

# EMPLOYMENT UPDATE

DECEMBER 11

## EMPLOYEE VS INDEPENDENT CONTRACTOR.

In this Employment Update, we provide an overview of the key issues in the employee vs independent contractor debate.

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On 25 October 2011, Justice Perram of the Federal Court of Australia decided that independent contractors engaged by ACE Insurance Ltd were really employees, and as such, were entitled to annual and long service leave, given the employer maintained organisational control, and conducted all training courses, to facilitate employee advancement through the organisation.

### Employee Relationship

In [\*ACE Insurance Ltd v Trifunovski\* \[2011\] FCA 1204](#), the Federal Court of Australia (Court) had to determine whether five insurance agents (Agents), engaged by general insurer, Combined Insurance Company of Australia (Combined), as independent contractors, were in fact employees.

The Agents claimed they were employees, entitling them to annual and long service leave following the termination of their engagement. They filed claims seeking entitlements over the period from 1981 to 2006.

The Agents were paid commission, used their own vehicle, did not have income tax deducted from earnings, and issued tax invoices to Combined for the services provided.

However, the tax invoices were

generated by Combined, and issued to itself; the Agents accrued no goodwill in their own businesses; were unable to work for any other insurer; sold only Combined's policies to Combined's customers; and were trained by Combined on business systems developed and maintained by Combined. In the circumstances, having, "...no good will, they [Agents] had no business which could be sold. In real terms...they [Agents] were...under Combined's practical control" Justice Perram said.

In defence, Combined argued that some of the Agents' claims for annual and long service leave were time barred. In addition, Combined argued that the Agents could not claim to be employees because they had signed contracts stating that they would provide services to Combined as independent contractors.

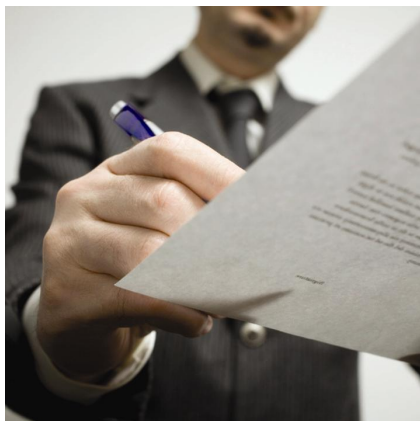
In its counter-claim, Combined alleged that it had suffered loss by reason of misleading and deceptive conduct engaged in by the Agents,



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General Protection Claims	Misconduct & Poor Performance	Transmission of Business



### Fair Work Act 2009 (Cth) (Act).

consisting of their execution of the written contracts under which they agreed they were independent contractors. The damages sought by Combined was the quantum of liability assessed in the Agents' claims.

Whilst the Agents had executed contracts reflecting their agreement to be engaged as independent contractors, the Court found that the Agents were not conducting their own business but were clearly part of Combined's business. The hierarchical structure, specialised training and opportunity for advancement, were seen as key factors in finding that the Agents were in fact employees and not independent contractors. Justice Perram said, "...there was only one business being conducted and that was Combined's business of renewing the policies of its existing customers and chasing up those which had lapsed or cancelled".

### Independent contractor relationship

In contrast, the Victorian Court of Appeal (VCAT) recently overturned a ruling awarding almost \$900,000 to an electrician who was seriously injured by a fall into a lift well, saying

its examination of the totality of the relationship left little doubt the electrician was an independent contractor.

The electrician was a self-employed contractor from 1984 to the time of the accident in June 2002.

In 2000, Elazac Pty Ltd engaged the electrician to assist as project manager in the refurbishment of a building, which eventually included servicing the lifts in the building.

VCAT held that whilst Elazac exercised control over what work was to be done at what time, Elazac did not exercise control over how work was to be performed by the electrician. The electrician was able to allocate his own employees or employees of Elazac to do the work, and was also able to retain contractors to perform particular jobs.

VCAT held that the "most significant feature" of the case was the electrician's employment of his own workers at work sites where he was required to perform work. It also said:

*Not only did the [electrician] consider himself to be self-employed, everything he did in the course of his work suggested that this was so: he employed employees; his tax returns and financial documentation disclosed he was operating a business in partnership with his wife; he could determine who he employed and where they worked; he performed additional work (in working hours) for an organisation unrelated to [Elazac] (and sent his employees to work there from time to time); and finally, [Elazac] did not deduct taxation from the [electrician's] pay*

*and did not pay him holiday pay, sick leave, long service leave or superannuation."*

### Common law of employment

The distinction between an employee and an independent contractor is, "rooted fundamentally in the difference between a person who serves his employer...and a person who carries on a trade or business of his own" ([Hollis v Vabu Pty Ltd \[2001\] HCA 44](#)).

In order to determine whether an individual is an "employee" or "independent contractor", the Court must look at the 'totality' of the relationship, including a number of indicia:

- the terms of the contract
- the intention of the parties
- whether tax is deducted
- whether subcontracting is permitted
- whether uniforms are worn
- whether tools are supplied
- whether holidays are permitted
- the extent of control or the right to control
- whether wages are paid or whether there exists a commission structure
- what is disclosed in tax returns
- how one party represents the other
- for whose benefit goodwill in the business ensures
- how business-like is the alleged business of the worker – are there systems, manuals and invoices.

### The Implications

If an individual has been wrongly retained as an independent contractor, this can have very serious implications, for example:

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- the person will be entitled to employment benefits under legislation and any applicable industrial instrument (including minimum wages, paid personal leave, paid annual and long service leave, superannuation, and possibly overtime and other penalties or loadings where an industrial instrument, such as an award, applies to the employee);
- the person may have unfair dismissal rights;
- the company will have breached its income tax withholding obligations and possibly its payroll tax obligations; and
- the company would be vicariously liable for the employee's negligent acts.

This decision is a useful restatement of the factors which should be taken into consideration when deciding whether an individual should be retained as an independent contractor or hired as an employee, as well as showing the risk in getting it wrong.

An individual who is performing the work that a reasonable person would consider an employee would perform, and who does not have a particular skill or specialised service to offer, should be an employee.

It is also important to note that where an employer represents to this individual that they will be engaged as a contractor rather than as an employee, the relationship may be found to be a sham arrangement which is unlawful under the Fair Work Act 2009. A breach of these provisions could result in the employer being fined up to a maximum of \$33,000 for each

offence, in addition to paying the employee entitlements.

It is very important that the "label" given to the relationship reflects the true nature of the relationship...that is, if it walks like a duck and quacks like a duck – it's a duck, and you must treat it as such. No matter whether the parties agree the relationship was a contractor/principal relationship, the Court can find the relationship was an employment one, if the evidence points to this.

However, a contractor relationship can be found to exist if there is evidence that there is discretion as to how work is to be performed, the provision of work to unrelated entities and records disclosing the operation of a business.

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