

Employment Law

Williams Love & Nicol is a premier commercial law firm providing full client services from our base in Canberra. Our practice is focused on providing commercially realistic and practical advice that is timely, accurate and delivers value for money.



JOHN WILSON - PARTNER,
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How to Spot Employees, Independent Contractors, Roosters, Ducks and Elephants

On 15 July 2011, proceedings covering the important distinction between employees and independent contractors ended with the discontinuance of an appeal by the employer.

The case was brought by a business,

On Call, against the Commissioner of Taxation, seeking to challenge an assessment that On Call was liable to make superannuation contributions for more than 2,500 workers over a period of 5 years from 1 July 2002 to 30 June 2007.

The amount owing under the assessment was not quantified, but it can be assumed to be a substantial sum. The case demonstrates the



Next newsletter: When is a Casual Not a Casual?

The recent Federal Court decision in *Williams v MacMahon Mining Services Pty Ltd* raises serious questions for the employment of 'permanent' casuals. Read more next issue.

importance for any business in correctly identifying whether the workers performing in the business are employees or else independent contractors.

It reaffirms the importance of the totality of the circumstances, and looking "*beyond and beneath the documents*". This approach was described by an English Judge as "*the elephant test*" – an animal too difficult to define but easy to recognise when you see it; and an Australian Judge has said that the parties cannot create a working relationship "*which has every feature of a rooster, but call it a duck.*"

Successfully structuring a work relationship as independent contracting rather than employment may provide important benefits including avoiding the costs of complying with statutory requirements

for pay and conditions, workers compensation levies, payroll tax, and superannuation contributions. Importantly, vicarious liability will result if the workers are classified in law as employees.

Unsuccessful attempts by On Call to create a relationship of independent contracting included:

- calling its workers "independent contractors" in standard contracts and information kits;
- expressly stating in its contracts that there was no employment relationship; and
- providing no entitlement to annual leave, sick leave, long service leave or any other leave.

The court said "the binary divide" is often a question which may not be easy to answer, and that the "substance or reality" of the relationship needs to be identified, not just the terms of any contracts.

The dominant feature is "the entrepreneur test." Under this test, the worker will be an employee unless the work is being provided as a representative of that entrepreneur's own business (rather than as a manifestation of the business receiving the work).

Independent decision making, financial self-reliance and the risk of loss undertaken by the entrepreneur in their pursuit of profit is indicative of an entrepreneur, as compared to an employee who is paid a wage in exchange for services.

The case illustrates the huge cost of wrongly classifying working relationships. Clearly, comprehensive legal advice based on whole business operations is required to avoid such expense.

On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3) [2011] FCA 366 (Bromberg J, 13 April 2011)

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FORTHCOMING EVENTS

- [Bullying Prevention & Management](#)
19th Sep 2011, 9:15am — 4:30pm
See www.worksafe.act.gov.au for more details
- [The Work Safety Act Explained](#) **FREE**
14th Sep 2011, 10:00am — 11:30am
See www.worksafe.act.gov.au for more details
- [Human Rights for the Community Sector](#)
20 October, 2011, 9:30am — 1pm
See <http://www.hrc.act.gov.au> for more details

Meet the Team

Elishka Skelding

Elishka Skelding joined our Employment law team at the beginning of the year after completing her Practical Legal Training at 8th Floor Wentworth Barrister's Chambers in Sydney. She graduated from the Australian National University with a Bachelor of Commerce(Finance)/Laws in 2008, and has recently attained her Graduate Diploma in Legal Practice. Elishka is a dedicated and hardworking solicitor, and has already achieved several notable successes during her time at the firm. She also has an interest in running, and has spent time in Japan, Germany, Wales and South Africa.