

EMPLOYER OR CONTRACTOR?

(Is that contractor working for you an employee?)



Use this guide to find out.

GREG REIFFEL (CAHRI)

Introduction

Despite various pieces of legislation and (many, many) written judgements there still many instances where a person has been engaged as a contractor, has subsequently been found to be an employee.

This raises issues for your business that can relate to taxation, superannuation, leave payments and unfair dismissals/adverse action claims.

The consequences for a worker incorrectly engaged as a contractor, instead of hiring as an employee can include:

- Lack of job security.
- Lack of income security.
- Award entitlements do not apply.
- Having to make their own arrangements for workers compensation, superannuation and taxation.
- Lack of career advancement and training.

Therefore the purpose of this report is to set out the vexing question of whether that person you put on as a contractor is actually an employee (employed under a “contract **of** service) or a “contractor” (engaged under a contract **for** services).



Legislation

Legislation adopted to protect against (what is called) “sham contracting” includes the Fair Work Act 2009 and the Independent Contractors Act 2006. Both are federal pieces of legislation. There are in fact many pieces of legislation that can be applied to contractors.

Under the *Fair Work Act 2009*, the main part (there are more) is:

Division 6—Sham arrangements

357 Misrepresenting employment as independent contracting arrangement

- (1) A person (the **employer**) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

(a) did not know; and

(b) was not reckless as to whether;

the contract was a contract of employment rather than a contract for services.

358 Dismissing to engage as independent contractor

An employer must not dismiss, or threaten to dismiss, an individual who:

(a) is an employee of the employer; and

(b) performs particular work for the employer;

in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.

Note: This section is a civil remedy provision (see Part 4-1).

359 Misrepresentation to engage as independent contractor

A person (the **employer**) that employs, or has at any time employed, an individual to perform particular work must not make a statement that the employer knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.

Note: This section is a civil remedy provision (see Part 4-1).

Whilst the *Independent Contractors Act 2006* covers the following:

3 Objects of this Act

(1) The principal objects of this Act are:

- (a) to protect the freedom of independent contractors to enter into services contracts; and
- (b) to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial; and
- (c) to prevent interference with the terms of genuine independent contracting arrangements.

(2) The Act achieves these objects, principally, by providing for the rights, entitlements, obligations and liabilities of parties to services contracts to be governed by the terms of those contracts, subject to:

- (a) the rules of common law and equity as applying in relation to those contracts; and
- (b) the laws of the Commonwealth as applying in relation to those contracts; and
- (c) the laws of the States and Territories as applying in relation to those contracts, other (in general) than any such laws that confer or impose rights, entitlements, obligations or liabilities of a kind more commonly associated with employment relationships.

Independent Contractors Act 2006

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors [2015] HCA 45

- Unanimous decision of the High Court overturns the previous "Odco" decision of the Full Court of the Federal Court of Australia.
- "Triangular contracting" arrangement with its former employees and a labour hire company (also known as an "Odco" arrangement).

The "Odco System" explained

- The Odco system is a method of engaging workers through commercial contracts (contracts for services) as opposed to employment agreements (contracts of service).
- Under the system, the "contractors" were hired through a third party "labour-hire" company (so that there would be no direct hiring by the principle company that used the services).
- Prior to this High court decision, this type of arrangement had been found to be legitimate by way of a 1991 decision of a Full Bench of the Federal Court of Australia

in *Building Workers Industrial Union of Australia & Ors v Odco Pty Ltd (1991) 29 FCR 104* (thus “Odco-system”).

- Odco supplied contract carpenters, labourers, shopfitters and other construction workers to the commercial building industry in Melbourne. The workers supplied were self-employed contractors and not employees of either Odco or Odco’s client builders.
 - Odco met with opposition from building unions, who opposed Odco workers from entering building sites. Odco brought proceedings in the Federal Court against the then Building Workers Industrial Union (BWIU) (now the CFMEU). That action alleged that the union had breached section 45D of the then Trade Practices Act 1974 (Cth), in that their actions in requiring builders to remove Odco contractors from building sites were secondary boycotts. The core decision which the Federal Court was required to make was whether, at common law, Odco workers were contractors or employees.
 - The Court determined that the Odco workers were contractors and not employees of anyone. The BWIU appealed the decision, however, the Full Federal Court unanimously dismissed the appeal. The BWIU then sought special leave to appeal to the High Court. Special leave was unanimously refused.
 - Making the “Odco-system” lawful and legitimate.
- Quest South Perth Holdings Pty Ltd (Quest) operated a business of providing serviced apartments.
 - Contracting Solutions Pty Ltd (Contracting Solutions) operated a labour hire business.
 - In 2009, two housekeepers and a receptionist of Quest were moved onto what are commonly known as “Odco” triangular style independent contracting arrangements with a company named “Contracting Solutions”.
 - Contracting Solutions met with the Quest employees and provided them with “contractor applications” which indicated that if the employees completed the form they would be:
 - “An independent contractor rather than an employee.
 - Rostering of shifts were unchanged.
 - Same “flat rate of pay” no matter when they carried out the work.
 - The FWO was tenancies; taking the matter first to the Federal Court (losing), the appealing to the Full Bench of the Federal Court (again losing) and finally succeeding in the High Court.
 - The FWO argued that:
 - Full Federal Court’s “restrictive construction” of section 357 does not reflect its wording; is “contrary to its obvious purpose and is plainly wrong” and “allows for the provision to be easily circumvented through third party contracts”.

- The FWO said that the Full Federal Court's ruling revealed a potential loophole in the application of section 357 to the triangular relationship of labour hire company, worker and "end-user" employer.
- The High Court unanimously allowed the appeal, holding that section 357(1) prohibited the misrepresentation of an employment contract as a contract for services with a third party.
- The Court declared that Quest contravened section 357(1) by representing to the employees that the contracts of employment under which they were employed by Quest were contracts for services under which they performed work as independent contractors.

Another nail in the coffin for labour-hire companies?

- At the time of writing the *Workpac* issues are yet to be heard in the High Court. This will deal with "sham" casual arrangements.



Recent views of the Fair Work Commission

A number of applications for “unfair dismissals” before the Fair Work Commission have dealt with the employee/contractor issue. Specifically, if the FWC finds that the applicant is a contractor, there is no power for the FWC to deal with the matter.

Decisions of the FWC often cite:

In *French Accent v Do Rosario*, a Full Bench of the Commission’s predecessor stated that, in determining whether a worker is an employee or an independent contractor, the ultimate question is ‘whether the worker is the servant of another in that other’s business, or whether the worker carries on a trade or business on his or her own behalf: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own of which the work in question forms part.’ The question is concerned with the objective character of the relationship and is to be answered by considering the terms of the contract and the totality of the relationship.



The tests

Introduction

Over previous decades, many courts have considered the question of “what is a contractor” and these judgements have resulted in a number of tests. The following are examples:

Control Test

Zuijs v, Wirth Bros. (1955) 93 CLR 561. High Court. Dixon CJ, Williams, Webb & Taylor JJ. Set out the following which would be indicative of an employer having “control”:

- Power of selecting person engaged.
- Remuneration takes the form of wages.
- Right to suspend or dismiss for misconduct.
- Some degree (read large) of superintendence and control over the way the worker carries out work.
- Scheduled time.
- Manner to be carried out.
- Safety measures to be observed.
- Uniform (costume) must be worn.
- “Place where dress” (changing rooms provided?).

Jamsek v ZG Operations Pty Ltd [2020] FCAFC 1934

- Lack of control:
 - The degree of control enforced by the company.
 - The drivers maintained visible logos of the company on their vehicles and clothing.
 - Worked full working weeks solely for the company- making it impracticable to conduct work outside of the arrangement as a result.
 - It is not sufficient for independent contractors to have some control, but instead that control must be substantial.
 - It also implies that the ability to conduct business outside of the arrangement can be key.
- Goodwill
 - The drivers were also unable to generate goodwill on behalf of themselves.

- All benefit derived from the good business and conduct of the drivers was reflected on the company, not the drivers themselves.
- A key factor in defining an independent contractor is their ability to represent themselves independently of the company they are contracting for, and to derive the resulting benefits.
- Nature of the Contract:
 - The drivers were offered “take-it-or-leave-it” contract.
 - The company made it clear that either the men accept the new arrangement or face redundancy.
 - The “ultimatum-like” nature of the offer did not represent a true independent contracting arrangement, as the drivers had little ability to dictate terms.
 - The truck drivers did not have influence over the contract itself.
 - The contract, once entered into, was not revisited as much as a contract of employment.

Organisation of Integration Test

- One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.
- It depends on whether the person is part and parcel of the organisation.

“Mixed” or “Multiple” test.

Montreal V Montreal Locomotive Worker (1947) 1 DLR 161.

- Control.
- Ownership of tools.
- Chance of profit.
- Risk of loss.

Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance (1968) 2 Q.B. 497.

- Truck was painted in Ready Mix colours.
- Wear the company’s uniform.
- Truck was adapted to carry the company’s mixing unit which was fitted at its expense.

- Latimer was responsible for the repair and maintenance of the truck.
- Obligated to deliver concrete as and when required to do so by Ready Mixed, or to employ and pay a substitute.
- Not permitted to operate as a haulier or carrier of goods other than under his contract with Ready Mix.
- Obligated to carry out all reasonable orders of a competent servant of the company 'as if he were an employee of the company' and to 'use his best endeavours to further the good name of the company'.
- Earnings were calculated by reference to a fixed rate per radial mile.
- He had to pay all running costs.
- Could not use the truck as security.
- Company had the right to deduct hire-purchase payments.
- Right to purchase the truck on the expiration of the contract.
- If he did not pay his bills, company could pay them on his behalf.
- Company insured the vehicle in Latimer's name, and again deducted premium payments from his earning.
- Ready Mixed had the right summarily to terminate the contract, contractor committed a breach of any term of the contract; bankruptcy, 'having been warned by the company of any grounds for dissatisfaction it may have in respect of the operation of the truck shall not within a reasonable time have removed the cause of such dissatisfaction'.
- Contract contained an express term to the effect that Latimer was an 'independent contractor'.
- There must be a wage or other remuneration.
- Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. The right need not be unrestricted.
- Look first to the express terms of the contract, if they deal fully with the matter one may look no further.

Queensland Stations Proprietary Ltd v. Federal Commissioner of Taxation 1945) 70 C.L.R. 539.

- Written contract.
- Contract provided that he should obey and carry out all lawful instructions.
- Whole of his time, energy and ability in the careful droving of the stock.
- Provide at his own expense all men, plant, horses and rations required for the operation.

- Paid at a rate per head for each of the cattle safely delivered at the destination (held to be an independent contractor).

Hunberstone v. Northern Timber Mills (1949) 79 C.L.R. 389.

- Whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.
- Not merely his own labour but the use of heavy mechanical transport, drive by power, which he maintained and fuelled for the purpose.
- The most important part of the work to be performed by his own labour consisted in the operation of his own motor truck and the essential part of the service for which the respondents contracted was the transportation of their goods by the mechanical means he thus supplies.
- The essence of a contract of service is the supply of the work and skill of a man.
- But the emphasis in the case of the present contract is upon mechanical traction.
- This was to be done by his own property in his own possession and control.

Short's case, His Lordship restated Lord Thankertons' 'four indicia' of:

- Right of selection,
- Payment of wages,
- Right of control, and
- Right of suspension or dismissal, and continued: "He must do all this, at his own expense..."
- Being paid a rate per mile for the quantity which he delivers.
- The ownership of the assets, the chance of profit and the risk of loss in the business of carriage are his and not the company's".
- Free to decide whether he will maintain the vehicle by his own labour or that of another.
- Free to choose whom he will employ and on what terms.
- Free to use another's services to drive the vehicle when he is away because of sickness or holiday.
- Free to choose where he will buy his fuel or any other of his requirements.

In *Stevens v. Brodribb Sawmilling (1986) 160 C.L.R. 16*, for example, Mason J. had this to say about the continuing relevance of the traditional concept of 'control':

- Mode of remuneration.
- The provision and maintenance of equipment.

- The obligation to work.
- The hours of work and provision for holidays.
- The deduction of income tax.
- Delegation of work by the putative employee.
- Not guaranteed work.
- Free to seek other work.
- Partnership with their wives.
- Brodribb's bush boss was responsible for the overall co-ordination. Except in relation to the placement of ramps and various roads and the choosing of logs, he was left entirely to exercise his own skill and judgement.
- Brodribb retained lawful authority to command either Stevens or Gray in the performance of the work which they undertook to do. As I have said, they provided and maintained their own equipment, set their own hours of work and received payments, not in the form of fixed salary or wages, but in amounts determined by reference to the volume of timber which they had been involved in delivery.
- "Brodribb's bush boss seems to have been confined to the organisation of activities in the forest".
- "What is more, Brodribb and the men, including Stevens and Gray, regarded their relationship as one of independent contract, not one of employment".
- "The power to delegate is an important factor in deciding whether a worker is a servant or an independent contractor: *Australian Mutual Provident Society v. Allan* (1978) 52 A.L.J.R. 407".
- Windeyer J. in *Marshall v. Whittaker's Building Supply Co.* (1963) 109 C.L.R. 210 at 217 said that the distinction between a servant and an independent contractor 'is rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own'.

Bank voor Handel en Scheepvaart N.V. v. Slatford (1953) 1 Q.B. 248 at 295.

- 'Depends on whether the person is part and parcel of the organisation'.
- Still appropriate to apply the control test in the first instance.

Montreal v. Montreal Locomotive Works (1947) 1 D.L.R. 161 at 169.

- Observation that it is the right to control rather than its actual exercise.

Other indicia

- Right to have a particular person do the work.
- Right to suspend or dismiss the person engaged.
- Right to the exclusive services of the person engaged.
- Right to dictate the place of work, hours of work and the like.
- Provision by him of his own place of work, own equipment.
- Creation by him of goodwill or saleable assets in the course of his work.
- Payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax.

Re Porter; Re Transport Workers Union of Australia (1989) 34 I.R. 179.

- Economic considerations dictate that work will only be accepted from the other party to the contract...
- Income tax is deducted from the remuneration of a person.
- Dixon J. in *Humberstone*. There are many persons who perform work for others, undoubtedly in the capacity of employees, and who provide their own equipment for the purpose of performing such work. A carpenter, plumber, electrician or butcher may provide tools of trade, without that provision being regarded as a conclusive factor.
- ...the amount of capital invested. Often, however, the exercise of a choice to own a truck may be no more significant than a change of job to one that pays more.
- Provide maintain, register and ensure a vehicle suitable for the carriage of goods.
- Sub-contractor who employs any other person is responsible for insuring against **workers compensation** claims.
- Sub-contractor is also responsible for **public risk insurance**, in the joint names of the sub-contractor and the prime contractor.
- Sub-contractor is also obliged to ensure that any person employed by him to drive the vehicle has a driver's licence.
- The sub-contractor is required to maintain a **personal accident insurance** policy.
- Remuneration, which is fixed at an hourly rate.
- Refusal to carry goods may only take place if sub-contractor the goods are unsuited for carriage in or on the vehicle., two-way radio prime contractor's expense. Paint and decorate the vehicle and to affix signs and devices to it.
- Substitute another driver.

- Substitution of a driver can only occur if the sub-contractor is prevented by sickness, disability, or other urgent cause from driving the vehicle, notice is given to the prime contractor, and the prime contractor approves the substitute driver. Similarly, a substitute vehicle can only be used because of breakdown or accident and must be approved by the prime contract.
- No cost to the sub-contractor.
- 'Stand down' any sub-contractor if the vehicle does not meet requirements two weeks' notice of intention to stand down must be given.
- "There is also provision for retrenchment, involving the principle of 'last on first off'. Financial membership of the union is a requirement. Provision is made for annual leave, the cost of which is to be borne by the sub-contractor".

Economic reality test

- MacKenna J. in *Ready Mixed* concluded that Latimer was 'a small businessman', rather than a 'servant'.
- "Whether the worker can be said to be an entrepreneur who was in business on her or his own account".

Cooke J. in *Market Investigations Ltd v. Minister of Social Security* (1969) 2 Q.B. 173.

- Paid for the number of days which the company estimated the interviews would take, plus expenses.
- She could work when she chose.
- Permitted to work for other parties.

Montreal, Denning L.G. in *Bank voor Handel* and the United States Supreme Court in *United States v. Silk* 331 U.S. 704 (1946). He continued:

Fundamental test to be applied is this:

- 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. Perhaps no exhaustive list can be compiled.
- Provides his own equipment.
- Whether he hires his own helpers.
- What degree of financial risk he takes.
- Degree of responsibility for investment and management he has.
- Opportunity of profiting from sound management in the performance of his task.
- Fixes remuneration.

- Degree of the control exercised by the company.
- Contract is looked at as a whole.
- Inconsistent with existence of a contract of service.
- Company felt it could not dismiss her during an assignment.
- The absence of provision for time off, sick pay and holidays.
- Free to work as an interview for others, though I think (no finding that she did so).

Nethermere.

- 'business on his own account' test as the 'fundamental test'.

Mutuality of obligations

Dietrich v. Dare (1980) 30 A.L.R. 407.

- 'lacked the element of mutuality of obligation that is essential to the formation of ... a contract (of service)'.

O'Kelly v. Trust House Forte (1983) I.C.R. 728. The industrial tribunal took into account the following factors which they considered consistent with a contract of employment:

- The applicants provided their services in return for remuneration for work actually performed.
- They did not invest their own capital or stand to gain or lose from the commercial success of the functions organised by the banqueting department.
- They performed their work under the direction and control of the company.
- When the casual workers attended at functions they were part of the company's organisation and for the purpose of ensuring the smooth running of the business they were represented in the staff consultation process.
- Carrying on the business of the company.
- Clothing and equipment were provided by the company.
- The applicants were paid weekly in arrear and were paid under deduction of income tax and social security contributions.
- Their work was organised on the basis of a weekly rota and they required permission to take time off from rostered duties.
- There was a disciplinary and grievance procedure.
- There was holiday pay or an incentive bonus calculated by reference to past service.

The following additional factors in the relationship the industrial tribunal considered were ***not inconsistent*** with the contract of employment:

- The applicants were paid for work actually performed and did not receive a regular wage or retainer.
- The method of calculating entitlement to remuneration is not an essential aspect of the employment relationship.
- Casual workers were not remunerated on the same basis as permanent employees and did not receive a regular wage or retainer.
- The method of calculating entitlement to remuneration is not an essential aspect of the employment relationship.
- Casual workers were not remunerated on the same basis as permanent employees and did not receive sick pay and were not included in the company's staff pensions scheme and did not receive the fringe benefits accorded to established employees.
- There is, however, no objection to employers adopting different terms and conditions of employment for different categories of employee (for example, different terms for manual and managerial staff).
- There were no regular or assured working hours.
- It is not a requirement of employment that there should be "normal working hours".
- Casual workers were not provided with written particulars of employment.
- If it established that casual workers are employees there is a statutory obligation to furnish written particulars'.
- The following factors were considered by the industrial tribunal to be inconsistent with a contract of employment:
 - The engagement was terminable without notice on either side.
 - The applicants had the right to decide whether or not to accept work, although whether or not it would be in their interest to exercise the right to refuse work is another matter.
 - The company had no obligation to provide any work.
 - During the subsistence of the (744) relationship it was the parties' view that casual workers were independent contractors engaged under successive contract for services.
 - It is the recognise custom and practice of the industry that casual workers are engaged under a contract for services.

Expressed intention of the parties

High Court in *Cam & Sons v. Sargent* (1940) 14 A.L.J.R. 162

- Typically such 'clarification' takes the form of an express stipulation to the effect that the worker 'is not an employee of the company but is an independent contractor and shall perform his duties free from the direction and control of the company'.

Australian Mutual Provident Society v. Chaplin (1978) 18 A.L.R. 385 (the *A.M.P* case).

The first principle:

- Subject to one exception, where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract. The one exception to that rule is that, where the subsequent conduct of the parties can be shown to have (421) amounted to an agreed addition to, or modification of, the original written contract, such conduct may be considered and taken into account by the court (see *A.M.P* case (at 392-393)).

Third principle

- "Written contract an express provision purporting to define the status of the party engaged under it either as that of employee on the one hand, or as that of independent contractor on the other".

The elephant test

Narich Lord Brandon stated that:

- *Wedderburn* (1986:116) characterises this 'intuitive process' and the 'elephant test' 'an animal too difficult to define but easy to recognise when you see it'.
- By way of a more rational approach to the categorisation issue *Davies and Freedland* (1984: 88 -89) suggest that:
- 'In business on own account' test on the other hand, creates a primarily economic frame of reference, in which the question is approached from the perspective of the worker that than that of the employing enterprise, whether the worker constitutes an independent economic unit'.

The following extract is taken from *Mills* (1979: 229): **The control test** consists essentially of:

- The right of the employer from time to time during the performance of the contract to issue directions as to the way the work is to be done,
- So that failure by the employee to obey such directions is a breach of the contract.

- That is to be distinguished from the case where express provisions in the contract (or in subsequent variations of the contract agreed to by the parties) directly specify the way the work is to be done.
- Sir Otto Kahn-Freund has more recently asserted the general proposition that: 'there can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the "contract of employment"'.



About the Author



Greg Reiffel is a highly knowledgeable and accomplished consultant having:

- More than 30 years' experience in Human Resource Management, Employee and Industrial Relations, and OH&S.
- Greg has worked across many industry sectors, including peak employer bodies such as the Victorian Employers Chamber of Commerce and Industry (VECCI) and Civil Contractors Federation (CCF), Community-Based and Not-For-Profit Organisations, State and Local Governments, manufacturing (including FMCG), civil construction, utilities maintenance, Education and Registered Training Organisations.

Greg's qualifications include:

- Graduate Diploma of Business: Industrial Relations/Human Resource Management (equivalent to Bachelor (Hon's),
- Certificate IV in Training and Assessment,
- OH&S Lead Auditor Certification, and
- Work Effectively with Aboriginal & Torres Strait Islander People Certification.
- Greg is also a Certified Professional member of the Australian Human Resources Institute (AHRI).

Greg takes a pragmatic approach to each and every assignment. He identifies opportunities for improvement in your people management. Whether it be Workplace/Industrial Relations and/or Human Resources Management issues. He draws from his extensive strategic and practical experience to deliver effective solutions tailored to each client's individual needs and circumstances.

Greg's deep understanding of Workplace/Industrial Relations and Human Resources Management systems, legislation, and industry jargon, along with his longstanding commitment to implementing practical, affordable solutions, has made him a valuable asset to many businesses, saving them tens of thousands of dollars over the years.

To contact Greg, email him at greg@gregreiffelconsulting.com.au

or ring 0438 906 050