by selfless reasons consistent with a volunteering role?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> No
Is there an expectation or provision of remuneration or benefit in relation to the work performed?	<input type="checkbox"/> No	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes
Is the type of remuneration based on hourly rates or wages (and are overtime and penalties paid)?	<input type="checkbox"/> No	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does the person have absolute discretion and autonomy about how they perform their tasks or work (can they determine their start and finish times)?	<input type="checkbox"/> No	<input type="checkbox"/> No	<input type="checkbox"/> Yes
Is the person free to provide similar services to others within the same industry?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Yes
	<input type="checkbox"/> No	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Can the arrangement end at any time?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> No

# Resources

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## Related Not-for-profit Law resources

Employees [www.nfplaw.org.au/employees](http://www.nfplaw.org.au/employees)

For more information about the differences between an employee, contractor and volunteer, go to our NFP Law Guide: “Employee, contractor or volunteer?”

Volunteers [www.nfplaw.org.au/volunteers](http://www.nfplaw.org.au/volunteers)

The Volunteers page on the Information Hub features further information on specific issues covered in this fact sheet and the laws as they relate to volunteers, including resources on:

- Safety, risk management and volunteers
- Volunteer screening
- Volunteers and workplace behaviour
- Recruiting and engaging a volunteer
- Sample Volunteer Agreement

## Related Resources

Fair Work Ombudsman [www.fairwork.gov.au](http://www.fairwork.gov.au)

This website offers useful fact sheets on volunteering and other unpaid work.

Volunteering Australia [www.volunteeringaustralia.org](http://www.volunteeringaustralia.org)

Visit Volunteering Australia’s website for the new definition of ‘volunteering’ and explanatory notes.

NSW Volunteering [www.volunteering.nsw.gov.au](http://www.volunteering.nsw.gov.au)

Visit NSW Volunteering’s website for advice and guidance on volunteering for volunteers, organisations and businesses.

## Cases

[Dickinson v The Tropical Fruits Incorporated \[2006\] NSWCCPD 331](#)

[Morris and Morris v Anglican Community Services \[2000\] SAIRC 6](#)

A NFP Law Information Hub resource. Access more resources at [www.nfplaw.org.au](http://www.nfplaw.org.au)

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