WILLIAMS LOVE & NICOL
LAWYERS

INDEPENDENT CONTRACTOR OR EMPLOYEE – OR SKATING ON THIN ICE

John Wilson

Introduction

It is sometimes difficult to determine whether someone is an independent contractor or an employee, especially in cases where services are only provided to one hirer. Sometimes, a person might be an employee in one relationship, and yet an independent contractor in another, perhaps concurrent relationship.

However, the difference is a crucial one because different laws, rights, and obligations attach to each type of relationship.

Independent contractors are, for example, subject to different tax, insurance and superannuation requirements, whereas employees are entitled to certain employment benefits which are denied to independent contractors.

There are a number of factors which the Courts will take into consideration in determining whether a labour relationship is that of an employer-employee or independent contractor-hirer. These include things such as the lawful authority to command, the way in which the work is performed, the hours of work, access to entitlements, the provision of tools and equipment etc.

It is not enough to simply *say* that a worker is an independent contractor (or an employee) – as the Full Bench of the Australian Industrial Relations Commission ('AIRC') said in *Abraham Abdalla re Abraham Abdalla v Viewdaze Pty Ltd t/as Malta Travel* - PR927971 [2003] AIRC 504 (14 May 2003) at paragraph 34(3) (bold added):

> *The terms and terminology of the contract are always important and must be considered. However, in so doing, it should be borne in mind that **parties cannot alter the true nature of their relationship by putting a different label on it**. In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: that is, the **parties cannot deem the relationship between themselves to be something it is not**. Similarly, subsequent **conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract**. If, after considering all other matters, the relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity by the very agreement itself which they make with one another.*

Nor is it enough to simply say that because a worker has their own Australian Business Number (ABN) the worker is therefore an independent contractor. It ***does not*** follow.[1]

[1] *CFMEU and Nubrick* [2009] FMCA 981.

Where an employer tries to "dress-up" an employee-employer relationship as an independent contractor-hirer relationship, they are committing an illegal act which is punishable by a range of pecuniary penalties. This sort of subterfuge is called a *sham arrangement*, or *sham contracting arrangement*.

Sham contracting is usually entered into by an employer in the hope of avoiding the payment of certain employee entitlements such as superannuation, workers' compensation, leave and some taxes.

Sham contracting is generally an intentional act, but employers have also been known to enter such arrangements quite innocently.

Where an employer can prove that a sham arrangement was entered into through reliance on independent and apparently reliable (but wrong) advice or can successfully argue that they did not realise, *and were not reckless* as to the true nature of the contractual relationship, they may be able to escape any sanction for making sham arrangements (see *CFMEU and Nubrick* [2009] FMCA 981 which was the first sham contracting prosecution case under s901 of the old *Workplace Relation Act 1996* (Cth)).[2]

This paper will look at the key differences between the contractual relationships of employees and their employers compared and contrasted with those of independent contractors and their hirers.

In doing so it will highlight some of the relevant legislation and address a few of the pitfalls which individuals and businesses may face if they fail to recognise the true nature of, and properly manage their labour relationships with their workers.

It will also look at sham contracting – what it is, and its consequences.

Is a Worker an Independent Contractor or Employee?

Does it matter?

The short answer is "yes" – and for many reasons. To mention just a few, these include legislative and regulatory provisions, vicarious liability, superannuation, taxation, worker autonomy, union activity, intellectual property, and insurance.

In the first instance, employment relationships are regulated by specific labour protection laws (e.g. the *Fair Work Act 2009* (Cth) which specifies minimum conditions and standards of employment for many Australian employees through *national employment standards*), various awards, and agreements.

[2] In this case, although the Federal Court found that two 'contractors' were in fact employees, they also held that no actual sham existed. In *Nubrick*, the company seemed to think that because the workers each had an Australian Business Number (ABN) that they were contractors. However, just because a worker has an ABN is not, of itself, indicative of the fact that they are an independent contractor. ABNs are an administrative instrument of the Australian Taxation Office and are only used to manage GST and BAS obligations. The ABN legislation makes it clear that the holding of an ABN by an individual is *not* an indicator, one way or the other, of whether a person is self-employed/independent contractor or an employee

On the other hand, independent contractor relationships are usually treated as ordinary commercial contracts which are regulated by the general commercial laws applying to business dealings.

Since each regime creates different rights and obligations, people and organisations entering into labour relationships (whether they be "contracts *for* service" with independent contractors, and/or "contracts *of* service" with employees) need to know which laws, awards, agreements, etc, regulate their relationships with their "workers".

In particular, any business which relies heavily on *independent contractors* or *labour-hire agencies* to provide workers for them, need to closely examine their processes to ensure that they are not inadvertently entering into *employment relationships* with their workers – or, alternatively, forcing people who would more correctly be classified as "employees", into "independent contractor" relationships.

How Many Independent Contractors are there in Australia?

Determining the precise number of independent contractors in Australia is difficult.

Independent Contractors Australia[3] suggests that there are almost 2 million self-employed Australian workers. Using ABS data - the *Forms of Employment Survey* (FOES) - the association suggests that there are currently approximately 1.9 million independent contractors in Australia.

However, the Productivity Commission quotes figures of only about 787,000 independent contractors – or 8.2% of all workers (in 2004) - based on the same ABS data.[4]

Although the Productivity Commission estimate, like Independent Contractors Australia's estimate, is also based on the 2004 ABS FOES data, this data is not ideal because it only includes self-employed contractors who fall within the following five categories of workers:

- employees with paid leave;
- self-identified casuals;
- employees with no paid leave who do not identify as casuals;
- owner-managers of incorporated enterprises; and
- owner-managers of unincorporated enterprises.

However, the following groups of self-employed contractors were not identified as independent contractors by the ABS in 2004 (and therefore are not included in the Productivity Commission estimates) due to changes in the FOES questions:

- employees (excluding owner-managers of incorporated enterprises) with paid leave;

[3] This is a not-for-profit association that was formed in 1999 to create a national presence and lobby group for independent contractors.
[4] Independent Contractors Australia website accessed on 28 October 2011 at <http://www.contractworld.com.au/research/ica-numbers2.php>.

- employees (excluding owner-managers of unincorporated enterprises) with no paid leave who do not identify as casuals; and
- some owner-managers of unincorporated enterprises.

Further, the Productivity Commission does not categorise owner-managers who employ other people as self-employed contractors.

By comparison, the Independent Contractors of Australia used both Productivity Commission and FOES 2004 data to claim that the percentage of independent contractor workers in Australia has grown from 16.4% of the total workforce in 1978 to 19.9% (or 1.9 million) in 2004.[5]

This estimate is based on the total number of owner-managers in both incorporated and unincorporated enterprises, and therefore includes owner-managers with employees, which the Productivity Commission argues should not be included in the estimate.

Due to the abovementioned definitional disparities, estimates for the number of independent contractors at work in Australia range from approximately 800,000 to 2 million in 2004 (or from approximately 8% to 20% cent of all Australian employed persons).[6]

While these figures indicate substantial variation in the potential numbers of independent contractors in Australia, two things are clear – firstly, the numbers are, in any case, significant, and secondly, it appears that the percentage of independent contractors as a percentage of the total Australian workforce is increasing.

This means that hirers (also variously called payers and principals) and employers need to ensure that any contracts they make with their workers (and vice versa) are not only comprehensive and protective of their rights – but also reflect the true nature of the relationship – whether it is an independent contractor-hirer or employee-employer relationship.

So What's the Difference between Employees and Independent Contractors?

The term "independent contractor" is not legislatively defined in the federal legislation covering independent contractors (which will be discussed later in this paper).

Therefore, the courts generally refer to the common law when deciding whether a worker is an employee or an independent contractor. What the courts are aiming to do is to establish the truth of the relationship.

As Justice Gray said in *Re Porter*, ***"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***"[7], and as Lord Denning MR stated in *Massey*, "*…if the true relationship of the parties is*

[5] Ibid.

[6] Parliament of Australia, *Explanatory Memorandum, Independent Contractors Act 2006* accessed 27 October 2011 at <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r2584_ems_6bac5bef-479e-4a4c-b2cd-6ece8e9732b3/upload_word/303544.doc;fileType=application%2Fmsword>.

[7] *Re Porter: Ex Parte TWU* (1989) 34 IR 179 at 184.

that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it..."[8]

The distinction between an employee and an independent contractor is, as Windeyer J observed in *Marshall v Whittaker's Building Supply*[9], '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'.

There are a number of tests which have helped the courts identify the true nature of the relationship between principals and workers – that is, whether a person is (a) serving someone else in that other person's business or (b) carrying on their own trade or business.

These can be characterised as:

- the control test (often seen as the most important test);
- the risk test;
- the organisation/integration test;
- the delegation test; and
- the results/task versus labour test.

These tests are not exhaustive and, as will be seen below, the courts will look to a number of *indicia* to determine, whether on balance, and all things considered, the relationship is that of an employee/employer or hirer (or principal)/contractor.

This is not always an easy or clear-cut determination and it is not a fixed one - the courts are likely to increase the number of indicia they will consider in making such determinations as people and organisations become more creative in the mechanisms they employ to try and avoid their labour relationships being characterised as employment relationships.

Control Test

The control test provides that a worker will likely be an *employee*, if they are subject to the employer's commands, e.g. the employer is able to designate the actual work, the hours of work, the place of work, and the manner in which a worker is to perform the work.

While *actual control* is important it need not be exercised overtly for a worker to be considered to be an employee. The *right* to control is especially critical where workers are engaged in "professional" work - even if not exercised. Professionals may exercise their own judgment and discretion on how to perform their tasks.[10] However, if the authority to command remains in incidental or peripheral matters, (such as hours of duty) then there is as strong suggestion that one is an employee.

[8] *Massey v Crown Life Insurance Company* 1978 1 WLR 676.
[9] (1963) 109 CLR 210 at 217.
[10] *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561.

> *The real question is one of the degrees of control exercised by the person employing…and this means not only the amount of control but the nature of that control and the direction in which it is exercised*[11].

In the *Federal Commissioner for Taxation v J Walter Thompson (Australia) Pty Ltd*,[12] Latham CJ stated that the distinction between employee and contractor:

> *is…that in the case of a servant an employer has power, not only to direct what work the servant is to do, but also to direct the manner in which the work is done*.

Where a worker possesses special skill and expertise, it may be difficult to determine actual control. In *Zuijs v Wirth Brothers Pty Ltd*[13] it was established that a mere ***right to control*** rather than the ***actual exercise of control*** could lead to the existence of a contract of employment.

In *Brodribb's case*,[14] although there was significant control exercised over the workers, Mason J emphasised that '*it is the totality of the relationship between the parties that must be considered*'. It is necessary, then, to examine *all* the terms of the contract to determine if it is a *contract for services* or a *contract of service*.

In *Vabu Pty Ltd v Commissioner of Taxation*,**[15]** the NSW Court of Appeal held that the bicycle couriers in question were contractors for the purposes of superannuation guarantee legislation primarily because they were required to supply and maintain their own vehicles and the company paid them by the job and not the hour.

However, in another case before the High Court of Australia involving the same couriers and the same 'employer', *Hollis v Vabu*,[16] the couriers were found not to be independent contractors for the purposes of the law of negligence where a pedestrian had been injured by one of the couriers.

The High Court looked at a number of factors – what it referred to as 'the totality of the relationship' - including the considerable control exercised by the company, and the wearing by the couriers of company livery.

The Court found that while there were factors indicating the existence of an independent contractor relationship, these were outweighed by other factors evidencing an employment.

Consequently, the respondent 'employer' was held to be vicariously liable as an employer, for the injuries to the pedestrian Hollis, who was run over by an anonymous cyclist wearing the Vabu company livery.

---

[11] *Gould v Minister of National Insurance* (1951) 1 KB 731 at 734.
[12] (1944) 69 CLR 227 at 231.
[13] (1955) 93 CLR 561.
[14] *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16.
[15] (1996) 81 IR 150.
[16] (2001) CLR 21.

The Organisation/Integration Test

Does the worker operate on his or her own account or in the business of the payer?

In *Hollis v Vabu*, the majority of the High Court quoted passage of Windeyer J in *Marshall v Whittaker's Building Supply Co* :[17]

> *... the distinction between an employee and 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.*

This distinction is sometimes referred to as the integration or organisation test.

The notion of an 'integration' test first arose in *Montreal v Montreal Locomotive Works*,[18] and was affirmed by Lord Denning in *Stevenson Jordan and Harrison Ltd v MacDonald and Evans*,[19] where he said (bold added):

> *…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**…*

This decision was reaffirmed in *Bank Voor Handel En Scheepvaart NV v Slatford*.[20]

Looking at whether a person is part of, or integrated into, the operations of the business for which they are working, also helps the courts determine whether an *authority to command* exists.

True independent contractors should be able to demonstrate, by reference to a number of factors, that they are really in business for themselves. The courts will try to determine whether the worker is or is not '*part and parcel*' of the organisation.[21]

The Risk Test

Where significant commercial risk is borne by workers, it is more likely that they are in business for themselves - and so, that they are independent contractors. This can be assessed by looking at things like the ownership of assets, the method of payment, the responsibility and the liability for any injury or defect arising from the work, etc.

Where a worker bears little or no risk for any costs arising out of any injury or defects incurred in carrying out their work, the worker is more likely to be an employee (see *Hollis v Vabu*, where Vabu undertook to provide insurance for the couriers and deducted the amounts from payments to them).

---

[17] (1963) 109 CLR 210.
[18] [1947] 1 DLR 161 at 169.
[19] [1952] 1 TLR 101.
[20] [1953] 1 QB 248 at 295.
[21] *Stevenson Jordan and Harrison Ltd v MacDonald and Evans*[1952] 1 TLR 101.

On the other hand, independent contractors bear the commercial risk and responsibility for any poor workmanship or injury sustained in the performance of work. An independent contractor typically carries their own insurance and indemnity policies to protect against such eventualities.

Delegation Test

The power to delegate or subcontract work (in the sense of being able to engage others to do the work) is a significant factor in deciding whether a worker is an employee or independent contractor.[22] If a person is contractually required to *personally perform* the work, this is an indication that the person is an employee.

If an individual has unlimited power to delegate the work to others (with or without the approval or consent of the principal), this is a strong indication that the person is engaged as an independent contractor.[23]

Under a contract for services, the emphasis is on the performance of the agreed services (that is, achievement of a 'given result').

Unless the contract expressly requires the service provider to personally perform the contracted services, the contractor is free to arrange for his or her employees to perform all or some of the work, or may subcontract all or some of the work to another service provider. In such circumstances, the contractor is the party responsible for remunerating the replacement worker.[24]

A common law employee may frequently 'delegate' tasks to other employees, particularly where the employee is performing a supervisory or managerial role.

Note however, that any 'delegation' exercised by an employee is *fundamentally different from the delegation exercised by a contractor* e.g. when an employee asks a colleague to take an additional shift or responsibility, the employee is not responsible for paying that replacement worker - rather the workers have merely organised a substitution or shared the work load.

This is not delegation which is consistent with that exercised by a contractor.[25]

---

[22] *Stevens v Brodribb* at (1986) 160 CLR 16 at 26, per Mason J.

[23] *Australian Mutual Provident Society v Chaplin and Anor* (1978) 18 ALR 385 at 391. In cases such as *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 1 All ER 433, *Bowerman v Sinclair Halvorsen Pty Ltd* [1999] NSWIRC 21 and *Express* & *Echo Publications Ltd v Tanton* [1999] ICR 693, it was held that a power of delegation is inconsistent with a contract of service even if the principal has the right to approve or qualify any replacement worker.

[24] In *McFarlane v Glasgow City Council* [2001] IRLR 7, it was held that gym instructors engaged by the council were employees of the council, even though the instructors were obliged to find replacements when they were unable to take a class. One of the factors leading to this conclusion was that the replacements were paid directly by the council rather than by the instructors.

[25] Australian Taxation Office, Superannuation Guarantee Ruling SGR 2005/1, 'Superannuation guarantee: who is an employee?' accessed on 29 October 2011 at <http://law.ato.gov.au/atolaw/view.htm?docid=SGR/SGR20051/NAT/ATO/00001>.

The Results/Tasks versus Contracts for Labour Test

Businesses/independent contractors usually complete a specified (or 'given') task, whilst employees are typically engaged on an ongoing basis (even if only for a fixed term) to perform a range of tasks. Where a contract is only for skilled labour this is an indicator of employment.

Purported 'independent contractors' would normally be considered employees if they are only selling their labour, only undertaking one contract, and that contract is long term (or of *infinite duration*) and not for a specified task.

Where the substance of a contract is to achieve a specified or given result, there is a strong (but not conclusive) indication that the contract is one for services.

In *World Book (Australia) Pty Ltd v Federal Commissioner of Taxation*,[26] Sheller JA said:

> *Undertaking the* ***production of a given result*** *has been considered to be a mark, if not the mark, of an independent contractor...*[27]

'Production of a given result' means the performance of a service by one party for another where the first party is free to use their own means (such as third party labour, plant and equipment) to achieve the contractually-specified *outcome*.

Satisfactory completion of the specified work is the 'result' for which the parties have contracted. 'Consideration' is typically a fixed sum paid on completion of the particular job, as opposed to an amount paid by reference to hours worked. If remuneration is payable when, and only when, contractual conditions have been met, it is usually made for producing a given result.[28]

In contracts to produce a given result, payment is often made for a negotiated contract price, as opposed to an hourly rate. For example, in *Brodribb*, payment was determined by the volume of timber delivered, and in *Queensland Stations* it was by way of a fixed sum per head of cattle delivered.

Having regard to the true essence of the contract, the manner in which payment is structured will not of itself exclude genuine result-based contracts. For example, there are results-based contracts where the contract price is based on an estimate of the time and labour cost necessary to complete the task.

While the notion of 'payment for a result' is expected in a contract for services, it is not necessarily inconsistent with a contract of service (that is, an employment relationship).

[26] 27 92 ATC 4327; (1992) 23 ATR 412.
[27] In *World Book (Australia) Pty Ltd v Federal Commissioner of Taxation* 92 ATC 4327 at 4334. Sheller JA referred to the HCA decision in *Queensland Stations* as authority for that proposition. He also used the facts of that case as an example of a contract to produce a result. Note that, given the emphasis that the courts have placed on the control test, the production of a given result is probably not *the* mark of an independent contractor but merely *one of the* marks.
[28] *Neale (Deputy Commissioner of Taxation) v. Atlas Products (Vic) Proprietary Limited* (1955) 94 CLR 419 at 424-425.

For example, the High Court of Australia in *Federal Commissioner of Taxation v Barrett & Ors*,[29] found that workers engaged by a land agent firm to find purchasers for land entrusted to the firm for sale, who were paid only by commission, were employees and not independent contractors. Likewise, the High Court in *Hollis v Vabu,* considered that payment to the bicycle couriers per delivery, rather than per time period engaged, was a natural means to remunerate employees whose sole purpose is to perform deliveries.

Further, the Full Court of the Supreme Court of South Australia in *Commissioner of State Taxation v The Roy Morgan Research Centre Pty Ltd,*[30] found that interviewers who were only paid on the completion of each assignment, not on an hourly basis, were employees and not independent contractors.

Accordingly, it can be said that the contractual relationship as a whole must still be considered to determine the true character of the relationship between the parties. [31]

All of the above 'tests' are, then, essentially just tools to enable the courts to arrive at the truth.

As mentioned above they are not exhaustive and the courts will not simply accept what the parties say about the nature of the relationships as determinative.

For instance, in *Ferguson v John Dawson and Partners (Contractors) Ltd*,[32] despite the fact that both parties labelled Ferguson a "…*self-employed labour only subcontractor*…'', the court held that in reality, the relationship was one of employer-employee.

Similarly, in the *J Walter Thompson case,*[33] the court held that actors in a radio play were employees of the radio station even though they had other employment during the week and were not paid an hourly rate because they were required to attend rehearsals for which they were not paid, and received payment for the performances that they did.

In *Abdalla* a Full Bench of the Australian Industrial Relations Commission reaffirmed and drew on earlier principles (particularly those set out in *Hollis v Vabu*) to outline the indicia relevant to determining whether or not a worker is an employee.

The relevant part of the decision is reproduced at Appendix 1; but, in summary, it provides that one should consider whether the:

- putative employer:
    - exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like;

[29] 30 73 ATC 4147 at 4153..

[30] 32 [2004] SASC 288..

[31] Australian Taxation Office, Superannuation Guarantee Ruling SGR 2005/1, 'Superannuation guarantee: who is an employee?' accessed on 29 October 2011 at <http://law.ato.gov.au/atolaw/view.htm?docid=SGR/SGR20051/NAT/ATO/00001>.

[32] [1976] 1 WLR 1213.

[33] *FCT v J Walter Thompson (Australia) Pty Ltd* (1944) 69 CLR 227.

- has the right to suspend or dismiss the person engaged;
- presents the worker to the world at large as an emanation of the business;
- deducts income tax from the remuneration paid to the worker; whether the

- worker
    - performs work for others (or has a genuine and practical entitlement to do so);
    - has a separate place of work and or advertises his or her services to the world at large;
    - provides and maintains significant tools or equipment;
    - can delegate or subcontract the work;
    - is remunerated by periodic wage or salary or by reference to completion of tasks;
    - is provided with paid holidays or sick leave;
    - creates goodwill or saleable assets in the course of his or her work;
    - spends a significant portion of his remuneration on business expenses; and the
- work involves a profession, trade or distinct calling on the part of the person engaged.

Looking Behind the Mask in Labour Relationships

Although as stated above, the list from *Abdalla* is not exhaustive, it is important to emphasise that the '**intention**' of the parties is not included as one of the indicators of whether a worker is an employee or an independent contractor.

This means that clauses such as '...*nothing in this agreement is intended to establish an employment relationship*' may have little or no effect, and may indeed merely arouse the suspicion of the court that there is an employee lurking behind the contractual veneer.

The case of *Damevski v Giudice* [34] demonstrates the steps that a court will take to deconstruct the artifice surrounding a labour relationship which is presented to the world as that of a contractor-hirer relationship in order to avoid legal obligations to employees.

In that case the Full Court of the Federal Court of Australia (overturning a decision of the Full Bench of the Australian Industrial Relations Commission) found that the applicant was an employee, despite the fact that he operated his own registered business and had agreed to be engaged as a contractor through a third party.

[34] [2003] FCAFC 252.

Marshall J stated the following:[35]

> *Mr Damevski was not carrying on a business of his own. In truth, the relationship between Endoxos and Mr Damevski was one of mutual dependence and involved no one else, other than MLC in a confined capacity which related entirely to the manner of effecting Mr Damevski's remuneration. Mr Damevski had no right to delegate his shifts to other persons. He worked solely for Endoxos. He was provided with equipment by Endoxos to perform work.*

By the same token it is important to point out that where, having considered all of the *indicia* of the particular relationship in question, it remains uncertain whether the relationship is that of employment or independent contractor, how the parties have characterised themselves is likely to be determinative.

Lord Denning put it this way in *Massey v Crown Life Insurance*:[36]

> *If, after considering all other matters, the relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity by the very agreement itself which they make with one another.*

Labour-Hire Arrangements

Although it is commonly believed that there is no contract or employment relationship between a worker and a host company where the workers are engaged by a labour-hire agency (the so called *Kangan* defence),[37] the decision of Australian Industrial Relations Commission in *Jamie Orlikowski v IPA Personnel Pty Ltd*[38] illustrates that that belief may be less certain than previously thought.

That case concerned an application to by Mr Orlikowski to join the Australian Quarantine and Inspection Service ('AQIS') as a second respondent in his unfair dismissal claim against the labour-hire agency. His application was granted.

Mr Orlikowski was engaged at AQIS through one employment agency in 2004 and remained with them until terminated in 2009. In August 2008 a second agency won the tender to provide labour-hire services to AQIS and Mr Orlikowski was engaged by them from that time. Throughout the 4.5 years, AQIS exercised considerable control over Mr Orlikowski, although he was only paid by the employment agencies.

His counsel argued that the employment agency was little more than a 'payment mechanism', and that if this was the sum total of their role, the AQIS was the true employer.

[35] at paragraph 58.
[36] [1978] 2 All ER 576 at 579.
[37] *Advanced Workplace Solutions Pty Ltd and Fox v Kangan-Batman TAFE* (AIRC) 25 October 1999 unreported. The case involved a TAFE lecturer engaged by a labour force licensee for a whole academic year who carried out virtually identical duties to other TAFE lecturers. When she lodged an unfair dismissal claim, the Full Bench of the AIRC found there was no intention by either the lecturer or the TAFE to create legal relations. The only contracts were those between the lecturer and the licensee, and the licensee and the TAFE.
[38] [2009] AIRC 565.

Senior Deputy President Lacy made some unfavourable comments about the effect of labour-hire arrangements:[39]

> ***While labour hire services facilitate flexibility the process has the potential to undermine collective bargaining, occupational health and safety, vicarious liability, accountability, job security and workplace harmony.*** *There is an increasing incidence in the use of labour hire providers in Australia and it presents significant issues in termination of employment matters. First and foremost the issue normally involves discernment of which of the putative or potential employers is the actual employer. The fundamental question is whether two, otherwise unrelated, legal entities share or co-determine those matters governing essential terms and conditions of employment which depend on the control one employer exercises, or potentially exercises, over the labour relations policy of another*.

The decision in *Orlikowski* indicates that the *Kangan* defence may no longer be unassailable, raising the possibility of two separate non-related entities being considered to be the employer of a person – at least in a labour hire situation.

A comparative summary of the differences between employees and independent contractors is provided at Appendix 2.

The Common Law and Legislation

In addition to the extensive common law on the issue of employees and independent contractors, there are numerous Commonwealth, State, and Territory statutes which may govern the contractual relationships of employees-employers and independent contractors-hirers.

Each Australian jurisdiction has a raft of statutes covering labour relations e.g. industrial relations, occupational health and safety, workers compensation, privacy, workplace surveillance, public sector employment, and administrative review of government action legislation.

Some of the key relevant legislation includes:

- The *Fair Work Act 2009* (Cth) ('the FWA') – the FWA governs the employment of all national system employees in Australia. National system employees include Commonwealth and Territory employees as well as employees in those States which have referred the power to regulate the employment relationship to the Commonwealth. Currently, this includes all States except Western Australia (who has nonetheless referred the regulation of most private sector employment to the Commonwealth). The FWA also covers employees of constitutional corporations. Note that some State government employees are also specifically excluded from coverage by most of this Act.

- The *Australian Consumer Law* (the former *Trade Practices Act 1974* (Cth)) – contracts with both employees and independent contractors are also governed to a certain extent

[39] at [42].

by Australian Consumer Law ('the ACL'). The ACL prohibits things like 'misleading and deceptive conduct' and 'unconscionable conduct'. This means, for example, that a person must not encourage someone to enter into a services contract by deceiving them about what their true entitlements would be, or on the promise that certain work will be provided to them.

- The *Superannuation Guarantee (Administration) Act 1992* ('the SGAA') – under section 12(1) of the SGAA, if a person is an employee at common law, that person is an employee under the SGAA. This is a question of fact to be determined by examining the terms and circumstances of the contract having regard to the indicators expressed in the relevant case law. However, the classification of a person as an employee for the SGAA is not solely dependent on the existence of a common law employment relationship. It also extends to, inter alia, a person who works under a contract that is wholly or principally for labour: ss12(3); a person paid to perform, present, or participate in the performance of any music, play, dance, entertainment, sport, display, or promotional activity or similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills, or someone paid to provide services in connection with the foregoing

- The *Independent Contractors Act 2006* (Cth) – this Act overrides State laws deeming independent contractors to be employees[40] and excludes any law conferring or imposing rights, entitlements, obligations or liabilities that would be considered "workplace relations matters" in an employment relationship.[41]

Independent Contractor Legislation

As this paper primarily addresses the distinction between employees and independent contractors, it is useful to provide more background on the *Independent Contractors Act 2006* (Cth) ('the ICA').

Before March 2007, a number of employment laws in Australian states and territories laws applied to genuine independent contractors as if they were employees.

The ICA changed this situation to ensure that independent contracting arrangements are predominantly regulated by commercial contract law rather than employment law.[42]

Between 1 March 2007 to 1 September 2011 there was a transitional period during which state and territory laws continued to apply to independent contractors and their principals (or hirers).

[40] *Independent Contractors Act 2006* (Cth) section 7(1)(a).
[41] *Independent Contractors Act 2006* (Cth) section 7(1)(b).
[42] Note however that a number of State and Territory laws are not excluded by the Act. Such "saved" laws are listed in section 7(2) of the IGA or section 4 of the *Independent Contractors Regulations 2007* (Cth). These include inter alia, laws related to outworkers, *Owner Drivers and Forestry Contractors Act 2005* (VIC), *Building and Construction Industry (Security of Payment) Act 2009* (ACT), *Health Services Act 1997* (NSW) and Chapter 6 of the *Industrial Relations Act 1996* (NSW) and any other provision of that Act to the extent that it relates to, or has effect for the purposes of, a provision of Chapter 6.

This period allowed parties with contracts covered by state or territory contracting laws before 1 March 2007, time to arrange their affairs and become conversant with requirements under the ICA before the relevant state and territory laws ceased to apply.

The transitional period did not, however, apply to *new* independent contracting arrangements entered into after 1 March 2007 (unless they were a continuation of arrangements in place prior to that date). Any new contracts are immediately governed by the ICA.[43]

The ICA uses a range of constitutional powers including the corporations power. This means that there must be a '*requisite constitutional connection*' – that is, outside of the A.C.T. and Northern Territory, one party to the contract must be a constitutional corporation, the Commonwealth, or a Commonwealth Authority.[44]

Although this leads to a situation where the Act has incomplete coverage of independent contracting arrangements, most contractors will in fact be covered.

As the ICA does not define '*independent contractor*', the question of whether someone is an employee or an independent contractor continues to be determined by the multi-factor common law tests as outlined above. It does however define '*services contract*' at section 5 as a contract for services where at least one party is an independent contractor and the contract relates to the performance of work by the independent contractor.

Note that 'independent contractors' specifically rate a mention in a number of other pieces of legislation, such as the recent *Workplace Privacy Act 2011* (ACT) where they are, along with employees, outworkers, persons doing work experience placements, and volunteers, are included as 'workers'[45] for the purposes of that Act.

Complaints about Independent Contractor Matters

Under the FWA, Fair Work Inspectors ('FWI') can investigate a range of matters relating to independent contractors, including alleged sham contracting. e.g. they can investigate alleged discrimination, alleged adverse action or coercion in relation to workplace rights, prohibited conduct relating to freedom of association, and prohibited conduct relating to reform opt-in agreements.

Where an independent contractor complains to the Fair Work Ombudsman ('FWO') about any of the above matters, a FWI can investigate the matter and may take an employer to court. The Australian Building and Construction Commissioner ('ABCC') has similar powers for matters in relation to the building industry.

[43] Accessed on 19 October 2011 at <http://www.fairwork.gov.au/employment/independent-contractors/independent-contractors-act/pages/default.aspx>.

[44] *Independent Contractors Act 2006* (Cth) section 5.

[45] In this Act: *worker* means an individual who carries out work in relation to a business or undertaking, whether for reward or otherwise, under an arrangement with the person conducting the business or undertaking. Examples – worker 1. employee 2. independent contractor 3.outworker 4. person doing a work experience placement 5 volunteer. *Note*: An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

However, neither the FWO nor the ABCC can investigate complaints by independent contractors about contract breaches, for example, where the contractor has not been paid in accordance with the contract, or complains that the contract is harsh or unfair. In such cases, the independent contractor may have other legal remedies.

Penalties and Court Orders

Where the courts find that a person has contravened the FWA or the opt-in agreement protections in the ICA they may order the payment of a penalty of up to $33,000 per contravention for a body corporate or $6,600 for an individual. This means that where an employer is involved in more than one sham contracting arrangement, they may have to pay a penalty for each such arrangement.

In relation to a contravention of the FWA, a court may also make any other orders it considers appropriate e.g. if an employer dismisses or threatens to dismiss an employee so as to re-engage them as an independent contractor to do substantially the same work, an FWI can apply to the courts to:

- stop the dismissal from happening
- order the employer to reinstate the employee
- make the employer compensate the employee, and/or
- make another appropriate order.

Further, where an employee has been dismissed, the employee (or their union) can apply to FWA to try and deal with the dispute.[46]

The Consequences of Getting it Wrong

While there are clearly important distinctions between employees and independent contractors, it is also clear that there are many potential consequences in wrongly classifying a worker who is in fact an employee, as an independent contractor.

The following list is not exhaustive but it does indicates some of the ramifications of 'getting it wrong':

- vicarious liability actions e.g. claims in negligence for damage suffered by third parties (which insurance will not cover);
- unfair dismissal claims;
- claims for retrospective and future entitlements in relation to annual leave, sick leave, long service leave;
- claims for superannuation;

[46] Accessed on 19 October 2011 at <http://www.fairwork.gov.au/employment/independent-contractors/pages/making-a-complaint.aspx>.

- penalties from the Fair Work Ombudsman or the courts for breaches of awards and/or the FWA e.g. for sham contracting;
- claims under workers' compensation legislation;
- consequences under OH&S legislation;
- taxation risks; and
- commercial risks such as damage to reputation, goodwill etc.

Vicarious Liability

The distinction between employees and independent contractors crystallised in the 19th century when the English courts developed the principle that individuals or entities could be 'vicariously' liable for the wrongful acts or omissions of servants or employees, but not for acts or omissions of independent contractors.

This principle was recently reaffirmed by the High Court of Australia in *Sweeney v Boylan Nominees*.[47]

Note however that despite this principle, organisations may still be responsible for a contractor's negligence in some situations e.g. if they have a non-delegable duty of care.

Employers have a non-delegable duty of care to their employees, educational authorities have a non-delegable duty of care to their students, and hospitals have a non-delegable duty of care to their patients. This means that even if responsibility for some activities, tasks, or work has been assigned to someone other than an employer's employees, the employer still has a special duty to take reasonable care to avoid any harm from those activities.[48]

Unfair Dismissal Claims

According to an article by Ewin Hannan *Bosses see red at rise in "unfair sackings*"[49] figures show that unfair dismissal claims increased by 15% to almost 15,000 in the 2010-2011 financial year. However, it is worth pointing out that 2010-2011 was the first full year since the (*Fair Work Act 2009*) 'referrals' from states other than Western Australia took effect, so some increase in the number of unfair dismissal claims was in fact quite predictable.

Fair Work Australia's annual report showed that claims for unfair dismissals rose from 13,054 to 14,897 compared to 7,994 in the 12 months to June 2009, and that 83% of claims were settled at or before conciliation.

There are no figures to indicate what percentage, if any, of these workers were people who had been wrongly classified as independent contractors.

[47] (2006) 226 CLR 161.
[48] Andrew Stewart, '*Stewart's Guide to Employment Law*', Third Edition, Federation Press, 2011, p 45.
[49] Weekend Australian, 29-30 October 2011.

However, it is fair to say that when workers who are ostensibly independent contractors (but who believe that they were in fact employees) are dismissed from their employment, they may lodge unfair dismissal applications.

This is evidenced by cases such as *T Sammartino v Mayne Nickless Express t/a Wards Skyroad*[50] and *Brad Storen v South City Plaster.*[51]

Claims for Entitlements

As mentioned above, Australian employees are covered by legislation such as the FWA and/or other legislation, awards and agreements. The FWA and comparable legislation in other jurisdictions provides entitlements for personal/sick leave, annual leave, parental leave, minimum rates of pay, meal breaks, etc. Various provisions are also made for long service leave.

Independent contractors are not normally entitled to such benefits but where a worker has been wrongly classified as an independent contractor but is later found to be an employee, businesses may become liable for paying any accrued entitlements to such benefits.

Sham Contracting

At the same time as the ICA took effect in March 2007, new provisions about sham contracting were added to the *Workplace Relations Act 1996* (Cth) ('the WRA'). Similar provisions were later included in the *Fair Work Act 2009* (Cth) ('the FWA') at Part 3-1.

Under the FWA there are three separate provisions relating to sham contracting. Each of these applies to conduct by persons or bodies capable of being a national systems employer, as well as any other conduct occurring in a referring State or Territory.

---

[50] Australian Industrial Relations Commission, U30616/1998: Mr Tony Sammartino ('Mr S') worked as an *owner-driver* for Mayne Nickless Express (Mayne Nickless) in its Wards Skyroad courier services from about July 1986 until January 1998. On 29 January 1998 Mayne Nickless terminated the services of Mr Sammartino as a contract carrier. The dismissal followed an investigation into an allegation that Mr Sammartino had misconducted himself in the performance of his work. Mr Sammartino lodged an application for relief under section 170CE of the *Workplace Relations Act 1996* (the Act) (that his dismissal was harsh, unjust, or unreasonable. His application was founded upon a premise that he had been an employee of Mayne Nickless. Mayne Nickless contended that Mr S was engaged as a "*contract carrier*" under the terms of an unregistered industrial agreement between it and the Transport Workers Union of Australia; and that Mr S had accepted the terms of the agreement. A term of the agreement provided that the legal relationship between Mayne Nickless trading as Wards Express and Mr S was that of principal and independent contractor. The AIRC held that Mr S was an employee.

[51] Australian Industrial Relations Commission, U2007/2886: Mr S commenced employment in June 2004 as a 3rd year apprentice. In November 2006 he was offered and accepted the role as a subcontracted team leader. This was confirmed in a letter from Ms Joiner, the company bookkeeper dated 16 November 2006. In part that letter states as follows;"*Congratulations on moving to a new position in the Company as Team Leader. With this comes more responsibility and a change in your employment details. As a Team Leader you are now a Subcontractor. This means you will still accumulate annual leave as previously as an employee. You will no longer receive paid sick leave or paid public holidays. You will need to get an ABN number. If you like, you will need to complete a Voluntary agreement taxation form which means that 20% tax will be taken out fortnightly. We would like to inform you that as agreed with Luanne and Rohan you have received an increase in your wage. Your new hourly rate is $23.50*." When terminated, Mr S lodged an application for unfair dismissal which the company contested on the grounds that he was not an employee. The AIRC held that the establishment of the employment relationship is often a complex issue. Without determining the issue, there are several factors which support the company's view that Mr S was a contractor with the company during the period of time he worked as a Team Leader. However, at the time of the termination of employment Mr S was not a contractor as the majority of indicia (as per *Abdalla*) support the contention that he was an employee.

Section 357(1) of the FWA prohibits a person from misrepresenting an actual or proposed employment relationship as an independent contracting arrangement.

This is a civil remedy provision. There is a defence which provides that a person will not be liable for sham contracting if they can prove that at the time they made the representation they did not know, and were not reckless as to the true nature of the relationship between the parties: s357(2).

In *ABCC v Rapid Formwork Constructions Pty Ltd & Anor*,[52] the first respondent was found guilty of a number of contraventions of s357(1) of the FWA and was fined $10,500 under s546(1) of the FWA with respect to each contravention. It was also ordered to pay a penalty of $1,500 for contravention of the Modern Award, and $1,500 under s719 of the *Workplace Relations Act 1996* (Cth) for its contravention of the ACT Award.

These penalties were at the 'low-end' of those which could have been imposed and took into consideration that the respondent had already paid the workers in question outstanding entitlements to leave, and was co-operative with the investigation.

The case involved two young, unskilled, unlicensed construction workers who were (a) required by or on behalf of Rapid, to obtain an ABN, (b) to sign a contract that provided for an hourly rate of pay (and which had no time limit or specified duration), and (c) provided with some protective clothing by Rapid. Neither worker had any form of insurance and no superannuation was paid by them, or on their behalf by the respondent.

Minimising Risks in Relation to the Employee-Employer and Independent Contractor-Hirer Arrangements

There are a number of things parties can do to minimise the risks in relation to contracting relationships, whether they are service contracts (or contract for services) in relation to independent contractors, or employment contracts (or contracts of service) in relation to employees. These include:

1. Getting it in writing (and ensure the writing reflects the reality of the situation!), and
2. Keeping any supplementary evidence.

The Benefits of Getting it in Writing

Written contracts provide more certainty and minimise business risks by making the arrangements between the parties clear from the outset. The benefits of a written contract include:

- providing a record and evidence of what was agreed between the employer-employee or independent contractor-hirer
- helping prevent misunderstandings or disputes by making the agreement clear from the beginning

[52] [2011] FMCA 649.

- providing security and peace of mind for all parties – all parties (employees, independent contractors, paying parties) know the period of engagement, the remuneration, and either that they will have work or that work will be done for them
- clarifying the status of the service provider – that is, by expressly stating that this is a 'services contract' and not an 'employment contract' or vice versa – note that this will not override a "sham" contract but courts will take such a statement into account if there is any uncertainty about the nature of the relationship
- reducing the risk of a dispute by detailing payments (or salary, allowances, entitlements, etc, timeframes (or length and type of employment) and work to be performed, standards, and milestones, etc under the contract (or job role, description, duties, etc)
- detailing dispute resolution strategies (e.g. how disputes over payments, performance, conditions, breaches, etc are to be resolved)
- providing for any agreed variations to the contract, and
- specifying how either party can bring the relationship to an end e.g. before the work is completed in the case on an independent contractor, or by giving notice, etc, in the case of employees.[53]

The Risks of Not Getting it in Writing

Parties to a contract face a number of risks to themselves and/or their business if any contracts are not in writing. These risks include:

- an important part of the agreement being misunderstood;
- a dispute arising over what was actually agreed; and
- a court not enforcing the contract because of lack of proof of the contract's existence or terms.

Therefore, parties should have written contracts where possible and obtain legal advice prior to signing any such contract. Ideally, such contracts should also be drawn-up by lawyers unless specific and relevant pro-forma or precedent or "standard form" contracts can be sourced elsewhere.

Written contracts are essential where:

- the contract price is large enough, or the work to be done is important enough, that if the parties don't get paid or the work is not done, then the business will fail or suffer significant detriment;
- there are quality and material requirements and specifications that must be followed;
- there is any doubt that the payer has the money to pay or the service provider has the capacity to deliver;

[53] Attorney-General's Department, *'Independent Contractors: Contracts Made Simple'*, Commonwealth of Australia, p9.

- where there is any type of insurance required for the work to be done;
- where it is required by either party's insurer for professional indemnity purposes;
- where the contract contains essential terms such as critical completion dates, progress payments, and/or maintenance of skills or qualifications, etc;
- where confidentiality and protection of information such as intellectual property is important; and
- where there is a legal obligation to have a written contract (e.g. trade contracts for building work in Queensland).[54]

Keeping Supplementary Evidence

Ideally, a written contract would cover all possible contingencies and its purpose, meaning and interpretation would be incontrovertible.

However, all parties to a contract should bear in mind both "*mater artium necessitas*" (that necessity is the mother of invention) and the wonderful ingenuity of people – in other words, they should consider that parties may seek to either avoid express terms in contracts by challenging their meanings, or to include implied terms in contracts. This outcome is particularly likely where there is no written contract or where contracts are partly written and partly verbal.

For this reason, it may prove useful to keep a record of any information that supports a verbal contract or the interpretation of a written contract e.g. emails, quotes with relevant details, lists of specifications and materials, diary entries, and notes of any discussions between the parties e.g. the basics of a contract as written on a napkin during a "boozy lunch", even if not signed by both parties.

Conclusion

It is evident that it is critically important for businesses to correctly classify their workers as either employees or independent contractors.

This is not always a clear cut matter and requires careful consideration of a number of indicia. The take-home message is that the courts will not easily be fooled by arrangements dressed up to look like something they are not.

Failure to get it right can have a number of adverse consequences for individuals and businesses including financial penalties and damage to reputation – skate on thin ice and pay the price!

[54] Ibid, p11.

Appendix 1

Summary of the law distinguishing employees from independent contractors

(from *Abdalla*, bold added):

> **[34]** Following *Hollis v Vabu,* the state of the law governing the determination of whether an individual is an employee or an independent contractor may be summarised as follows:
>
> **(1)** Whether a worker is an employee or an independent contractor **turns on whether the relationship** to which the contract between the worker and the putative employer gives rise is a relationship where the contract between the parties **is to be characterised as a contract of service or a contract for the provision of services**. **The ultimate question will always be whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business of 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. This question is answered by considering the **totality of the relationship**.
>
> **(2) The nature of the work performed and the manner in which it is performed** must always be considered. This will always be relevant to the identification of relevant `indicia' and the relative weight to be assigned to various `indicia' and may often be relevant to the construction of ambiguous terms in the contract.
>
> **(3) The terms and terminology of the contract are always important and must be considered.** However, in so doing, it should be borne in mind that parties cannot alter the true nature of their relationship by putting a different label on it. In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: that is, the parties cannot deem the relationship between themselves to be something it is not. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract. If, after considering all other matters, the relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity by the very agreement itself which they make with one another.
>
> **(4) Consideration should then be given to the various `*indicia*' identified in *Brodribb* and the other authorities bearing in mind that no list of indicia is to be regarded as comprehensive and the weight to be given to particular indicia will vary according to the circumstances.** Where a consideration of the `indicia' points one way or overwhelmingly one way so as to yield a clear result, the determination should be in accordance with that result. For ease of reference we have collected the following list of `*indicia*':
>
> - ***Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like.***

Control of this sort is indicative of a relationship of employment. The absence of such control or the right to exercise control is indicative of independent contract. While control of this sort is a significant factor is not by itself determinative. In particular, the absence of control over the way in which work is performed is not a strong indicator that a worker is an independent contractor where their work involves a high degree of skill and expertise. On the other hand, where there is a high level of control over the way in which work is performed *and* the worker is presented to the world at large as a representative of the business then this weights significantly in favour of the worker being an employee.

"The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but 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." "[B]ut in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in *Queensland Stations Pty. Ltd v Federal Commissioner of Taxation*, a case involving a droving contract in which Dixon J observed that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract."

- ***Whether the worker performs work for others (or has a genuine and practical entitlement to do so)***

The right to the exclusive services of the person engaged is characteristic of the employment relationship. On the other hand, if the individual also works for others (or the genuine and practical entitlement to do so) then this suggests independent contract.

- ***Whether the worker has a separate place of work and or advertises his or her services to the world at large.***

- ***Whether the worker provides and maintains significant tools or equipment.***

Where the worker's investment in capital equipment is substantial and a substantial degree of skill or training is required to use or operate that equipment the worker will be an independent contractor in the absence of overwhelming indications to the contrary.

- ***Whether the work can be delegated or subcontracted*.**

If the worker is contractually entitled to delegate the work to others (without reference to the putative employer) then this is a strong indicator that the worker is an independent contractor. This is because a contract of service (as distinct from a contract for services) is personal in nature: it is a contract for the supply of the services of the worker personally.

- ***Whether the putative employer has the right to suspend or dismiss the person engaged.***

- ***Whether the putative employer presents the worker to the world at large as an emanation of the business.***

Typically, this will arise because the worker is required to wear the livery of the putative employer.

- ***Whether income tax is deducted from remuneration paid to the worker*****.**

- ***Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.***

Employees tend to be paid a periodic wage or salary. Independent contractors tend to be paid by reference to completion of tasks. Obviously, in the modern economy this distinction has reduced relevance.

- ***Whether the worker is provided with paid holidays or sick leave.***

- ***Whether the work involves a profession, trade or distinct calling on the part of the person engaged****.*

Such persons tend to be engaged as independent contractors rather than as employees.

- ***Whether the worker creates goodwill or saleable assets in the course of his or her work.***

- ***Whether the worker spends a significant portion of his remuneration on business expenses.***

This list is not exhaustive. Features of the relationship in a particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.

(5**) If the indicia point both ways and do not yield a clear result the determination should be guided primarily by whether it can be said that, viewed as a practical matter, the individual in question was or was not running his or her own business or enterprise with independence in the conduct of his or her operations** as distinct from operating as a representative of another business with little or no independence in the conduct of his or her operations.

(6) If the result is still uncertain then the determination should be guided by *"matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability"* including the *"notions"* referred to in paragraphs [41] and [42] of *Hollis v Vabu* (see above).

In *Abdalla* the Court recognised that ”... ***the various indicia point in both directions...the case falls close to the ill-defined dividing line between employment and independent***

contract.... *the absence of control emerging (should be given) substantial weight.... On balance, the various factors... tend more strongly to a characterisation of independent contract. The case is by no means clear cut and, accordingly, we must consider whether it can be said that, viewed as a practical matter, Mr A was or was not running his own business or enterprise with independence in the conduct of his business operations as distinct from operating as a representative of Viewdaze with little or no independence in the conduct of his operations. On the evidence...we conclude that, viewed as a practical matter, Mr A was in substance running his own business enterprise with independence in the conduct of his operations. He was entirely free to work as little or as much as he liked. Consistent with a contractual right to act as an "independent" agent, he was not subject to any substantial measure of control by....in relation to his attendance at work or the manner in which he performed his work. The evidence suggests that his work involved bringing his own business to the ...agency (rather than transacting business allocated to him....) and retaining the vast bulk of the commission generated from that business. The primary purpose of the relationship between the parties seems to have been to provide Mr A with a convenient vehicle through which to transact the business that he generated through his own sources and contacts with Viewdaze in return taking a small portion of the commissions thereby generated. It follows that, on the evidence...* ***the proper characterisation of the relationship between the parties is one of independent contract****".*

Appendix 2

Comparison of Employee versus Independent Contractor[55]

Characteristic	Employee	Independent contractor
Lawful authority to Command	Under a ***contract of service***, the payer can usually direct the ***manner of performance***. Where the nature of the work involves professional skill or judgement, the degree of control over performance may be diminished and may not be exercised. The key is that the lawful authority to command rests with the payer.	The hallmark of a ***contract for services*** is that the contract is one for a ***given result***. The contractor works to achieve the results in terms of the contract. The contractor works on her/his own account, e.g. a plumber or landscaper.
How the work is performed	Tasks are performed at the request of the employer and in the way in which the employer directs. The worker is said to be working ***in the business*** of the payer.	An independent contractor enters into a ***contract for a specific tasks or series of tasks***. The contractor maintains a high level of discretion and flexibility as to how the work is performed. However, the contract may contain precise terms as to materials used, methods and standards of performance, and still be one for services.
Risk	An employee bears little or no risk. An employee is not exposed to any commercial risk. This is borne by the employer. Further, the employer is generally responsible for any loss resulting from poor work. The employer is expected to carry insurance to cover the employees who may be injured or injure others in the course of their employment.	An independent contractor stands to make a ***profit or loss on the task***. She or he bears the ***commercial risk***. The contractor bears the responsibility and liability for any poor work or injury sustained in the performance of the task. Generally a contractor would be expected to carry her/his own ***insurance*** policy.
Place of Performance	A worker under contract of service will generally perform the tasks on the payer's premises.	A contractor will generally provide all their own assets and may work at a number of different locations for one or more payers.
Hours of Work	An employee generally works ***standard or set hours.***	An independent contractor generally ***sets their own hours of work.***
Leave Entitlements	An employment contract will generally provide annual leave, long service leave, sick leave and other benefits and allowances.	Generally an independent contract contains no leave provisions (although mere non-payment of such entitlements does not in itself make the contract one for services).
Remuneration	An employee is generally paid an hourly rate, piece rates, award rates, overtime, etc.	Payment to an independent contractor is based on ***performance of the contract.***
Expenses	An employee is generally reimbursed for expenses incurred during employment.	An independent contractor is responsible for their own expenses.

[55] Table adapted from Net Lawman *'Independent Contractor or Employee*?" accessed on 26 October 2011 at <http://www.netlawman.com.au/info/independent-contractor-or-employee-australia.php>.

Appointment	An employee is generally recruited by an advertisement by the employer.	An independent contractor is likely to advertise their services to the public at large.
Termination	An employer reserves the right to dismiss an employee at any time (subject to any state or federal laws).	An independent contractor is ***contracted to complete a set task***. The payer may only terminate the contract without penalty where the worker has not fulfilled the conditions of the contract. The contract will usually contain terms dealing with defaults made by either party
Delegation	An employee has no inherent right to delegate tasks to another. However, there may be a power to delegate some duties to other employees.	An independent contractor may delegate all or some of the tasks to another person and may employ other persons.
Equipment	Plant and equipment is usually provided by the employer.	The contract usually specifies who is to provide the plant and equipment. This is usually the responsibility of the contractor.
Scheduling of Work	An employer determines or controls the time frame within which the work is to be performed.	The work would be performed in accordance with agreed schedules and consistent with the obligations under the contract.
Expectation of Work	An employee usually has an ongoing expectation of work.	A contractor is usually engaged for a ***specific task.***
Method of Payment	An employer usually pays an employee according to an award or employment agreement.	A contractor usually invoices the person who engages them for their services.
Taxation	An employee pays PAYG tax which the employer pays on behalf of the employee.	A contractor usually deals with her/his own tax.
Relationship to the business	An employee is usually an ***integral part*** of the employer's business.	A contractor's work is usually an ***accessory*** to the business.
Ability accept other work	A full-time employee is usually restricted to work for the one employer during normal business hours.	A contractor can accept as many contracts as they wish.
Right to Refuse Work	An employee does not have the right to continually refuse a ***reasonable task***.	A contractor usually agrees to the tasks beforehand. The contract governs the tasks that must be performed.

BIBLIOGRAPHY

Legislation

Independent Contractors Act 2006 (Cth)
Independent Contractors Regulations 2007 (Cth).
Fair Work Act 2009 (Cth)
Superannuation Guarantee (Administration) Act 1992 (Cth)
Workplace Relations Act 1996 (Cth)
Workplace Surveillance Act 2011 (ACT)

Cases

Abraham Abdalla re Abraham Abdalla v Viewdaze Pty Ltd t/as Malta Travel - PR927971 [2003] AIRC 504 (14 May 2003)
Bank Voor Handel En Scheepvaart NV v. Slatford [1953] 1 QB 248
CFMEU and Nubrick [2009] FMCA 981
Damevski v Giudice [2003] FCAFC 252
FC for Taxation v J Walter Thompson (Australia) Pty Ltd (1944) 69 CLR 227
Gould v Minister of National Insurance (1951) 1 KB 731
Hollis v Vabu (2001) 207 CLR 21
Marshall v. Whittaker's Building Supply Co 23 (1963) 109 CLR 210
Montreal v. Montreal Locomotive Works 20 [1947] 1 DLR 161
Stevens v Brodribb Sawmilling Company Pty Ltd [1986] HCA 1; (1986) 160 CLR 16
Stevenson Jordan and Harrison Ltd v. MacDonald and Evans [1952] 1 TLR 101
Sweeney v Boylan Nominees (2006) 226 CLR 161
Vabu Pty Ltd v Commissioner of Taxation (1996) 81 IR 150.

Books

Attorney-General's Department, *'Independent Contractors: Contracts Made Simple'*, Commonwealth of Australia, November 2010
Andrew Stewart, '*Stewart's Guide to Employment Law*', Third Edition, Federation Press, 2011

Articles

Bruce Butler and Madelaine August, Monahan + Rowell Lawyers, *'Summary – Independent Contractors Act 2006'* (March 2007)
Ewin Hannan, *'Bosses see red at "unfair sackings*"', Weekend Australia 29-30 October 2011
Richard Thompson and Josh Strong, Wisewould Mahony Lawyers, "*Independent Contractors and Labour Hire – The Dangers"* accessed at
http://www.ourcommunity.com.au/files/ocmatters/IndependentContractors.pdf

Government Rulings

Australian Taxation Office, Superannuation Guarantee Ruling SGR 2005/1, 'Superannuation guarantee: who is an employee?' accessed on 29 October 2011 at
<http://law.ato.gov.au/atolaw/view.htm?docid=SGR/SGR20051/NAT/ATO/00001>

Websites

Behan Legal accessed on 29 October 2011 at

<http://www.behanlegal.com/KnowledgeCentre/EmploymentLawIndustrialRelations/AreyouaContractororactuallyanEmployee/tabid/180/Default.aspx>
Fair Work Ombudsman <http://www.fairwork.gov.au>
Independent Contractors Association website accessed on 28 October 2011 at <http://www.contractworld.com.au/research/ica-numbers2.php>.
Net Lawman *'Independent Contractor or Employee*?" accessed on 26 October 2011 at http://www.netlawman.com.au/info/independent-contractor-or-employee-australia.php
Student at Law at <http://www.studentatlaw.com/articles/49/1/Tort-Law---Topic9-Vicarious-Liability/Page1.html>