



SMEs warned improper contractor arrangements can lead to big super and tax bills

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Entrepreneurs who use independent contractors who work in a way very similar to ordinary employees have been warned that they may be liable for superannuation payments, payroll tax and other penalties if the ATO decides the contractor is actually an employee.

The warning comes after a **case in the Administrative Appeals Tribunal** brought by the Tax Commissioner against Associated Translators & Linguists (ATL), a company that employs 1,000 contractors to provide interpretation and translation services.

The ATO argued ATL should be liable for superannuation guarantee payments to one of its contractors, a Mr Sani, on the grounds he was actually an employee, despite the fact he had an employment contract that clearly said he was an independent contractor.

According to Grant Miles from accounting firm Hayes Knight SA, the Superannuation Guarantee Assessment (SGA) Act specifies that super payments must be made by an employer "if a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract."

The tribunal agreed with the ATO, finding that Sani was an employee and that ATL was liable for super guarantee findings. Some of the reasons for the decision included:

- The contractors carried business cards and identification cards, stating they are members of ATL's panel of interpreters.
- The contractors were unable to delegate an assignment – once they took a job they had to do as they were told.
- The workers had strict reporting obligations.
- The workers were paid by the hour, rather than paid by result (ie. the completion of a job)

- The company's entire business is based on the work provided by the contractors.

MGI chairman Sue Prestney, who is also the spokesperson of SME affairs for the Institute of Chartered Accountants, says the case shows the risk that SMEs face when they incorrectly classify an independent contractor.

As well as superannuation payments, employers could be liable for payroll tax and penalties for withholding tax that has not been withheld.

"A lot of people think that if you call yourself a contractor then you are a contractor, but it's not something that you cannot accept at face value. There are possible nasty consequences for everyone where you get this wrong. "

Grant Miles agrees, and says the major problem is that there is no conclusive definition of who or what an independent contractor is.

"The fact that an agreement might state that someone is a contractor is considered merely a 'label' by the court. Where the contractor primarily supplies their personal labour, the dividing line between an employee and a contractor is even harder to distinguish as the tools of the contractor's trade are their knowledge and expertise."

Prestney says companies need to look closely at the nature of their relationship with an independent contractor and look beyond labels that an employer or an employee might use.

"If it's a master/servant relationship – they are in your office and you can tell them what to do – then you need to be careful," he says.

"If it's borderline, or even slightly grey, you are going to need to get advice because it is just such a confusing area."