

WILLIAMS LOVE & NICOL
LAWYERS



Seminar Coverage

- **John Wilson** - the difference between employees and independent contractors
- **Allison Ballard** - the consequences of getting it wrong and how to get it right
- **Elishka Skelding** - protecting your business from ex-worker misconduct e.g. employees taking your clients and your confidential information with them when they walk out the door

Independent Contractor or Employee?



John Wilson

Independent Contractor or Employee?



Does it really matter?

**What sort of numbers
are we talking about?**

What's the difference?

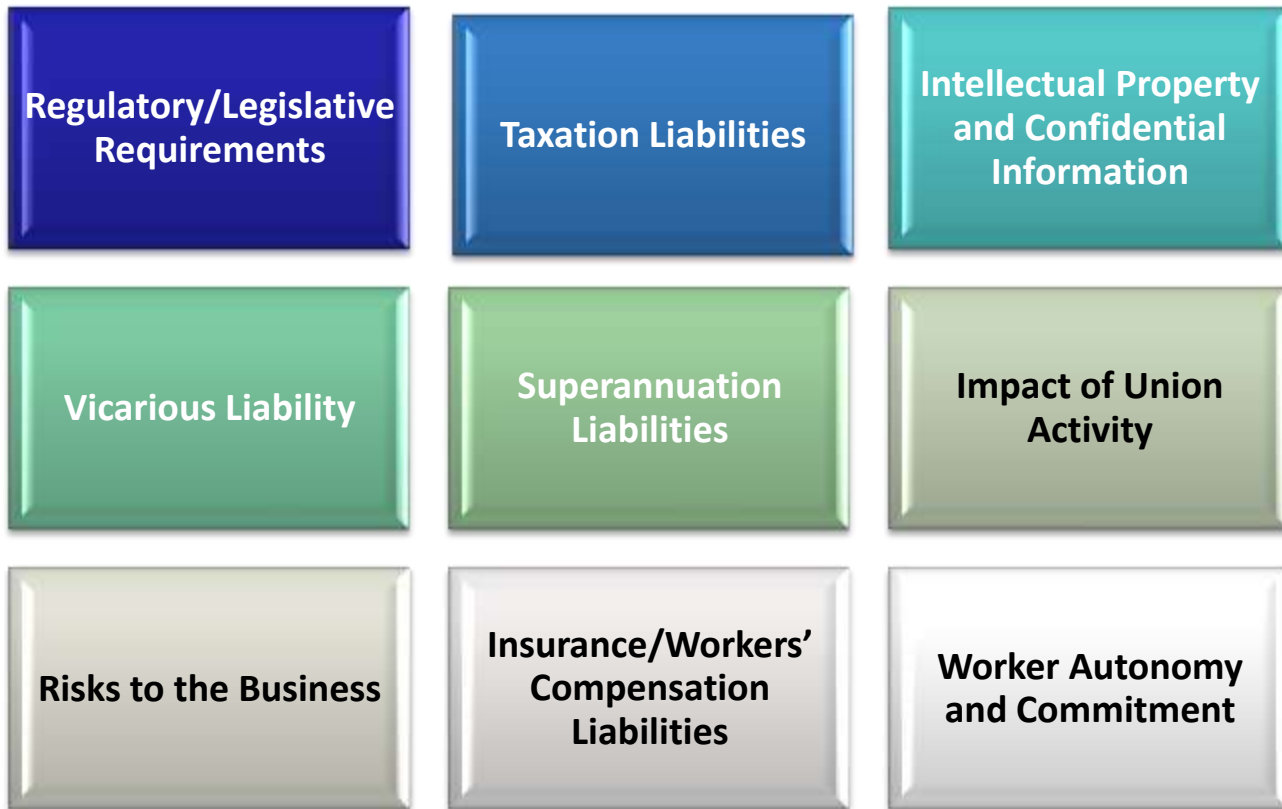
Why do we care?

Independent Contractor or Employee?

Does it really matter?

The short answer is “YES”

Some of the Factors that May be Impacted by the Type of Labour Relationship.....



Regulation of IC-E Relationships

- don't be left out in the cold!

- **Employment relationships** are regulated by specific *labour protection laws* which provide minimum terms and conditions of employment
- **Independent contractor relationships** are usually treated as ordinary commercial contracts regulated by *general commercial laws* that apply to business dealings

Businesses which rely heavily on *independent contractors* or *labour-hire agencies* need to closely examine their processes to ensure that they are not **inadvertently entering into employment relationships** with their workers

Independent Contractor or Employee?

**What numbers of Australian worker
are we talking about?**



Independent Contractors in Australia

- estimates range from about 800,000 to 2 million
- 8.2% to 19.9% of total workforce
- disparities due to differences in categorising employment groups
- in either case, a significant and probably growing component of the Australian workforce



Independent Contractor or Employee?

What's the difference?





Hmm... Well, these are red and have a smooth skin
And these are orange and have a rougher texture.



It's often difficult to determine if a worker is an IC or an E, especially if a person's services are only provided to one "hirer"

BUT

the distinction is crucial because different laws and mutual obligations apply to **employee-employer** and **independent contractor-hirer** relationships

AND SIMPLY THINKING A WORKER IS, OR CALLING A WORKER AN "INDEPENDENT CONTRACTOR" DOES NOT MAKE IT SO....

Abdalla v Viewdaze P/L t/a Malta Travel 504 (2003)

The Full Bench at para 34 said:

“the terms and terminology of the contract are always important and must be considered. However, in doing so, it should be borne in mind that parties cannot alter the true nature of their relationship by putting a different label on it.”



I also provide a cockadoodle-doo wake up call service
if you want when you're away from the farm...

Re Porter; ReTransport Workers Union of Australia : Gray, J

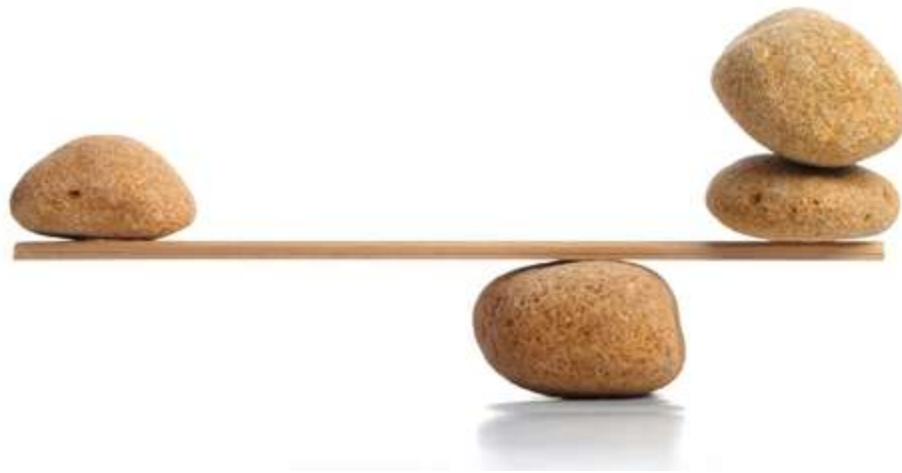
*“Although the parties are free, as a matter of law, to choose the nature of the contract which they will make between themselves, **their own characterisation of that contract will not be conclusive.** A court will always look at **all of the terms of the contract,** to determine its true essence, and will not be bound by the express choice of the parties as to the label to be attached to it.... **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.***



If it looks like a duck, and quacks like a duck, we have at least to consider the possibility that we have a small aquatic bird of the family anatidae on our hands.

Douglas Adams

To determine whether someone is an employee or an independent contractor requires consideration of a number of indicia need to be considered.....as Gray J, observed in *Re Porter*....



*“A court determining whether a particular relationship is that of employment or of some other kind can therefore only resort to the **process of balancing all of the factors**, or as they are called in **Stevens v Brodribb Sawmilling Co Pty Ltd [(1986) [1986] HCA 1; 160 CLR 16]** and other cases, the **‘indicia’**. In truth the result may be a matter of impression. It is unfortunate that this is so. It should not be necessary for people to obtain a decision of a court, in order to know the true nature of their relationship. Unfortunate or not, that is the case.”*

Zuijs v Wirth Brothers Pty Ltd [1955] HCA 73; (1955) 93 CLR 561



- Two Latvian trapeze artists
- During a performance, Zuijs grabbed his colleague's feet, and both fell to the ground, injuring Zuijs
- Zuijs claimed worker's compensation for injury but circus said he was an I.C. not an employee

So was Zuijs an independent contractor or an employee?

***Zuijs v Wirth Brothers Pty Ltd* [1955] HCA 73; (1955) 93 CLR 561**



HCA held Zuijs was an **employee**, largely because of the **control** exercised by the circus (“the control test”):

- tax was withheld from his pay
- he travelled with the circus
- the number, time and manner of rehearsals controlled as was his costume, where he dressed, his conduct toward the audience
- he had to perform when he was told to
- the frequency and duration of his performances was controlled by the circus
- it was part of circus business to provide trapeze exhibitions for its patrons
- no evidence that the circus had no right/power to order that Zuijs not repeat a particular feat if it was dangerous to him or the audience

Stevens v Brodribb Sawmilling Company Pty Ltd [1986] HCA 1; (1986) 160 CLR 16



- truck driver Stevens injured by bulldozer driver/“snigger” Gray when he negligently caused a log to roll down a ramp and pin Stevens between the log and the dozer
- HCA considered whether Stevens and Gray were I.C.’s or employees
- Mason J held :*“A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the **degree of control** which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it “*

***Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16**

- but... **control is only one of a number of indicia** - also need to look at inter alia
 - the 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
 - the delegation of work by the putative employee
- fellers, sniggers and truck drivers were not guaranteed work and were free to seek other work if bad weather or other circumstances prevented them from working for Brodribb
- all parties regarded Stevens and Gray as I.C.'s
- HCA held both Stevens and Gray were I.C.'s
 - they provided and maintained their own equipment
 - they set their own hours of work
 - they received fortnightly payments from Brodribb determined by the volume of timber they delivered to its sawmill
 - no tax was deducted from these payments

***Hollis v Vabu* [2001] HCA 44 (2001) 207 CLR 21**

“CRISIS COURIERS” CAUSE CHAOS!



- an unidentified courier cyclist negligently injured a pedestrian, Hollis, while couriering – he said “Sorry mate” and headed off, pushing his bike and ignoring Hollis’s calls to him
- Hollis sued the courier company (Vabu) who engaged the couriers
- under traditional principles, Vabu could only be liable if the couriers were considered to be employees not independent contractors.
- one ground of the grant of special leave to appeal to the HCA was whether the C of A was in error in finding Vabu “*was not vicariously liable for torts committed during the course of work being performed at its request, and on its behalf by bicycle couriers retained by it*”
- in answering this, the HCA considered the nature of the couriers' engagement and whether it constituted an employment or IC relationship.

Hollis v Vabu [2001] HCA 44 (2001) 207 CLR 21



- whilst there were factors indicating the existence of an IC relationship, these were outweighed by other factors evidencing an employment relationship (41-45)
- the HCA looked at the “*totality of the relationship*” to establish whether, in the circumstances, the courier was an employee
- a strong majority of the court found that, on the facts, the couriers **were employees of the respondent and consequently the respondent was vicariously liable for the tort of its employee** – that is, for the injury (some of which was permanent) to the pedestrian

Abraham Abdalla v Viewdaze P/L t/as Malta Travel
PR927971 [2003] AIRC 504 (14 May 2003)

THE
TRAVEL
CONSULTANT



- originally an unfair dismissal case
- this was the 4th hearing
- both parties were self-represented
- Abdalla was a travel consultant who occupied business space at Viewdaze's premises
- he was paid a commission by Viewdaze

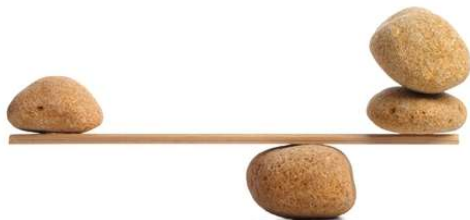
Was Abdalla an Independent Contractor?

**A difficult case because the contract pointed
both ways...towards employment and
towards independent contractor**



Abraham Abdalla v Viewdaze

- there was a document called an “*employment contract*”
- there was reference to him being a “casual employee”
- at one time super and tax payments were made for him
- Abdalla provided no business equipment and used Viewdaze’s phone, fax, etc.
- the contract referred to Abdalla as an “*independent agent*”
- Abdalla was paid on commission (80% of the commission he generated) - not salary or wages
- he had the status of a “freelance operator”
- Viewdaze had little or no control over him – A came and went as he pleased
- A was not allocated work by Viewdaze



Abraham Abdalla v Viewdaze

*'... 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..... 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 V in return taking a small portion of the commissions ...generated. It follows that, on the evidence... the proper characterisation of the relationship between the parties is one of independent contract.**'*

***Abraham Abdalla v Viewdaze* – the Full Bench drew on the principles in *Hollis v Vabu* to establish the indicia to determine whether a worker is an employee....that is, whether**

- any right to exercise control over manner, time, place, etc of work?
- any right to suspend or dismiss?
- presented to the world at large as an emanation of the business?
- income tax deducted?
- remunerated by wages/salary?
- provided with holiday/sick leave? any genuine and practical right to work for others?
- any separate place of work or advertising of services to the world at large?
- any provision/maintenance of own tools/equipment?
- any right to delegate/subcontract?
- paid on completion of tasks?
- work involves profession, trade, distinct calling?
- goodwill/saleable assets created in the course of work?
- Significant proportion of remuneration spent on business expenses?

Abraham Abdalla v Viewdaze

- No mention is made of **intention** as one of the indicia.....
- Therefore clauses to the effect that “*nothing in this agreement is intended to establish a relationship of employment*” will have little effect, and may in fact trigger the suspicions of the court/tribunal that there is an employee lurking behind the veneer

***Dameski v Giudice* [2003] FCAFC 252**

- The courts will generally try to deconstruct artificial arrangements designed to evade legal obligations to employees
- In this case the Full Court of the FCA overturned a decision of the Full Bench of the AIRC that Mr D was not an employee
- Mr D was previously engaged by the company as an employee for 3 years
- The company then said it was moving to a contracting system whereby Mr D would set up his own business and become a contractor to another entity
- Although ostensibly Mr D was a “contractor” and he signed papers agreeing to the proposed change, he continued to work as he had done previously and was provided with a van, equipment, and company livery

Labour-Hire Agencies

- ***Advanced Workplace Solutions Ptd Ltd and Fox v Kangan-Batman TAFE (AIRC)***
- TAFE lecturer engaged by a labour force licensee for a whole academic year who carried out virtually identical duties to other TAFE lecturers.
- Sacked and lodged an unfair dismissal claim
- 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

BUT

Jamie Orlikowski v IPA Personnel Pty Ltd [2009] AIRC 565

- Mr O was engaged by AQIS through one agency in 2004 and remained with them until terminated in 2009.
- In August 2008 2nd agency won tender to provide AQIS labour-hire services Mr O was engaged by them from that time.
- Throughout the 4.5 years, AQIS exercised considerable control over Mr O, although he was only paid by the agencies.
- His counsel argued that the 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.
- Senior Deputy President Lacy made some unfavourable comments about the effect of labour-hire arrangements at paragraph 42 ***"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"***

Jamie Orlikowski v IPA Personnel Pty Ltd [2009] AIRC 565

- Mr O was granted his application to have AQIS named as the second respondent
- SDP Lacey *“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. If this is the case, the labour-hire industry may well fall from grace.
- **WATCH THIS SPACE!!!!**

Independent Contractor or Employee?

Why do we care?



Why do we care?

In a word because there are a number of serious consequences for getting it wrong....some of these consequences will be addressed in the next couple of sessions





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Independent Contractor or Employee - The Consequences of Getting it Wrong



Allison Ballard



It is quacks like a duck it is not a rooster.....

Employees



Generally:

- entitled to a minimum set of conditions under workplace relations law e.g.
 - payment of wages
 - meal breaks
 - set hours of work
 - leave entitlements
- can be directed about when, how, and where they work – must perform the duties of the position
- not required to provide tools & equipment
- take no commercial risk & cannot make a profit

Independent Contractors

Generally:

- paid for an agreed result
- provide all/most of the materials & equipment needed to do the work
- free to delegate work to others unless the contract states otherwise
- free to provide services to other businesses
- free to accept/refuse work
- free to decide the way they work
- able to make a profit or loss
- have to tender and tout for work
- aim to make a profit
- feed remuneration back into their business

Classifying workers incorrectly can have a potentially devastating impact on your business



Benefits to “Employers” of “Workers” not being “Employees”

- flexibility in bringing the relationship to an end
- no access to unfair or unlawful dismissal laws
- an ability to engage labour on an “as needed” basis
- no requirement to pay superannuation
- no requirement to pay leave entitlements, meal breaks, etc.
- no requirement to pay WorkCover insurance
- no requirement to pay payroll tax
- company tax rate v income tax rate



Benefits to the worker of being a contractor rather than an employee

- workers are theoretically “free agents” who have rejected the “bondage of employment”
- workers who theoretically have equal power/rights and the principals they contract with
- workers are theoretically able to render their services to who they choose, how and when they see fit
- may feel “self-empowered” by being their own boss
- are not employees and don’t want to be employees (at least according to IC of A)



Consequences of Getting It Wrong

- Vicarious Liability
- Common Law Doctrines
- Unfair Contract Claims
- Unfair Dismissal Claims
- Liability for Benefits
- Liability of Unpaid Tax
- Liability to Superannuation Payments
- Penalties for Sham Contracting

Consequences of Getting It Wrong



Vicarious Liability

For the purposes of vicarious liability, the law divides workers into two groups:

- employees employed to work under a **contract of service**
- independent contractors who work pursuant to a **contract for services**

WHY?

Vicarious Liability

- If an employee commits a tort in the course of employment, the employer is liable regardless of whether he or she has personally committed a tort



In *Bazley v Curry*, McLachlin J said “*the employer's enterprise [has] created the risk that produced the tortious act*” and the employer must bear responsibility for it.

He termed this risk “**enterprise risk**” and said that “*where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong*”.

Employers are generally not liable for torts of its independent contractors.....

“the work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal”.

Dixon J, *Colonial Mutual Life Assurance Soc Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931)

Authorisation to commit a tort



***Mclnnes v Wardle* (1931) 45 CLR 548**



- Employer held liable when independent contractor destroyed rabbits on property with fire
- Fire got out of control
- Evatt J held, on the facts, that employer must be taken to have expressly authorised the contractor to burn off the bracken for the purpose of fumigating the burrows, because this was the ordinary and usual method of destroying rabbits

“Strict liability” torts

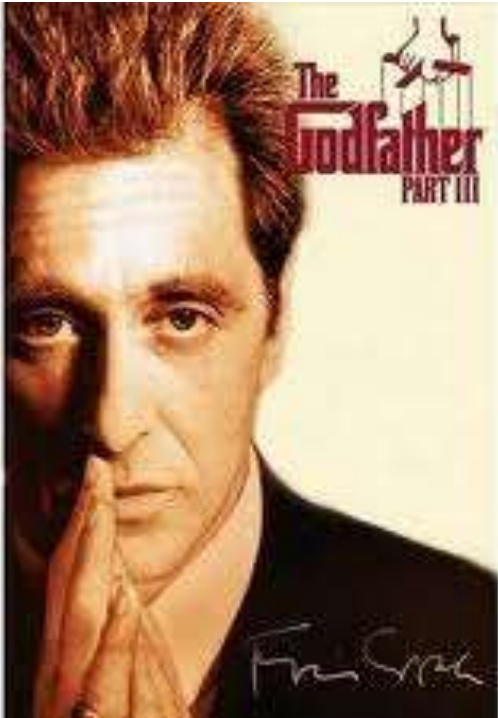


- Sometimes there is liability where no intentional or negligent act has been committed
- One may be answerable for such torts when they are committed by independent contractors
- Example: 1. Keeper of animal answerable for injury done by it even though it was in custody of independent contractor (*Higgins v William Inglis & Sons Pty Ltd* [1978] 1 NSWLR 649 2. breach of statutory duty

Hosking v De Havilland Aircraft [1949]



“Personal Negligence” by Employer



- Where they carelessly appointed an incompetent contractor?
- Where they arranged for work to be done, well knowing, or being in a position to realise, that there is a particular risk involved, they may be personally liable for failing to explain the nature of the risk to the contractor and for supervising the execution of the work?

Sweeney v Boylan (2006)



- Female customer in servo buying milk
- Door fell off fridge striking her on head
- She sued the owners and the fridge fixers (Quirks) for negligence
- Sadly the fridge mechanic was an independent contractor of Quirks
- So, Quirks not liable for the his actions

Other Common Law Doctrines

Despite the established rule re vicarious liability, businesses can be found responsible for a contractor's negligence if it has a *non-delegable duty of care*

Non-delegable duty of care

A special duty that requires a person to take reasonable care to avoid harm from certain activities – it applies even where responsibility for those activities has been entrusted to someone other than the person's own employees

Non-delegable duty of care

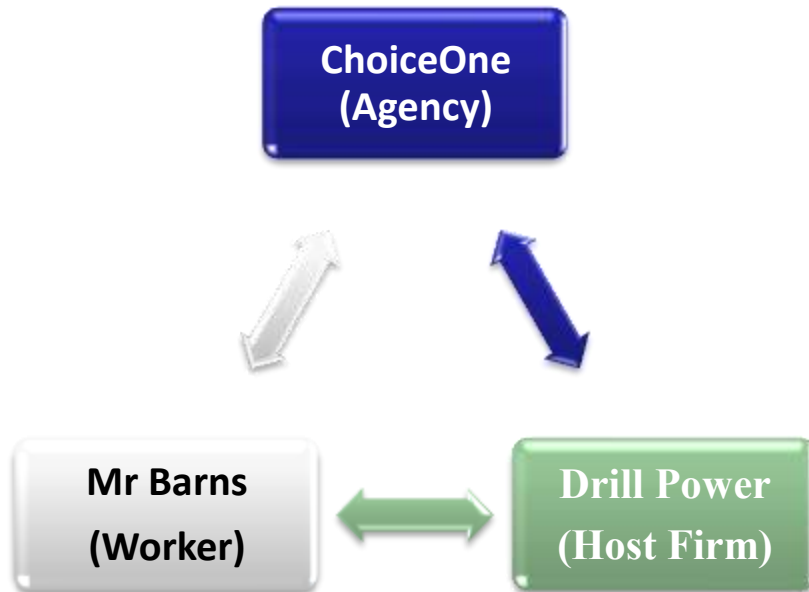
- employer's duty of care to its employees
- school authorities to children
- hospitals to patients

***Barns v Parlin Pty Ltd & Ors* [2010]**



- Highlights the strict nature of the non-delegable duty of care owed by an employer to its employee
- But ultimately finds a labour-hire employer not liable to contribute towards common law damages for its injured worker

Barns v Parlin Pty Ltd & Ors [2010]



- Mr B was “employed” by labour-hire ChoiceOne (3rd defendant)
- Mr B was “working” for Parlin (“Drill Power” – 1st defendant)
- Drill Power was involved in drilling work for Barrick Gold at their site (2nd defendant and 3rd party)
- Mr B received burns to 60% of his body when engulfed by fire caused by failure of high pressure hose on drilling rig

SHAM CONTRACTING

SHAME
THOSE WHO
SHAM



Fraud Con Charade Fake Cheat
Mock Bogus Imitation Pretend
Imposter Charlatan SHAME

If it quacks like a duck.....

<http://www.youtube.com/watch?v=YvsFuxwEHOM&feature=related>



Sham Contracting is **Illegal**

Employers **CANNOT**

- tell an employee that he or she is a contractor
- dismiss/threaten to dismiss an employee so as to engage them as an independent contractor doing the same/mostly the same work – or vice versa
- mislead an employee/former employee in order to persuade them to do the same/mostly the same work as an independent contractor

FAIR WORK ACT 2009 - SECT 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**.

DEFENCES to SHAMMING - SECT 357 (2)

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*.

FWA Section 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.

Section 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.

ABCC v Rapid Formwork Constructions Pty Ltd & Anor [2011] FMCA 649

- two teenaged construction workers
- unskilled, unlicensed
- driven to the site each day
- told to get an ABN if they wanted work

On 1 September 2011 Neville FM handed imposed penalties of \$21,000 on the first respondent for two contraventions of s.357(1) of the *Fair Work Act 2009* , \$1500 on the first respondent for contravening the relevant awards, and \$1500 on the second respondent for contravening s.900(1) of the *Workplace relations Act 1996*.

Getting it Right



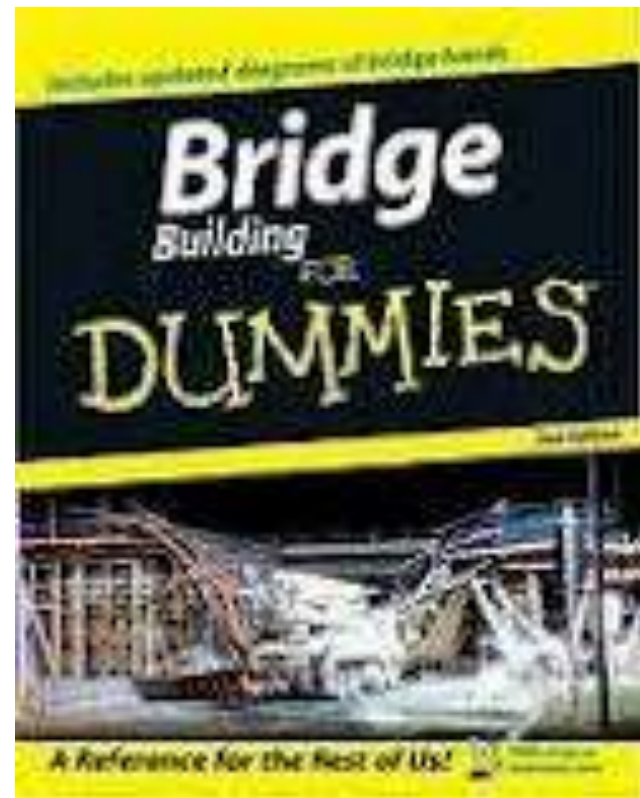
1. Do the right thing!!
2. Draft the right contract or agreement
3. Interpose another entity

The Right Contract/Agreement

- Explicit describe the arrangement as a “contract for services”
- Downplay any element of control
- Allow the worker the freedom to work for other clients
- Allow other workers to assist them
- Pay by results and on presentation of an invoice
- Insist that the worker provide their own tools or equipment
- Require the worker to insure against any work-related injury
- Deny the worker any entitlement to paid leave

Not foolproof....

- – but it is hard to find a case where an employment relationship has been found where there is a carefully drafted contract – especially if it included an unqualified power to delegate or subcontract



Further Resources

- **Contractor decision tool at**
<http://www.business.gov.au/IndependentContractors/DecisionTool.aspx>
- **Independent Contractors – The Essential Handbook**
<http://www.business.gov.au/BusinessTopics/Independentcontractors/Documents/Independentcontractorstheessentialhandbook.pdf>
- **Superannuation Guarantee Eligibility Tool**
<http://www.ato.gov.au/businesses/content.aspx?doc=/content/85201.htm&pc=001/003/090/002/004&mnu=33897&mfp=001/003&st=&cy=1>
- **Employee Superannuation Calculator Tool**
<http://www.ato.gov.au/individuals/content.aspx?doc=/content/00188597.htm>

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CONFIDENTIAL INFORMATION



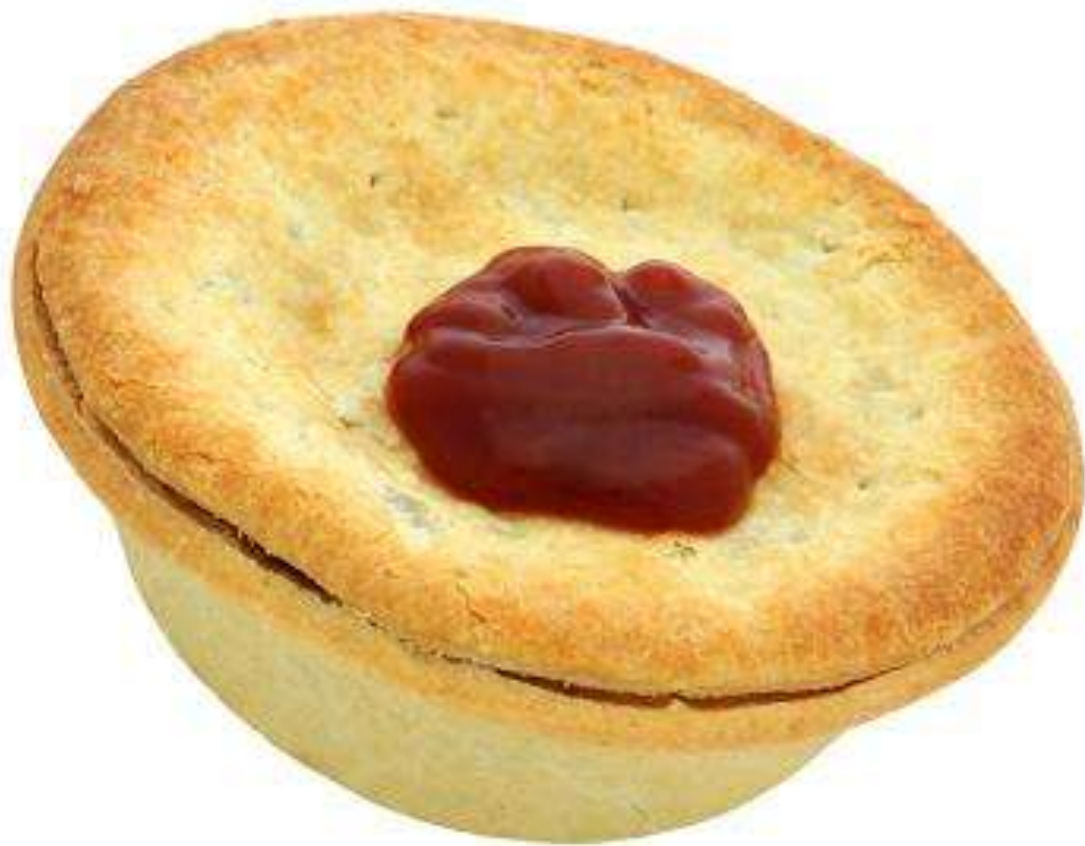
Elishka Skelding (pseudonym Sebastian McIntosh)

Employment and Confidential Information

- What is Confidential Information?
- How is it “automatically” protected?
- Can employers/principals do anything to change the default position?

What is *confidential*?





What *information* is capable of protection?

- Things over which an Employer has intellectual property rights
 - Copyright, like literary works and pictures.
- Trade secrets
 - Pricing
 - Sourcing of materials
 - Client lists
 - Research and Development

Determining whether information is Confidential – Some factors to consider

- Extent that information is known:
 - Outside business
 - By employees and others involved in the business
- Extent of measures to protect information
- Value of information
- Whether confidential status was made plain

What *information* is not “automatically” protected

- An employee’s “know how” or “stock of knowledge”
- information is something that is ascertainable by enquiry or experiment, albeit perhaps substantial enquiry or experiment
- Information that is not specifically identified

Examples of not protected “know-how”

- An ex-employee’s knowledge of the sources of particular types of paper sold by the employer
- knowledge of the satisfactory degree of dilution of a standard solvent for a particular purpose
- The identity of 4 particular suppliers (out of approximately 3,000) were reliable

Secrecy



"These documents are highly sensitive.
Have them shredded, then burned."

Exceptions to protection

- If disclosure of the information is in the public interest



The point is...

- You must be aware, in your own organisation what is, and isn't confidential
- Don't assume things are protected – take steps to identify the specific material and protect it
- Employee's aren't “automatically” prevented from using their “know-how”

How is information “automatically” protected

- The implied contractual duty of “fidelity”
- The equitable duty of “confidence”
- Section 183 of the *Corporations Act 2001* (Cth)

Duty of *fidelity*

- Contractual duty
- Implied as a matter of law
- Only between employees and employers – no third party
- Only lasts for the duration of the contract of employment / employment relationship
- not limited to confidential information

Obligations of the Duty of Fidelity

- Not to solicit customers
- Not to destroy the goodwill of the business
- Not to disclose confidential information
- Not to take a bribe or secret commission

Limitations

- Practical considerations
- Expensive to enforce
- Does not cover all forms of information
- Ceases when there is disclosure
- Uncertainty over what is actually protected
(see *G D Searle v Celltec*)

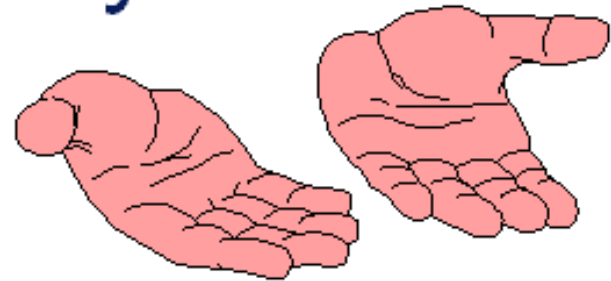
Limitation

- Ceases (or changes) on the end of the employment contract/employment relationship
- Only applies to employee's and employers, not contractor's and principles

Equitable duty of Confidentiality

- Equitable v Contractual obligations
- Can be enforced against third parties
- Different remedies are available in equity

Are your



clean?

Corporations Act 2001 (Cth)

182 Use of position—civil obligations

(1) Use of position—directors, other officers and employees A director, secretary, other officer or employee of a corporation must not improperly use their position to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation.

Corporations Act 2001 (Cth)

183 Use of information—civil obligations

- (1) Use of information—directors, other officers and employees A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:
- (a) gain an advantage for themselves or someone else; or
 - (b) cause detriment to the corporation.

Note 1: This duty continues after the person stops being an officer or employee of the corporation.

So what?



Basics of Contractual law

- The contract between the parties can consist of:
 - Express terms; or
 - Implied terms.

...more contract 101...

- Ordinarily, no post termination application
- However, “Restraint of Trade Clauses” vary the default position

Express Confidentiality Terms

- Where the terms apply *during* the employee's employment, there is no reason why the clause cannot be particularly restrictive and burdensome.

Restraints of Trade



“Know-how”

- Trade Secret or General Stock of Knowledge?
- Can be protected through Restraint of Trade Clause

Personal Attributes

- Somewhat philosophical language
- Not protected because:
 - Principle of mobility of labour;
 - Unreal for employee to rid their mind.

Reasonable restraints

- Area or scope
- Time
- Jurisdiction



“You can’t retire. You know too much
You might talk.”

The continuum of Information



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