

# ADVISOR DAY 2020

## CONTRACTORS AND RISKS OF MISCLASSIFICATION | DISASTERS WORKSHOPPED

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