

## CHARACTERISATION

- Application of rules and principles are guided by the objective or purpose underlying those rules and principles
- Objective and purpose of employment law – protecting vulnerable ‘dependent’ workers
- Taking employment as contractual relationship to counteract the inequality of bargaining power (reality limited choice/freedom of entering into ‘social relationship’)
- More obligation on employers to not act unfairly to employees (implied terms of duties)
- Employer/employee = contract of services
- Principal/independent contractor = contract for services
- More protection for employees (common law and legislations) + leaving parties free to structure their contracts -> market favouring independent contractor arrangements
  - o Reduced expenses and liabilities (worker’s compensation, leaves, payroll tax, vicarious liabilities, legislations and regulations)

## History

- *[Performing Right Society v Mitchell]* employees are subject to control and commands of master to which the manner he performs work to achieve a given result, not merely specifying the outcome of work (McCardie J)
  - o Control test = controlling the execution of the work the servant is to achieve
  - o Final test lies in the nature and degree of detailed control over the person alleged to be a servant
  - o Control is one of several circumstance to be considered, but usually *of vital importance*
  - o ‘...the right of *continuous, dominant and detailed control on every point* including the nature of music to be played’
    - EMPLOYEE MUSIC BAND WHO BREACHED COPYRIGHT
- Control test adopted and applied in Australia by HC *[FC of T v J Walter Thompson]* *[Queensland Stations]*
- *[Humberstone v Northern Timber Mills]* control test should be restated in some modified form. It is the capacity to control, not actual control (Dixon J)
  - o Whether the control places employee subject to commands of employers not what he shall do but how he shall do it
  - o Used own truck, carrier’s license in own name, worked same number of hours every day but no evidence suggesting he was bound to do so, paid based on weight per mileage -> indicates independent contractor
    - CANNOT GET WORKERS COMPENSATION AS INDEPENDENT CONTRACTOR
- *[Zuijs]* ultimate right to control, where there is legal right or authority to control inferred from circumstances

- ‘...special skill or knowledge so clearly identified or the necessity of employee acting on his own responsibility...little room for direction or command. It is the lawful authority to command so far as there is scope for it’
  - CIRCUS PERFORMER IS EMPLOYEE, IMPRACTICAL/IMPOSSIBLE TO EXERCISE ACTUAL CONTROL
- *[Stevens v Brodribb]* confirming control is the legal authority to control, not actual control. Control is just one factor, need to consider other indicia but none are determinative. A degree of indeterminacy and discretionary approach (more complex and flexible)
  - Mode of remuneration – lump sum vs. regular wages
  - Provision of own equipment
  - Obligation to work at certain time at certain places
  - Deduction of income tax
  - Right to delegate work to another person
  - Control in their own name or name of their business
  - Integration/organisation test (?) – if integral to organisation -> likely to be employee
  - MUST CONSIDER TOTALITY OF RELATIONSHIP BETWEEN PARTIES. STEVENS WAS INDEPENDENT CONTRACTOR AFTER WEIGHING UP ALL FACTORS. No vicarious liability owed or duty of care established
  - ‘*Distinction between employee and independent contractor has become increasingly amorphous*’
- *[Re Porter]* level of economic dependence of one party upon another
  - Amount of capital invested indicates whether owner is a business in their own right
  - Owner of a truck as truck driver (independent contractor) vs. tradesman providing tools (employee)
  - STILL NOT DETERMINATIVE. Can overlap
- *[Marshall]* distinction is ‘rooted fundamentally in difference between a person who serves his employer in their business and a person who carries on a trade/business on his own’
- *[Hollis v Vabu]* extended the ‘multi-factorial’ approach taken in *Stevens*
  - Couriers were not providing skilled labour or required special qualifications
  - Employer controlled allocation and direction of deliveries
  - Did not generate any goodwill to themselves
  - Wearing uniform = represented to the public as employees
  - Lack of scope for couriers to bargain for their rate of remuneration
  - (McHugh J) took the agency principle approach rather than exclusively employee or independent contractor
    - ‘...Couriers were not independent contractors...exercising an independent discretion in carrying out a task for his own business interests and who is retained simply to produce a result’
- *[On Call Interpreters]* Totality approach. Two-part inquiry – are they independent contractors? (Bromberg J)

- 1) Is the person performing the work as an entrepreneur who owns and operates a business?
  - Profit orientated for effort and risks taken? Or consistent return for services/labour similar to wages?
  - Pursue of autonomy that is not subject to command?
  - Creation of goodwill?
  - Tangible assets utilised to support its economic activities?
  - Ability to negotiate their own fees & own standard rates & terms of conditions?
- 2) In performing the work, is that person working in and for that person's business as a representative and not as representative of the business receiving the work?
  - Control and direct or have the capacity to do so in relation to the economic activity being carried out?
  - Power to delegate?
  - Economic dependency on the other party?
  - Representation or portray of economic activity of the business or employer's business?
- DIFFERENT SIGNIFICANCE MAY ATTACH TO THE SAME INDICATORS IN DIFFERENT CASES. Cannot check off a list of indicia mechanically
  - Little weight to economic dependency because of the part-time nature of interpreters' work
  - Casual employment so little weight put on absence of deduction of income tax and failure to provide leave (common features)
- LOOK BEYOND CONTRACTUAL DESCRIPTION OF RELATIONSHIP AND INTO THE REAL SUBSTANCE WHICH ESTABLISHES THE 'TOTALITY OF RELATIONSHIP'
- Look at the purpose and interpret the provision as a whole
  - Here: *'for workers who sell their labour in employment and employment-like settings'*
- *[Damevski v Giudice]* law takes a practical approach to contractual formation despite the technical and schematic nature of the doctrine of contracts
  - RESTRUCTURING THE CONTRACT FROM 'EMPLOYEE' TO 'INDEPENDENT CONTRACTOR' BUT FAILED TO ACHIEVE THE INTENDED OUTCOME OF ITS WORKFORCE BEING INDEPENDENT CONTRACTORS -> STILL EMPLOYEES
  - Lack of scope for bargaining for rates of remuneration, did not conduct own business, tools and equipment still provided by original employer, employment remained unchanged
  - Economic dependence on remuneration
- *[Trifunovski]* contract signed in own personal capacity (even if described as independent contractors) rather than with company seal + control exercised by employer on the sales' reps day-to-day activities + exclusive provision of services -> EMPLOYEE
- Contract of adhesion – lack of negotiation, take it or leave it arrangements
  - Dominant party set contractual terms that are suitable to its own purposes

- Favour independent contractors to avoid complying with wide range of statutes and industrial instruments setting pay and conditions, workers' compensation levies, payroll tax, superannuation contributions
- **Disguised relationships** – due to multiplicity, diversity of work arrangements and ingenuity -> leading to value in multi-factor test *[On Call Interpreters]*
- Balancing factors, it may be a matter of impression & weighs attached to criteria based on circumstances
- Indeterminacy in multi-factorial test poses difficulties in determining rights and obligations until litigation

### Vicarious employment – labour hire arrangements

- Businesses want labour but don't want to worry about employment contracts
- Easier with labour hire companies, just need to worry about contractual relationship with the hirer company
- To properly engage with independent contractor:
  - Allow freedom to work for other parties
  - Refrain from controlling how services are to be performed
  - Pay for results, not hourly rate
  - Contractor enter agreement in their capacity as director
- Must not misrepresent someone who is an employee that they are an independent contractor (s357 Fair Work Act)
  - *'A person (employer) that employs or proposes to employ, an individual must not represent to the individual that the contract of employment ...is a contract for services under which the individual performs...as an independent contractor'*
  - ^ extend by HC to employers who interpose 3<sup>rd</sup> party into the sham arrangement. Cannot avoid misrepresentation by introducing a third party to disguise the true employment relationship