

DEFINING EMPLOYMENT

Employment law is built upon a **CL distinction** b/w different types of contracts to perform work in return for payment:

EMPLOYMENT: “contract of employment” = “contract of service” = “employee” + “employer” → *the main concern of employment law* [can be full-time/part-time/permanent/casual/fixed-term]

INDEPENDENT CONTRACT: “contract for services” = “independent contractor” + “principal” → not generally the concern of employment law; regulated more by ordinary commercial law [aka consultants, self-employed, small biz operators]

→ these categories are constructed as **mutually exclusive**

→ Distinction b/w employment and other forms of work arrangement determines treatment under **FW Act**, all other predecessor industrial statutes; awards and enterprise agreements; also relevant for CL

	Covers Employees?	Covers ICs?
FW Act: Minimum standards (NES; modern awards; minimum wages order; unfair dismissal)	Yes	No
FW Act: enterprise bargaining; protected industrial action	Yes	No
FW Act: General protections; anti-bullying orders	Yes	Yes
Equal Opportunity Act 2010 (Vic) [anti-discrimination law]	Yes	Yes
Occupational Health and Safety Act 2004 (Vic) [Work health and safety law]	Yes	Yes
Independent Contractors Act	No	Yes

Key points about the CL distinction:

- 1) Cases turn on their particular facts, each case is unique
- 2) There is a lot of uncertainty over the correct categorization of many work relationships (this tends to favour the stronger party – normally the hirer – b/c they have the resources to settle uncertainty through litigation)
- 3) An express contract term stating that the worker is IC is not determinative
- 4) Must look at the practical reality of the relationship (i.e., both contract docs and actual practices)

A. DIRECT ENGAGEMENT

i. Why is it important to distinguish whether a person is employee or IC?

- b/c vicarious liability only attaches to wrongful acts/omissions of employees (not ICs)
- Awards made by industrial tribunals + modern award systems pertain only to rel'ns b/w employees and employers
- Capacity to make/be covered by reg'd enterprise agments is restricted to employees
- Nat'l employment standards and min wage only apply to employees

ii. Main test for distinguishing person is employee or IC?

There is no single definition; it is determined on a multi-factor approach, asking about different aspects of the relationship b/w an org and a worker, taken in the totality (**Hollis v Vabu**); includes not just the terms formally agreed upon but the actual work practices (**ACE Insurance v Trifunovski (2013)**)

Indicia	Emp	Con
Does the hirer have the right to exercise detailed control over the way work is performed, so far as there is scope for such control?	✓	
Is the worker integrated into the hirer's organisation?	✓	
Worker req'd to wear a uniform or display material that associates them w/ the hirer's business?	✓	
Must the worker supply and maintain any tools/equipment (esp. if expensive)?		✓
Worker paid according to task completion rather than wages for time worked?		✓
Does worker bear any risk of loss or have any chance of making profit from the job?		✓
Is worker free to work for others @ same time?		✓
Can worker subcontract or delegate performance to others?		✓
Is tax deducted by the hirer from the worker's pay?	✓	

Is worker responsible for insuring against work-related injury?		✓
Does worker receive paid holidays/sick leave?	✓	
Does contract of hire describe the worker as a contractor?		✓

iii. Can a lawyer draft a contract so as to disguise an employment relationship as IC?

Can downplay elements of control; allow worker to work for other clients; permit other workers to help them; have payment occur on result and presentation of invoice; insist on worker supplying own equip; requiring worker to supply own insurance; denying any entitlement to paid leave; describe arrangement as K for services

→ **but** note that intentions of the parties is not always determinative and it's much harder to disguise a worker as a contractor unless they have their own trappings of business

HOLLIS V VABU (2001) HCA

F	Bicycle courier engaged by Vabu injured a pedestrian
I	Is courier an employee or IC?
D	Employee.
RA	The key is to determine whether the worker is engaged in running their own business or was integrated into the hirer's business. This is determined on a multi-factor test which is meant to consider the totality of the relationship, where no particular weight is to be given to any specific factor.
RE	<p><u>Factors considered to be important:</u></p> <ul style="list-style-type: none"> • CONTROL: controlled the allocation and direction of deliveries; start times; regulation of men's facial hair; unable to refuse work; delivered in the manner in which Vabu req'd • Can't build goodwill; can't realistically work for other people • Couriers highly integrated Vabu runs a courier company – the couriers do the actual couriating ∴ highly integrated (vs. an ancillary function that would be more likely to be contracted out) • No special skill involved ∴ unable to make independent career as a freelancer • Req'd to wear Vabu uniforms and present themselves to public as an emanation of Vabu • No annual leave given, sick leave, or superannuation • Relatively small capital outlay for bikes and fact it can be used for other non-work purposes means it's not determinative of contract • Paid per delivery but Vabu worked out the number of jobs completed (vs couriers drawing up their own invoices and submitting them); no scope for bargaining over wages • Deterrence: important to deter by holding Vabu vicariously liable which could encourage them to take steps to reduce risks of future harm

ABDALLA V VIEWDAZE [2003] AIRC 504

F	<ul style="list-style-type: none"> • Travel agent working out of travel agency • Might come in one day, but not come in again for weeks • Generated own clients • Paid on commission (80/20 in favour of A) • Contract document: heading stated "contract of employment" and "employment" used throughout doc but other docs described him as "independent agent" • Business card described him as 'corporate manager' of the agency • Bookkeeper at the agency identified him as a 'casual employee' • Had his own ABN (nb: how the ATO defines someone)
I	Employee or IC?
D	IC
RA	Crucially, the agency lacked control over Abdalla's work, which indicates independent contracting. He was responsible for bringing his own business to the agency rather than transacting business that was allocated to him and he kept the vast majority of his earnings.
RE	<ul style="list-style-type: none"> • More control increases the likelihood of the person being an employee.

	<ul style="list-style-type: none"> B/c at CL, employment is regarded as one that involves the commitment of personal service, an unqualified power to delegate work duties is often seen as incompatible w/ employment
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ACE INSURANCE LTD V TRIFUNOVSKI [2011] FCA

F	Insurance salespeople going door to door selling insurance for a company (ACE)
I	Whether salespeople are employees or ICs
D	Employees
RA	<p>First, the distinction b/w an employee and IC is rooted fundamentally in the difference b/w a person who <u>serves his employer in his, the employer's business, and a person who carries on a trade or business of his own.</u></p> <p>Secondly, the answers to the question are to be determined by reference to the <u>totality of the relationship.</u></p> <p>Thirdly, a number of indicia have accreted over time in the authorities which are thought to throw light to varying degrees on the outcome without being determinative: terms of the K, intention of the parties, whether tax is deducted, whether sub-contracting is permitted, whether uniforms are worn, whether tools are supplied, whether holidays permitted, the extent of control of or the right to control the worker, whether wages paid or commission structure, what is disclosed in tax returns, whether one party represents the other, goodwill of the business.</p>
RE	<p><u>Indicia indicating employment:</u></p> <ul style="list-style-type: none"> Control: told where to go, how to sell through manuals and meetings/training/pep talks; extensive training req'd; script for selling provided (though theoretically not req'd to follow it, employees also reprimanded for not doing so); practical inability to conduct other business; ACE could dismiss them (vs contractors who are contracted to complete certain tasks); ACE provided leads and circuit selling structure Goodwill: attached to ACE, not workers (i.e., workers could not take ACE clients off in an attempt to begin own insurance selling scheme) Hierarchal structure: if sellers wanted to advance, they had to follow the company line and the steps laid out for advancement Public appearance: No uniforms but script used presented sellers as being 'from ACE' <p><u>Indicia indicating contract:</u></p> <ul style="list-style-type: none"> Supplied own vehicles; contract terms structured to look like IC; parties' own understanding of the nature of the relationship; paid on commission (however, that invoice was put together by ACE and submitted to ACE); ability to incorporate (however, more like a corporate vehicle for receiving money; individual still had to personally perform tasks); ability to hire admin staff of one's own (but could not delegate actual sales work); no paid leave or super (which could just suggest that the hirer is in breach of obligations); no deduction of income tax
ETC	<ul style="list-style-type: none"> Seems like ACE deliberately structured its workforce in the margin b/w employment and IC The legal advice given to ACE was not well integrated into its actual work practices

ACE Insurance Ltd v Trifunovski [2013] FCR

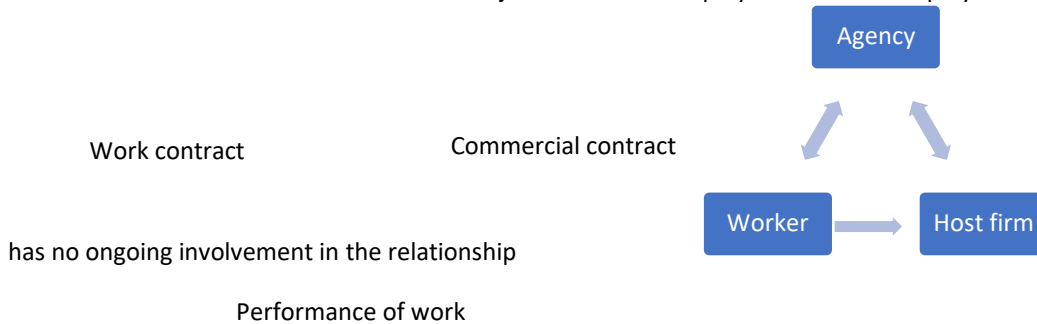
- Appeal was unsuccessful;
- Need for personal service is a 'strong indicator' of employment
- Close direction and supervision ∴ no independence of action

REFLECTION:

- Benefits and costs of this strategy from an employer's perspective?
 Benefits: no vicarious liability; fewer costs (super, leave, unfair dismissal, wage, etc.)
 Costs: if it's structured incorrectly and employees improperly disguised as ICs, employer can be doubly out of pocket in terms of paying back these costs
- Why might workers want to be ICs?
 Freedom; job flexibility; tax reasons
- What are the benefits and costs from the perspective of effective regulation?
 Terrible in terms of certainty; there is a lot that is discretionary in making the E vs IC determination which calls for an impressionistic judgment; access to legal determination of the relationship is difficult, complex, and lengthy

B. INDIRECT (LABOUR HIRE) ENGAGEMENT

- Labour agency hires out workers → agency agrees to supply the services of a worker to another business (the host firm) and the host pays a fee to the agency that covers the cost of the worker + some profit for agency → agency remunerates worker who agrees to perform work for host in accordance w/ host's instructions
- Different from recruitment where a recruiter just brokers an employment relationship by introducing employer to employee but



How might imposing another entity (an agency) avoid employment obligations entirely?

- K b/w agency and worker is for services, not employment, b/c no control is exercised by the agency once they get to the host firm
- If no contract b/w worker and host, worker cannot be an employee because cts will not imply a contract in the absence of any intent to create same
- Nb:** host still has obligs to provide safe workplace

How have unions mobilised around this issue?

- Seeking to include provisions in enterprise agreements that limit the use of contractors/labour hire
- Site rates/jump up clauses: require that labour hire/contract workers receive wages and conditions no less favourable than those req'd for firm's own employees (∴ removing incentive to hire external labour)
- Nb:** businesses are pushing hard to outlaw such clauses through **FWA**

BWIU v Odco (1990)

F	<ul style="list-style-type: none"> Odco ran labour-hire agency which provided workers to builders Odco had K w/ builders whereby building companies paid Odco for the labour it engaged
I	<ol style="list-style-type: none"> 1) Relationship b/w workers and host firm? 2) Relationship b/w workers and agency
D	<ol style="list-style-type: none"> 1) No contract ∴ no employment 2) Independent contract
RE	<p><u>RE: host-worker relationship</u></p> <ul style="list-style-type: none"> Agency pays the worker not the host ∴ don't even get to the 2nd question of whether K is one for employment Can't argue that the host and agency are <i>together</i> the employer (no such thing as joint employment) Agency is not just a funnel for payment (where host o/w is in employer role) b/c if the agency did not pay the worker, the worker would have no claim against the host. <p><u>RE: agency-worker relationship</u></p> <ul style="list-style-type: none"> Workers entered into K w/ Odco that their relationship was not for employment → where there is no reason to think the contract is a sham, or is not a genuine statement of the parties' intentions, it must be given proper weight in relation to the other clauses of the agreement Wages paid by Odco Workers agreed not to receive holiday pay, long service leave, sick pay; no taxes deducted; workers had to maintain own accident insurance and supply own equipment Workers free to work when they please, under no obligation to accept a job → elements of stability and continuity are absent Odco has no control over the way work is carried out

Labour Hire Licensing Bill 2017 (Vic)

- Introduced following an inquiry into the labour hire industry in Victoria
- Found significant evidence of exploitation of workers in the labour hire industry
- Recommendations included establishment of a labour hire licensing scheme in Victoria whereby agencies would need to apply for license from the gov't