ADVISOR DAY 2020

CONTRACTORS AND RISKS OF MISCLASSIFICATION | DISASTERS WORKSHOPPED

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CLIFFORD GOULDSON LAWYERS

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TOPICS

- A. DISTINGUISHING EMPLOYEES FROM CONTRACTORS
- B. WHEN A WORKER IS AN EMPLOYEE UNDER LEGISLATION
- C. SHAM ARRANGEMENTS AND ACCESSORIAL LIABILITY

A. Distinguishing Employees From Contractors

1. VICARIOUS LIABILITY

- 2. HOW THE COURTS IDENTIFY WORKER STATUS
- 3. RECENT CASES DEALING WITH THE ISSUE



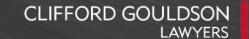
A.1. Vicarious Liability of Employers





A.2. Multi-factor test

- An assessment of the 'totality of the relationship
- An approach fraught with 'ambiguity, inconsistency and contradiction'



Issue	Test	Employee	Contractor
Control	Is the employer given the right of control over the other party, and is this control exercised?	Yes	No
How the work is paid for	Does the contractor submit an invoice on completion of task?	No	Yes
How is the contract determined?	Does the contract provide for termination by x number of weeks' notice or payment in lieu?	Yes	No
Individual or broader legal entity party to contract	Is the legal entity employed to do the work a partnership or company?	No	Yes
Provision and maintenance of equipment	Do the contractors provide their own tools and cover the cost of repair?	No	Yes
Hours of work	Are hours set for attendance on site?	Yes	No
Leave	Is leave paid?	Yes	No
Taxation	Is PAYG tax paid?	Yes	No
Capacity to select own employees and delegate	Can work be delegated at the contractor's discretion to employees of contractor's choice	No	Yes
Risk – capital investment	Is the contractor exposed to a loss of capital investment in the contract?	No	Yes
Superannuation	Are superannuation contributions being made?	Yes	No
Other jobs	Is the person free to carry on other jobs at the same time?	No	Yes
Organisation	Is the person interwoven or considered part of the organisation?	Yes	No
Professional indemnity (PI)	Does the contractor carry his or her own PI insurance?	No	Yes

A.3. Personnel Case



A.4. Truck Drivers Case



B. When a Worker is an Employee Under Legislation (Deeming Provisions)

1. SUPERANNUATION

2. WORKERS COMPENSATION

B.1. Superannuation

Section 12 of Superannuation Guarantee (Administration) Act 1992 (Cth):

'Interpretation: employee, employer

- (1) Subject to this section, in this Act, employee and employer have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):
 - (a) expand the meaning of those terms; and
 - (b) make particular provision to avoid doubt as to the status of certain persons.

...

(3) 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'.

B.2. Workers Compensation

Section 11 of Workers' Compensation and Rehabilitation Act 1992 (Cth):

'11 Who is a worker

- (1) A worker is a person who—
 - (a) works under a contract; and
 - (b) in relation to the work, is an employee for the purpose of assessment for PAYG withholding under the Taxation Administration Act 1953 (Cwlth), schedule 1, part 2-5.
- (2) Also, schedule 2, part 1 sets out who is a worker in particular circumstances.'

C. Sham Arrangements and Accessorial liability

1. SHAM ARRANGEMENTS

2. ACCESSORIAL LIABILITY



C.1. Sham Arrangements

An employer cannot:

- Misrepresent employment relationship as independent contracting arrangement
- Dismiss an employee to engage them as an independent contractor
- Knowingly make false statements to persuade an employee to become an independent contractor



C.2. Accessorial Liability

A person is involved in a contravention of a workplace law if they:

- assisted, recommended or caused the contravention;
- influenced the contravention (eg. By making threats or promises);
- were concerned in or were a party to the contravention; or
- Conspired with others, which resulted in the contravention.

What have we learned?

A. THE CHALLENGE IN CLASSIFYING WORKERS

A. THE IMPORTANCE OF GETTING IT RIGHT

B. THE RISKS OF GETTING IT WRONG





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