

# Contractor or Employee?



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# Overview

- Defining Employment
- The indicators to determine the nature of the relationship
- Case Study
- What are the risks?
- Sham Contracting
- How to reduce your risk

# Defining Employment

- It is a distinction made in common law.
- The FW Act relies on the common law definition of employment.
- There are many different categories attached to paid work relationships - our focus is on the distinction between **“contracts of employment”** distinguished from **“contracts for services”**.
- The common law constructs these categories as mutually exclusive.

# Clarifying terminology



## CONTRACT OF EMPLOYMENT

“contract of service”

Parties are called “employee” and “employer”

Employee maybe full-time; part-time; casual; permanent; fixed term

Main focus of Employment Law

## INDEPENDENT CONTRACTOR AGREEMENT

“contract for services”

Parties are called “Independent Contractor” (IC) and “principle”

Contractors, self-employed, consultants.

Regulated by more commercial law

# Why is the difference important?



Most (but not all) provisions in the FW Act and its predecessors apply to “employees” only.

Includes: Minimum standards of leave; wages; unfair dismissal etc. applies to employees only.

NOTE: Adverse action and anti-bullying apply to both employees and ICs

Employment status less critical in other contexts:

Equal Opportunity Act 2010 (Vic) & Occupational Health and Safety Act 2004 (Vic) cover both “employees” and “independent contractors”.

The Independent Contractors Act 2006 (Cth) applies only to ICs

# Keep in mind

- Cases turn on their own particular facts. Every case is unique.
- There is much uncertainty over the correct categorisation of many work relationships.
- An express contract term stating that the worker is an independent contractor is not determinative.
- Courts tend to look at both contract documents and actual practices, with a growing emphasis on actual practices.

# Indicators to determine the nature of the relationship



- Common law relies on a multi-factor test to determine whether a contract for services (contractor) or a contract of service (employee) exists.
- At its core, the following questions will be answered; **'can it really be said that this person is in a business of their own?'** and **'in performing work, is this person working in and for their own business, rather than as part of someone else's business?'**
- The following indicators must be considered in totality to determine whether the relationship appears overall to be one of employment or contracting

# Indicators

Facts to Consider	CONTRACTOR	EMPLOYEE
Degree of control over how work is performed	Has a high level of control in how the work is done	Low – Performs work, under the direction and control of their employer, on an ongoing basis
Independence	High	Low
Ability to delegate	High	Low
Tools / equipment	Uses their own tools and equipment (note: alternative arrangements may be made within a contract for services)	Tools and equipment are provided by the employer, or a tool allowance is provided
Payment / Remuneration	Has obtained an ABN and submits an invoice for work completed or is paid at the end of the contract or project	Time based – Paid regularly (for example, weekly / fortnightly / monthly)
Expectation of Work	Usually engaged for a specific task	Usually has an ongoing expectation of work (note: some employees may be engaged for a specific task or specific period)
Hours of Work	Under agreement, decides what hours to work to complete the specific task	Generally, works standard or set hours (note: a casual employee’s hours may vary from week to week)

# Indicators Continued

factors	CONTRACTOR	EMPLOYEE
<b>Risk</b>	Bears the risk for making a profit or loss on each task. Usually bears responsibility and liability for poor work or injury sustained while performing the task. As such, contractors generally have their own insurance policy	Bears no financial risk (this is the responsibility of their employer)
<b>Superannuation</b>	Generally, pays their own superannuation (note: in some circumstances, independent contractors may be entitled to be paid superannuation contributions)	Entitled to have superannuation contributions paid into a nominated superannuation fund by their employer
<b>Tax</b>	Pays their own tax and GST to the Australian Taxation Office	Has income tax deducted by their employer
<b>Leave</b>	Does not receive paid leave	Entitled to receive paid leave (e.g., annual leave, personal / careers leave, long service leave) or receive a loading in lieu of leave entitlements in the case of casual employees

# Case – Hollis v Vabu

Hollis was injured by X, a bicycle courier who worked for Vabu

Who is responsible depends on whether X was an employee or IC of Vabu

Indicators considered:

- Control over manner of performance of work?
- Level of skill and training?
- Presentation to public?
- Payment arrangements?
- Supplied own bike and performed own maintenance?
- Integration into Vabu's business?
- In receipt of leave entitlements, superannuation etc?
- Express terms in contract?

“Multi-factor” approach of joint judgment; must look at “totality of the relationship”

Contract terms v Practical reality of work practices

# Case – Hollis v Vabu

- Control over manner of performance of work? **High (employee)**
- Level of skill and training? **Low skill (employee)**
- Presentation to public? **Uniform (employee)**
- Payment arrangements? **Paid own tax and no salary (contractor)**
- Supplied own bike and performed own maintenance? **Yes (contractor)**
- Integration into Vabu's business? **Highly (employee)**
- In receipt of leave entitlements, superannuation etc? **No (contractor)**
- Express terms in contract? **Yes**

# Case – Hollis v Vabu



In totality the court found these workers to be employees based on the practicality of the work performed and based on these findings

The bicycle couriers were **not providing skilled labour** or labour which required special qualifications. A bicycle courier is unable to make an independent career as a free-lancer or to generate any “goodwill” as a bicycle courier;

Couriers had **little control over the manner of performing their work**. Rather Vabu actively controlled each courier’s work. The fact that there was an allocation and direction of the various deliveries by Vabu's fleet controller was given some weight;

Couriers were **presented to the public** and to those using the courier service as “Crisis Couriers”. They were to wear uniforms bearing Vabu's logo;

Vabu **superintended the couriers’ finances**. There was no scope for the couriers to bargain for the rate of their remuneration;

The situation in respect of **tools and equipment** also favours, if anything, a finding that the bicycle couriers were employees

# Risks getting it wrong



## **Legal & Financial**

- Employers may be exposed to back payments and superannuation payments with consequent tax implications.

## **Denial of entitlements**

- Includes access to leave, minimum rates of pay, superannuation as well as protection from unfair dismissal laws and the benefits of ongoing job security.

## **Increased Risk for Certain Jobs – Unskilled Labour**

- Workers being considered employees increases when worked performed is relatively unskilled and is continuous for a period of time.
- Contractors engaged in service roles where they are performing regular maintenance are at risk of having the relationship blur into one of an employee.
- A cleaner performing simple work for a single principle contractor, who wears their uniform, operates their equipment and accepts little or no commercial risk, cannot be defined as anything other than an employee. (FWO V Quest [2015] HCA)

## **Legislative Changes – Franchisor’s Increased Liability**

- Passing of the governments new laws under the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017. This amendment holds franchisors liable for workplace violations by franchisees.

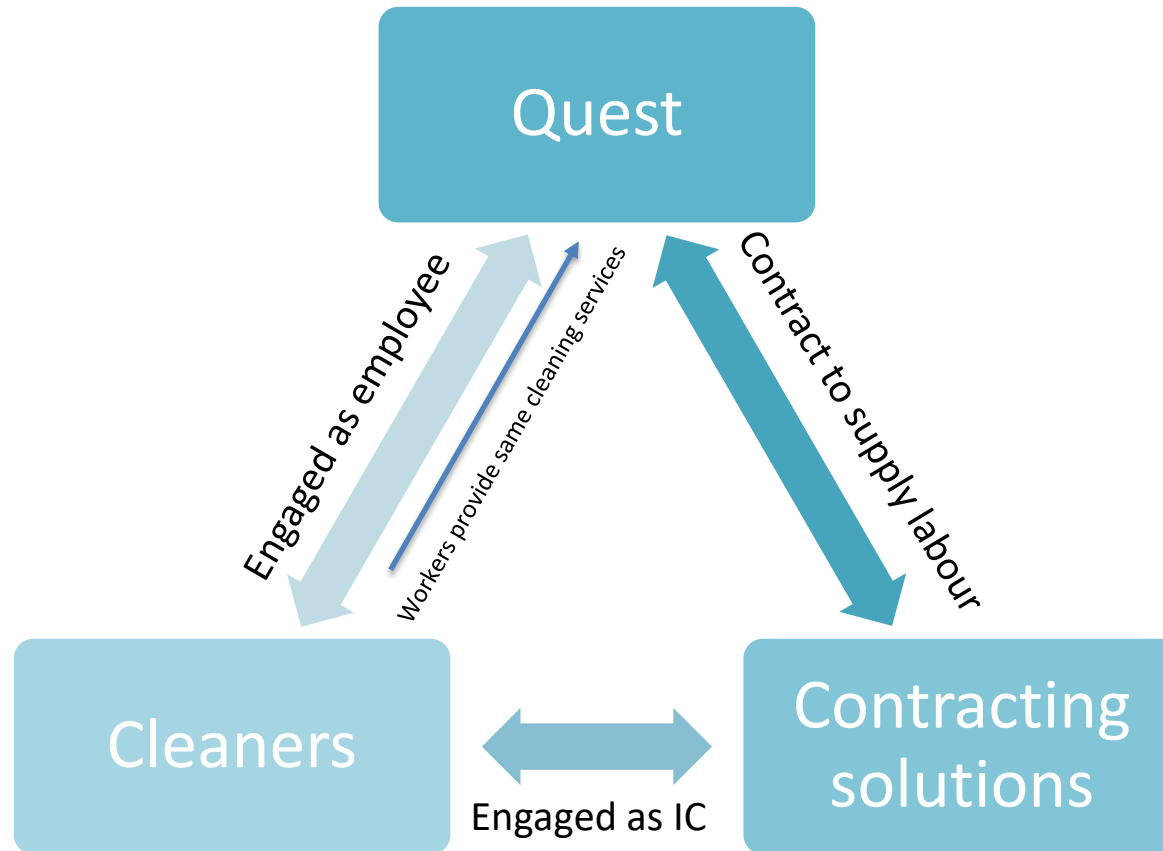
# Sham Contracting

- “Sham contracting” is the term used to describe an arrangement which is really a employment relationship, but is constructed as an independent contractor arrangement to avoid employment obligations.

Sham contracting provisions set out in FW Act, Part 3-1, Div 6, ss 357-359

Section No.	Summary- FWA, Part 3-1, Division 6
Section 357	(1) Misrepresenting to an individual that a contract of employment is a contract for services. (2) (2) Subsection (1) does not apply if the employer provides that when representation was made: (a) they did not know; and (b) was not reckless as to whether; the contract was a contract of employment rather than a contract for services.
Section 358	Dismissing (or threatening to dismiss) an employee in order to engage the individual as an independent contractor to perform the same (or substantially the same) work.
Section 359	Making false statements to an employee so as to persuade or influence the individual to perform the same (or substantially the same) work as an independent contractor

# S359- Case FWO v Quest South Perth [2015] HCA



# S359- Case FWO v Quest South Perth [2015] HCA



High Court (unanimous) made the following findings:

The housekeepers “continued to perform precisely the same work for Quest in precisely the same manner as they had always done”

Housekeepers remained employees of Quest under implied contracts of employment.

Section 357 of FW Act covers both of the following situations i.e. where a person says:  
“you are engaged by me as an independent contractor”;  
or “you are engaged by X [labour hire agency] as an independent contractor”.

# Are Uber drivers employees?



## What is Uber?

- Uber is a self-described 'technology company' that facilitates fee-for-service ridesharing.
- Essentially, Uber provides smartphone app-based services that connect individuals needing a ride with drivers willing to shuttle them.
- When a person summons a ride through the Uber app, Uber dispatches a driver who has agreed to provide the shuttle service to pick up the passenger.
- The passenger's credit card is charged for the service. Uber are paid a percentage of the fare for the trip and the remainder is passed on to the driver. Uber prescribes the fares which apply in each location.
- Drivers are engaged by Uber as independent contractors under standard form contracts – as such, the driver uses their own car, sets their own hours and is responsible for relevant business costs such as GST, car maintenance, fuel and insurance.
- Drivers do not wear any uniform and their cars are not branded by Uber.

# Exercise- Are Uber drivers employees?

- What factors suggest that the drivers are employees?
- What factors suggest that the drivers are independent contractors?



Thankyou, any  
questions?