




## Employee or Contractor?

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## Employee vs Contractor



- Contract **of** service refers to the relationship between an employer and an employee.
- Contract **for** services refers to a principal/independent contractor relationship.

### Why is it necessary to ensure a distinction?

- The differences determine the obligations owed by each party between each other at law.
- Legislation distinguishes the two relationships in a variety of legislative contexts, including income tax, industrial relations, payroll tax, vicarious liability, workers compensation and superannuation law. Acting in the belief/assumption that the relationship is one of contractor/principal when it is in fact employee/employer can be **VERY** costly!

## Totality of the Relationship



Whether a worker is an employee or contractor is determined by the nature of the arrangement not by the label used to describe it. Even a contractual term to that effect will not of itself be enough.

- Australian courts have adopted a 'totality' approach – a consideration of the totality of the relationship between the parties.
- A number of employment indicia have been expressed in the relevant case law which have become key indicators to whether a relationship is one of employment. The process is generally to examine a number of relevant factors within the context of the relationship.
- No single factor is determinative.
- However, control is a key indicator in the Australian context.

## Employment Indicia - Control



A contracting arrangement is a business to business relationship, with the contractor providing a service which usually includes providing labour, tools and expertise (not simply labour).

### **Control**

- The classic test for determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter.
- A common law employee is told not only what work is to be done, but how, when and where it is to be done.
- The importance of control lies not so much in its actual exercise (although that is clearly relevant).
- Contractors undertake to provide a service or deliver a certain product and are not under the direction or control of the the principal, so contractors can use their discretion and may delegate tasks to others.

## Employment Indicia - Integration



### Organisation/Integration Test

- Employees usually work for only 1 employer. A contractor is free to offer services to many and generally will do so in order to mitigate business risk.
- Employees are an integral part of the employer's business on an ongoing basis. Contractors are generally project based and more short term. Often contractor engagement will be by tender.
- Does the "worker" operate on their own account or in the business of the payer?

## Employment Indicia - Other



### 'Results' Contracts

- Where the contract is to achieve a specified result, there is a strong indication that it is a contract *for* services (i.e. contractor).

### Delegation

- If a person is contractually required to personally perform the work and cannot subcontract, this is an indication that the person is an employee.

### Risk

- Where the worker bears little or no risk of the cost arising out of injury or defect in carrying out their work, they are more likely to be an employee.
- A contractor generally bears the commercial risk and responsibility for any poor workmanship or injury sustained in the performance of work.
- A contractor will often carry (or be required to carry) their own insurance for public liability, professional indemnity, workers compensation/ income protection.

## Employment Indicia - Other



### **Provision of tools & payment of business expenses**

- The provision of equipment and tools by an individual and the incurring of expenses and other overheads (and an ability to recover/expense these costs as part of the contract) is an indicator of a contractor.

### **Basis of contracting**

- If the worker provides services etc through a corporate entity or trust then they are not an employee.

### **GST**

- Payment to a individual upon rendering invoices including GST is an indicator of a contractor.

### **Other indicators suggesting an employer-employee relationship**

- Circumstances surrounding formation of contract
- The right to suspend or dismiss the person engaged
- The right to the exclusive services of the person engaged
- Provision of benefits such as annual, sick & long service leave & other benefits prescribed under an award
- The requirement that a worker wear a company uniform.

## Sham Contracting



***'...the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck!'***

- Contractual arrangements often contain a clause that purports to characterise the relationship as that of principal and independent contractor and not that of employer and employee. Such a clause will not be given effect if it contradicts the agreement as a whole.
- Sham contracting is where an employer tries to disguise an employment relationship as an independent contracting relationship. This is often done to avoid having to give the employee their proper entitlements (leave, superannuation & long service) and to pay payroll & group tax and workers compensation.
- Sham arrangements are expressly prohibited by the *Fair Work Act*.

## Superannuation Guarantee



### Superannuation Guarantee (Administration) Act ("SGGA")

- Section 12 provides the definition of "employee" and "employer".
- As already noted, where an individual performs work for another party through a separate legal entity such as a company or trust, there cannot be an employer-employee relationship for SGAA purposes.
- If a partnership has contracted to provide services, then the person who does the work is not the employee of the other party. This applies even if the person performing the work is a partner.
- A person who holds an ABN and works under same may still be an employee for SGAA purposes.

## Workers Compensation and Rehabilitation Act 2003



Section 11 WCRA 2003 states who is a 'worker' for the purposes of the Act. The provision states:-

- (1) A worker is a person who works under a contract of service.*
- (2) Also, schedule 2, part 1 sets out who is a worker in particular circumstances.*
- (3) However, schedule 2, part 2 sets out who is not a worker in particular circumstances.*
- (4) Only an individual can be a worker for this Act.*

## WCRA Schedules



### **Schedule 2 Part 1 Persons who are workers**

- 1 A person who works under a contract, or at piecework rates, for labour only or substantially for labour.
- 2 A person who works for another under a contract is a worker unless they are paid to achieve a specified result/outcome; & have to supply the plant/equipment/tools needed; & are liable for the cost of rectifying any defect in the work performed; or  
(b) a personal services business determination is in effect for the person performing the work under the Income Tax Assessment Act 1997 (Cwth), section 87-60.
- 3 A person who works as a sharefarmer if they don't provide & use powered farm machinery; & they are entitled to <1/3 of the proceeds under agreement with the farm owner.
- 4 A salesperson, canvasser, collector etc paid entirely or partly by commission if the commission is not received for or in connection with work incident to a trade or business regularly carried on by them individually or by partnership.

## WCRA Sch2 Pt1



### **Schedule 2 Part 1 Persons who are workers (cont'd)**

- 5 A contractor (other than one mentioned in Pt 2, s4) if they contract for work that is not incident to a trade or business regularly carried on by them and they do not sublet the contract; or do part of the work personally.
- 6 A person who is party to a contract of service with another person who lends or lets on hire the person's services to someone else.
- 7 A person who is party to a contract of service with a labour hire agency or a group training organisation that arranges for the person to do work for someone else under an arrangement made between the agency or organisation and the other person.
- 8 A person who is party to a contract of service with a holding company whose services are let on hire by the holding company to another person.

## WCRA Sch 2 Pt 2



### **Part 2 Persons who are not workers**

- 1 *If the person performs work under a contract of service with a corporation of which they are a director; or a trust of which they are a trustee; or a partnership of which they are a partner; or the Cwth or a Cwth authority.*
- 2 *A professional sportsperson while they are participating as a contestant; or training or preparing for an event; or performing promotional activities as a result of their sportsperson status; or engaging on any journey in connection with participation, training, preparation or event participation.*
- 3 *A member of the crew of a fishing ship if their entitlement to pay is contingent upon the ship producing gross earnings or profits; & the pay is wholly or mainly a share of the gross earnings or profits.*
- 4 *A person who, in performing work under a contract, other than a contract of service, supplies and uses a motor vehicle for driving tuition.*
- 5 *A person participating in an approved program or work for unemployment payment under the Social Security Act 1991 (Cwth), ss 601 or 606 is not a worker.*

## Case Studies



- ***Hollis v Vabu Pty Ltd***[2001] HCA 44
- ***Reliable Couriers v Q Comp***[2005] QIC 51
- ***Fair Work Ombudsman v Land Choice Pty Ltd & Anor*** [2009] FMCA 1255 (17 December 2009)

## Contact Details



### Our offices:

#### Brisbane

Level 10, 410 Queen Street  
Brisbane QLD 4000  
GPO Box 3246 Brisbane QLD 4001 Australia  
**T** 61 7 3226 9099  
**F** 61 7 3220 1300  
**E** [brisbane@workplacelaw.com.au](mailto:brisbane@workplacelaw.com.au)

#### Gold Coast

Level 5, Corporate Centre One  
Cnr Bundall Road & Slatyer Avenue  
Bundall QLD 4217  
PO Box 9073 GCMC QLD 9726 Australia  
**T** 61 7 5597 8888  
**F** 61 7 5597 8899  
**E** [goldcoast@workplacelaw.com.au](mailto:goldcoast@workplacelaw.com.au)  
**W** [www.workplacelaw.com.au](http://www.workplacelaw.com.au)