

Topic 2: Defining the Employment Relationship

Types of employment relationships

- Employee and employer:
 - Employee and employer are defined as either a national system employee and a national system employer, or a employee and employer within the ordinary meaning of those terms.
 - Sections 12, 15 and 30E Fair Work Act 2009 (Cth)
 - ACE Insurance Ltd v Trifunovski [2013]
- Independent contractor:
 - Not confined to an individual.
 - Traditionally, the Courts have looked to the “right to control” to determine whether an individual is an employee subject to the control of an employer, or an independent contractor.
 - Federal Commissioner of Taxation v J Walter Thompson (Australia) Pty Ltd (1944) 69 CLR 227
- Casual employment:
 - The most common understanding of casual employment is someone who is hired on an informal, irregular and uncertain basis.
 - Reed v Blue Line Cruises (1996)
 - In order to dissuade employers from hiring too many casuals, it became standard practice for awards to impose a premium or loading on the wage rate for a casual job, which under the modern award system has been standardised to 25%.
 - The NES provide that where a casual is engaged by a national system employer, they are not entitled to:
 - Annual leave
 - Section 86
 - Paid personal/carer’s leave
 - Section 95
 - Notice of termination or redundancy pay
 - Section 123(c)
 - Williams v McMahon Mining Services (2010)
- Outworkers:
 - Outworkers are those who perform work away from a defined workplace.
 - Section 12 Fair Work Act
- Agency labour:
 - A labour hire agency is in the business of hiring out labour.
 - It agrees to supply the services of a worker to another business.
 - The host pays a fee to the agency that covers the cost of the worker’s services plus some profit margin for the agency.
 - The agency in turn remunerates the worker, who agrees to perform work for the host in accordance with their directions or requirements.
 - Country Metropolitan Agency v Slater (2003)
- Trainees and apprentices:

- An apprenticeship is a form of training arrangement where a young person enters into an agreement to work in a chosen trade at a relatively low wage and in return, the master agrees to provide an education in that trade.
- **The Education and Training Reform Act 2006**
- Apprentices can be considered employees.
 - **Rowe v Capital Territory Health Commission (1982)**
 - The same is generally true of other trainees, with the exception of those doing unpaid work experience without a contract.
- Public sector employment:
 - Public servants have an employment contract with the commonwealth or with the State or Territory, not with the particular department in which they work.
- Voluntary work:
 - Some classes of voluntary workers, such as unpaid firefighters or ambulance workers, may be deemed to be employees for the purposes of workers compensation legislation.
- Contract for services:
 - A contractual arrangement by which one person agrees to provide workplace services to another.
 - The contract is between two principals, with neither being the employer or employee of the other; the person providing the service is an independent contractor.
 - A contract for services tends to be one by which the contractor has undertaken to produce a given result, and payment is due only when the contractual conditions have been fulfilled.
 - **World Book (Aust) Pty Ltd v FCT (1992)**
- Contract of service:
 - A contract under which a person is engaged in the service of an employer to do such work as is contracted for and where the employer directs what is to be done.
 - It differs from a contract for services, under which a person engages to perform work for another, providing services for that person but not entering into that person's employment.
- There are many different ways work can be performed in exchange for money, and accurately identifying the nature of the work relationship at common law helps the determination of the different legal obligations between the parties.

The distinction between employees and independent contractors

- Employees perform work for the benefit of their employer, work under the control of their employer and earn a salary/wages.
- Independent contractors are in business for themselves, are engaged to provide a service and are expected to use their own skill/expertise.
- An employer is entered into a contract for services as opposed to a contract of service for independent contractors.
 - A multi-factor test is implemented to consider the totality of the relationship.
 - No one factor is determinative.

- **Stevens and Gray v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16**

- Whether contractor is running its own business;
- Extent of right to exercise control;
- Obligation to work;
- Control over hours of work;
- Ownership and maintenance of equipment;
- Right to work for more than one principal;
- Right to delegate work;
- Level of skill involved in the labour;
- Uniform and labelling;
- Mode of remuneration;
- Tax arrangements; and
- Provision for holidays or leave.

- **Hollis v Vabu Pty Ltd [2001] HCA 44**

- **On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3) [2011] FCA 366**

- An independent contractor is not entitled to any awards or industrial entitlements, leave entitlements, unfair dismissal laws but has a simpler remuneration system and record keeping, reduced likelihood of vicarious liability and can sometimes avoid paying superannuation, payroll tax, fringe benefits tax and workcover insurance.
- Workers' compensation laws deem certain workers to be covered by workers' compensation laws irrespective of whether they work as an employee or independent contractor.

The legal test

- In earlier Australian cases, a control test was used to determine whether the worker was an employee.
- Control is now one aspect of the multiple factor or indicia test.
 - **Hollis v Vabu Pty Ltd [2001] HCA 44**
 - The control factor is not limited to the putative employer's exercise of control, but also encompasses a right to control at least some aspects (even if only incidental aspects) of the work.
 - **Zuijs v Wirth Brothers Pty Ltd (1955)**
- The multiple indicia or multi-factor test is not the basic statement of the legal test in Australia for determining whether a worker is an employee at common law.
 - **Stevens and Gray v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16**
 - The determination requires a consideration of the totality of the relationship between the hirer and the worker, taking into account factors such as the method of payment (regular=employment), whether sick leave and recreation leave were provided, who owned and maintained the equipment, whether the worker could delegate their tasks to another worker without the hirer's permission, whether the worker could operate through a company in partnership etc.