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## When is a Contractor not a Contractor?

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### Introduction

In the last decade and a half, there has been a significant increase in the casualisation of workforces. This has resulted in a blurring of the lines between workers who are truly employees and those who are contractors. Often, these arrangements are not properly documented which can make it difficult to determine whether someone is an employee or a contractor.

This has ramifications for commercial organisations of all sizes and especially their liability insurers as it brings into focus the issue of whether an injury giving rise to a claim should be covered under a liability policy or a statutory workers' compensation policy.

This article examines how it is determined whether someone is an employee or a contractor and which claims are likely to be caught under the workers' compensation policy in Queensland.

### Workers' Compensation and Rehabilitation Act

The amendments to the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (**WCRA**) in 2013 were most notable for the introduction of the 5% degree of permanent impairment (**DPI**) threshold for access to common law damages. Despite that threshold having recently been repealed, some of the 2013 amendments remain in place. This includes the definition of 'worker', which was essentially restricted so as to no longer include contractors, except in limited circumstances.

Determining whether a claimant is a contractor or an employee is usually uncontroversial. If a claimant is an employee, then the statutory workers' compensation policy will most likely respond. If, on the other hand, the claimant is a contractor, then the public liability policy of the hirer will most likely respond.

There are times, however, when it is unclear whether a claimant is an employee or a contractor. There are also times when a claimant is treated as a contractor when, in fact, he or she is an employee, at least from the perspective of the Australian Tax Office (**ATO**). This has obvious implications for policy response.

## Definition of ‘worker’

Pursuant to s 11 of the WCRA:

*‘(1) A worker is a person who—*

*(a) works under a contract; and*

*(b) in relation to the work, is an employee for the purpose of assessment for PAYG withholding under the Taxation Administration Act 1953 (Cth), schedule 1, part 2-5.*

*(2) Also, schedule 2, part 1 sets out who is a worker in particular circumstances.*

*(3) However, schedule 2, part 2 sets out who is not a worker in particular circumstances.’*

Therefore, subject to schedule 2, there are two limbs that must be satisfied in order for a person to be classified as a ‘worker’ for the purposes of the WCRA:

1. The person must perform work under a contract; and
2. The person must be an employee for the purposes of the *Taxation Administration Act 1953 (Cth)* (**TAA**).

## ‘Works under a contract’

There is no qualification as to the type of contract that must be performed. Having regard to the ordinary principles of contract law, all that is probably required is that the work be performed in exchange for some form of consideration. There is no requirement that the contract be in writing.

## ‘Employee’

The term ‘employee’ is not defined in the TAA.

The ATO has released a tax ruling<sup>1</sup> to provide guidance as to who is an employee for the purposes of the TAA. The tax ruling essentially provides that the term ‘employee’ has its ordinary meaning as defined by the common law.

Consistent with the common law, the tax ruling recognises that parties are free to choose the nature of the contract which they make between themselves. However, their own characterisation of that contract will not be conclusive.

As stated in the tax ruling:

*‘If the underlying reality of the relationship is one of employment the parties cannot alter that fact by merely having the contract state (or have the worker acknowledge) that the worker’s status is that of an independent contractor.’<sup>2</sup>*

Key indicia of whether a person is an employee or an independent contractor include:

- Control;
- Basis of payment;
- Delegation;
- Risk; and
- Provision of tools and equipment.

## Control

This indicator, which has been referred to as the ‘*classic test*’<sup>3</sup> for determining whether a worker is an employee or an independent contractor, relates to the degree of control exercised over the worker in respect of the work performed.

If, for example, a worker is told what work to perform, how and where to perform the work, and when to perform the work, then this degree of control is indicative of an employer/employee relationship.

While the degree of control probably remains the most significant criterion for determining the nature of the relationship, other factors still need to be taken into account.

## Basis of payment

In simple terms, this relates to whether a worker is paid for the time spent performing the work or paid for the results. If a worker is paid on an hourly basis, then this is indicative of an employer/employee relationship. If, on the other hand, a worker is paid for a particular result (for example, the quantity of fruit picked or trees cut) then this is indicative of a principal/contractor relationship.

There can be instances, however, when a worker is paid for achieving specific results but is still



an employee. In *Hollis v Vabu*<sup>4</sup> the High Court considered that payment to the bicycle couriers per delivery, rather than per time period engaged, was a natural means to remunerate employees whose sole purpose is to perform deliveries.<sup>5</sup> This was in the context of other factors which, as a whole, tended to suggest that the workers were employees.

## Delegation

This relates to whether or not the worker has power or authority to delegate the work and pay someone else to perform the work. If a worker has an unlimited power of delegation, then this is indicative of a principal/contractor relationship.<sup>6</sup> If, on the other hand, the worker is required to perform the work personally, then this may be more consistent with an employer/employee relationship.

## Risk

This relates to who bears the commercial risk arising out of an injury or defect in carrying out the work. In an employer/employee relationship, the employer bears the risk. If, on the other hand, the relationship is such that the worker bears the risk, then this is indicative of a principal/contractor relationship. A contractor will typically take out their own liability insurance in such circumstances.

## Provision of tools and equipment

If a worker provides his or her own tools and equipment, then this can be indicative of a principal/contractor relationship. If the business provides the tools and equipment, or, alternatively, pays the worker to provide his or her own tools and equipment, then this is consistent with an employer/employee relationship.

This, however, is not determinative. For example, in *Hollis*, the workers, whom the High Court determined were employees, supplied their own bicycles and many of their own accessories.

This highlights the fact that it is the '*totality of the relationship*' that must be taken into account when determining whether a worker is an employee or a contractor for the purposes of the TAA.

## Dispelling the myths

There are several misconceptions relating to the identification of independent contractors. The first is that, if a worker issues invoices for the work he or she is undertaking, then the worker is a contractor. This is not necessarily correct. As discussed, whether or not the worker is a contractor will depend on the characteristics and key indicia of the arrangement.

Another misconception is that, if a contract of engagement specifies that the worker is a contractor, then that is determinative of the nature of the relationship. Again, while relevant, this is not correct for the reasons mentioned.

Finally, if a worker has an ABN, then he or she must be a contractor. Again, this is not necessarily correct.

## Employee/contractor decision tool

The ATO website provides useful guidance for assessing whether a worker is an employee or a contractor. This includes an '*employee/contractor decision tool*'<sup>7</sup> which allows the user to enter information into an online questionnaire and, based on the responses, will indicate whether the worker is an employee or contractor. While this is not determinative, it is a useful starting point for assessing the relevant relationship.

## Example

To illustrate the point, the following is an example of what can happen.

Joe is engaged by Clean Me Pty Ltd to carry out cleaning work in a commercial building. There is no contract of engagement. Joe considers himself to be an independent contractor and issues tax invoices to Clean Me for the work he performs. Clean Me pays the full invoice amount and does not withhold any tax.

Joe is told by Clean Me that he must clean the building between 5am and 7am, Monday to Friday. He is paid on an hourly basis and is provided with the cleaning equipment by Clean Me. Joe is not authorised to delegate the work to anyone else.

Joe suffers an injury during the course of his work and sues Clean Me.

While Joe, on the face of it, appears to be a contractor, on balance he is likely to be an employee for the purposes of the TAA.

Accordingly, Joe is probably a 'worker' for the purposes of the WCRA and the statutory policy will probably respond to the claim.

While 'employee' exclusions in public liability policies differ from policy to policy, the intention generally is that the exclusion will be engaged in circumstances where the workers' compensation policy responds. On that basis, Clean Me's public liability policy will probably not respond to the claim and dual insurance will not apply.

## Conclusion

The key point to remember here is that a 'contractor' is not always a contractor, a 'contractor' can sometimes be an employee.

It is important to not take an arrangement between a claimant worker and his or her 'employer' at face value. It is the characteristics of the relationship, not any labels placed on it, or the way in which the parties treat the relationship, that will determine the nature of the relationship.

The starting point for assessing the relationship will often be the contract of engagement.

A failure to properly assess a work relationship may result in a liability policy responding to a claim when, in fact, it ought not to.

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<sup>1</sup> TR 2005/16 – "Income tax: Pay As You Go - withholding from payments to employees."

<sup>2</sup> TR 2005/16, para. 18 – referring to *Commissioner of State Taxation v The Roy Morgan Research Centre Pty Ltd* [2004] SASC 288; 2004 ATC 4933; (2004) 57 ATR 147.

<sup>3</sup> See *Hollis v Vabu* (2001) 207 CLR 21, *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 63 ALR 513 at 525.

<sup>4</sup> (2001) 207 CLR 21.

<sup>5</sup> *Ibid* at 44.

<sup>6</sup> *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 63 ALR 513 at 517 and 519.

<sup>7</sup> <https://www.ato.gov.au/Calculators-and-tools/Host/?anchor=ECDTSGET&anchor=ECDTSGET/questions/ECDT#ECDTSGET/questions/ECDT>.

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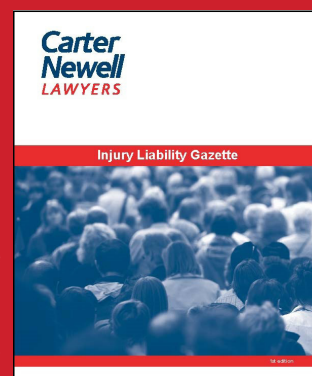
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## Injury Liability Gazette 7th edition

The 7th edition Injury Liability Gazette covers Queensland and New South Wales liability and personal injury decisions under the categories of occupier's liability, workplace law, damages and sports and recreational activities.

This edition includes a summary of *Coles Supermarket v Bright*, where the plaintiff suffered an injury to her left ankle due to a slip and fall which was recorded on CCTV, and *Jacobe v QSR Pty Ltd t/as Kentucky Fried Chicken Lakemba*, where the plaintiff tripped over a concrete wheel stop in a KFC car park and failed in his claim.

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