

## Topic 2: Entitlement to receive compensation under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)

### Criteria for entitlement to compensation:

1. **Worker**
2. **Suffered an injury**
3. **Nexus with employment**
4. **Connected to Victoria**

### Entitlement provision: s 39 WIRC:

- (1) If there is caused to a **worker** an **injury arising out of or in the course of any employment**, the **worker is entitled to compensation** in accordance with this Act.
- (2) If there is caused to a worker an injury arising out of or in the course of any employment which results in or materially contributes to the **death** of the worker, the worker's **dependants are entitled**, subject to this Act, to compensation in accordance with this Act.
- (3) Subject to section 7(1) and section 40(2) and (3), if a worker suffers an injury which occurs **by way of a gradual process over time and which is due to the nature of employment** in which the worker was **employed at any time before notice** of the injury was given, the worker or the worker's **dependants are entitled** to compensation under this Act as if the injury were an injury arising out of or in the course of employment.

### 1. 'Worker':

#### The definitions in s 3(1) of the WIRC Act provide that:

*worker* means an individual—

(a) Who—

(i) **Performs work for an employer; or**

(ii) **Agrees with an employer to perform work—**

**at the employer's direction, instruction or request, whether under a contract of employment (whether express, implied, oral or in writing) or otherwise; or**

(b) Who is **deemed to be a worker** under this Act;

#### The two ways to be a 'worker' under the WIRC Act:

- **Common law employee: s 3(a)**
  - Contract of employment
  - Independent contractors not covered
- **Deemed worker: s 3(b)**
  - **Schedule 1, Part 1**

### Employee or Independent Contractor?

- Both provide services for reward under a contract
- One provides the services under a 'contract of service' [insert 'contract of employment'] the other under a 'contract for services'
- Key distinction – One is running his/her own business, the other is working in the business of another
- The difference depends on balancing a number of factors (indicia)

- **Words used in contract not decisive**
  - 'The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everyone else recognise it as a duck': **Re Porter (1989)** 34 IR 179

## **Common Law Employee:**

### **The control test – An important indicia:**

- **Traditional 'control' test**
- **Modified in *Stevens v Brodrigg*:**
  - **Degree of control that employer/principal can exercise over employee/contractor is a 'significant factor'**
    - **This 'degree of control test' is not so much the 'actual control' that a person exercises over another 'as in the right of the employer to exercise it', citing Dixon J in *Humberston v Northern Timber Mills***
    - **This is common law adapting to contemporary society**

### **Other indicia in *Stevens v Brodrigg*:**

- Mode of remuneration (e.g. fixed salary or after services)
  - GST not included in wages- IC- ***Wesfarmers Federation Insurance Ltd v Wells [2008]***
- Provision and maintenance of equipment,
- Obligation to work,
- Hours of work and provision for holidays,
- Deduction of income tax, and the
- Ability to delegate work

- **Control test is not the only relevant factor: 'Rather it is the totality of the relationship between the parties which must be considered.'** (at 29)

### ***Hollis v Vabu*, HCA 2001:**

- Held that the **couriers were employees**
  - In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in taking too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. **Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations.**
  - A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it.
- **Other factors - couriers were not providing skilled labour or labour** which required special qualifications.
  1. **Couriers had little control over the 'manner of performing their work', ie**
    - Hours of work: assigned work according to a roster and the time at which they signed on,
    - Obligation to work: could not refuse work,
    - Could not delegate work.

2. **Couriers were presented to the public and to those using the courier service as emanations of vabu. They were to wear uniforms bearing vabu's logo.**
3. Deterrence rationale: make employer responsible so employer takes measures to avoid risks of injury/harm
4. Vabu 'superintended the ..finances' of the couriers, ie had to correct errors by a certain deadline; could not bargain rates'; rates had not changed for years; vabu could withhold pay for errors, overcharges, or unpaid bills; monetary 'penalties' for failure to return gear; vabu deducted insurance from courier's pay, passed on excess to couriers, and did not pay mle; payment per delivery; control over leave.
  - **Provision for holidays**
  - **Deduction of income tax**

**That is, couriers had 'limited scope for the pursuit of any real business enterprise on their own account'.**

6. 'Situation in respect of tools and equipment', ie despite the fact that couriers had to provide their own bikes and maintain them as well as their uniform and radio this 'capital outlay was relatively small and because bicycles are not tools that are inherently capable of use only for courier work'.
7. ('As a corollary to' point 2 above) not only was there the 'right' to control in incidental or collateral matters, but 'there was considerable scope for the actual exercise of control': 'Vabu retained control of the allocation and direction of the various deliveries. The couriers had little latitude.'
8. (Also expressed as part of point 7 above, but in fact quite distinct): the 'organisation test': the couriers' labour 'comprised the very essence of the public manifestation of Vabu's business. It was not the case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; rather, ... they *were* Vabu and effectively performed all of Vabu's operations in the outside world.' at [57]

**Ultimate question/focal point 2-stage test in On Call Interpreters (FCA, 2011):**

- **On Call**
  - Simply expressed, the question of **whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows;**
  - **Viewed as a "practical matter":**
    - (i) **is the person performing the work an entrepreneur who owns and operates a business; and,**
    - (ii) **in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?**
  - If the answer to that question is **yes**, in the performance of that particular work, the person is **likely to be an independent contractor**. If **no**, then the person is **likely to be an employee**.

**Statutorily Deemed workers:**

- **Those specified in part 1 of schedule 1 of the WIRC Act.**
- **Those specified by other acts as workers for the purposes of the WIRC Act.**

**Deemed workers – Part 1 Sched 1: (page 657)**

- A 'student' at a school while employed under a work experience arrangement, etc, or a TAFE student undertaking a practical placement: **clause 1(1)(a)-(e), and (g)**

- An apprentice: **clause 1(1)(f)**
- A person performing work in a 'declared training program': **clause 1(1)(g) and clause 2**
- A person attending an 'employment program' provided by the Authority: **clause 3(a)**
- A secretary of a Co-operative Housing Society: **clause 4**
- A door to door seller: **clause 5**
- A timber contractor: **clause 6**
- The driver of a vehicle carrying **passengers** for reward who drives the vehicle pursuant to a contract of bailment and who is required to make payment for the use of the vehicle: **clause 7**
  - Explanatory Memo **Sch 1 Pt 1 cl 7**: taxi drivers
- An owner driver carrying **goods** for reward: **clause 8**
- A '**contractor**', in certain circumstances (see further below): **clause 9**
- A share farmer who is employed by contract by the owner of land where the share farmer is entitled to receive less than one third of the income derived from the land (whether by cash and or in kind) or is under the contract specified as entitled to compensation under the Act: **clause 12**
- A person who performs work for a religious body or organisation within a specified class that has been the subject of an order of the Governor in Council: **clause 13**
- A person employed by the Crown or any department 'in all cases where this Act would apply if the employer were a private person', including a minister, member of parliament, judge, and bail justice: **clause 14**
- A municipal councillor: **clause 15**
- A person customarily attending certain pre-arranged places ('places of pick-up') at which employers select and engage persons for employment: **clause 16**
  - Explanatory Memo **Sch 1 Pt 1 cl 16**: fruit pickers
- 'Sporting contestants' not workers, unless: **clause 17**.
  - A rider 'in a horse race under the Rules of Racing of Racing Victoria': **clause 17(3)(a)**; or
  - A person who holds a licence etc to ride granted in accordance with the Rules of Racing of Racing Victoria (not being an apprentice or the owner or trainer of the horse) **and** who agrees to 'do ride work on a horse' etc: **clause 17(3)(b)**; or
  - A rider in a horse or pony race or a driver in a harness race conducted 'as part of a mixed sports gathering' within the meaning of the *Racing Act 1958* (Vic): **clause 18**
    - Explanatory Memo **Sch 1 Pt 1 cl 18**: jockeys employed by VRC
- An 'outworker' within the meaning of the *Outworkers (Improved Protection) Act 2003* (Vic): **clause 19**
- A sailor: **s 38**

### **Contractors deemed to be employees:**

- **Clause 9, Part 1, Schedule 1, WIRC Act** deems independent contractors (ICs) to be workers in certain circumstances
- **5 factors to consider**
  1. Contract in place: **clause 9(1)(a)**
  2. Services by IC 'not ancillary to the provision of materials or equipment' by that IC: **s 9(1)(b)**
    1. (Labour component to be 50% plus)
  3. IC does 80% of work him/herself: **s 9(1)(c)**
  4. Gross income from contract is at least 80% of gross income from those services during the 'relevant period' (12 months): **s 9(1)(d)**
  5. But not a deemed worker if IC 'carrying on an independent trade or business': **s 9(2)**

## WIRC Act Bill Explanatory Memorandum, pp. 325-329 (re Sch 1 Pt 1 cl 9).

- **Clause 9(1) establishes a 3-limbed test that an employment relationship will be deemed to exist where—**
  1. The labour component of the contract is more than the non-labour (materials/equipment) component ('ancillary services' test); and
  2. The natural person (contractor) personally performs 80% or more of work for that principal; and
  3. The contractor does 80% or more of his or her overall work for one person (principal).

### **Deemed workers – Other acts:**

- Jurors: *Juries Act 2000 (Vic) ss 54-59*.
- Registered or probationary members of the State Emergency Service engaged in specific emergency service work: *Victoria State Emergency Service Act 2005 (Vic) s 47(1)*.
- Persons assisting a police officer, in the course of duty, at the officer's request: *Police Assistance Compensation Act 1968 (Vic) s 2(1)*.
- Prisoners or offenders subject to a corrections order or persons subject to a diversion order whilst performing a specific activity: *Corrections Act 1986 (Vic) ss 104ZP(a), 104ZP(c), 104ZR*.
- Volunteer working at a prison: *Corrections Act 1986 s 104ZP(b)*.

### **Excluded categories:**

- **Voluntary workers: by implication; *Plumb v Wade***
  - **Except certain volunteers specified in Sch 1, eg emergency services, teaching assistants, etc**
- **Sporting contestants, clause 17 of Sched 1**
  - (1) Except as provided in subclause (3), if a person is engaged by an employer to participate as a contestant in a sporting or athletic activity, neither the employer or self-insurer nor the Authority is liable to pay compensation for an injury received by the person if the injury is received while the person is—
    - (a) Participating as a contestant in a sporting or athletic activity; or
    - (b) Engaged in training or preparation with a view to so participating; or
    - (c) Travelling between a place of residence and the place at which the person is so participating or so engaged.