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Think
Employment



Independent Contractor or Employee – Getting the Distinction Right

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Topics Covered

- Importance of the distinction between independent contractors and employees
- Factors to look at in determining whether a person is an employee or independent contractor
- Recent decisions and the impact they have on employers
- How to identify the risks and overcome them



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Identifying the Working Relationship

- Definition of employee – contract **for** service
- Definition of an independent contractor – contract **of** service

The Control Test

- *WHAT* work is performed ?
- *WHEN* is the work performed ?
- *WHERE* is the work performed ?
- *HOW* is the work performed?

Zujis v Wirth Bros Pty Ltd (1955)

93 CLR 561

Criteria	Independent Contractor/Employee
Remuneration in the form of wages	Employee
Right to summary dismissal	Employee
Could not exercise direct control over circus act	Independent contractor
Control over ancillary tasks surrounding circus act	Employee

Zujis v Wirth Bros Pty Ltd (1955) 93 CLR 561

- Case illustrates how the control test's usefulness has eroded overtime.
- The more complex an employment relationship becomes, the harder it is going to be to definitively rely on the control test.



Other Tests Indicating Employment or Independent Contract

Organisation/Integration Test



Method of remuneration



Labelling Clauses



Tests Indicating Employment Relationship



Delegation

Risk

Provision of benefits
such as leave
entitlements

Requirement to wear a
uniform

Tests Indicating Independent Contractors

Contract for a result

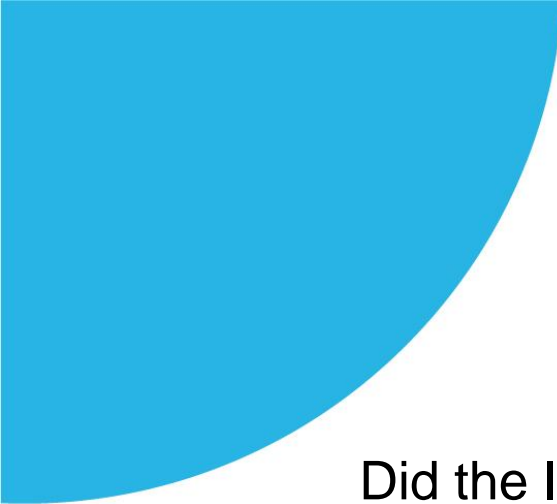
Tools and expenses

Basis for contract

GST

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

Criteria	Independent Contractor/Employee
Work allocated to couriers	Employee
Work performed in a manner directed by Vabu	Employee
Couriers presented to the public as emanations of Vabu	Employee
Couriers supplied their own bicycles and were responsible for maintenance	Independent contractor



On Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation (No 3) (2011) FCA 366

Did the Interpreters/translators own their own business?

- No evidence of repetitive and continuous business;
- Goodwill was more akin to good reputation;
- No professional indemnity insurance; and
- Little evidence of delegation.

On Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation (No 3) (2011) FCA 366

Whose business was the economic activity being performed for?

- On Call had the right to control;
- Interpreters/translators services were portrayed as activities of On Call;
- Goodwill accumulated was attributed to On Call; and
- On Call bore the responsibility for work that failed to meet expected standards.



ACE Insurance Ltd v Trifunovski (2011) FCA) 1204

Criteria indicating independent contractor:

- understood themselves to be independent contractors;
- were paid commission;
- could choose their working hours;
- had no income tax deductions; and
- Issued invoices to Ace.



ACE Insurance Ltd v Trifunovski (2011) FCA) 1204

Criteria indicating employment:

- accrued no good will against their own business;
- were practically unable to work for any other insurer;
- sold only Ace policies to Ace customers;
- were trained by Ace in a system of business devised and maintained by Ace;
- Ace exercised control and issued active instructions to Agents.

Questions



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Sham Contracting

- Prohibited under the General Protections Provisions of the Fair Work Act 2009

What are the Prohibitions Under the Act?

- Misrepresenting an employment relationship as an independent contractor relationship
- Dismissing or threatening to dismiss an employee to re-engage them as an independent contractor
- Knowingly making false representations in order influence an individual to enter an independent contract relationship



Who Could be Liable?

- Any person involved in the contravention.
- This includes company directors and human resource managers



What are the Consequences?

- Civil remedy provisions
- Can commence proceedings within 6 years of contravention



Remedies Include:

- Injunction
- Compensation
- Reinstatement
- Penalties
 - \$6,600 for individuals
 - \$33,000 for corporations

Defences?



Fair Work Ombudsman v Centennial Financial Services Pty Ltd and Ors (2011) FMCA 459

- Director of the company fined \$13,200
- Human Resource Manager fined \$3,750



**How can you protect
your business?**

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How can you protect your business?

- Inform yourself about all aspects of the arrangement at the outset and consider the whole relationship
- Look at the relationship in its entirety, not just one or two factors
- Where possible contract with an incorporated entity
- Put good contracts in place
- Review your arrangements periodically
- If unsure, get legal advice
- Remember If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck



EI Advantage

There are a number of tools available on the EI Advantage website for subscribers including fact sheets, checklists, sample contracts and information packages.

If you would like more information. Please do not hesitate to contact our office.

Questions



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If you need help to decipher who is an independent contractor and who is an employee, please contact us.

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