

INDEPENDENT CONTRACTORS AND THE CONSTRUCTION INDUSTRY – some employment law and further legal perspectives

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- “People who choose to be contractors should be able to be contractors [and] people should not be coerced into contracting arrangements when they want to be employees”
- Dr Craig Emerson, Minister for Independent Contractors, as quoted in the *Sydney Morning Herald* 12 December 2006.

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Former Minister Andrews in Second
Reading to Independent Contractors
Changes:

- Genuine independent contractor relationship should be governed by commercial law, not industrial law.
- Impediments to genuine contracting should be removed.

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- **What is genuine contracting?**
- Go to Common Law and factual substance
- Therein lies the difficulty?
- *Stephens v Brodribb* (1986) 160 CLR 16;
- *Hollis v Vabu* (2001) 207 CLR 21;
- *Sweeney v Boylan Nominees* (2006) 222 CLR 161

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- **Contractor** – commercial relationship – entrepreneurial.
- Sell their skills and labour to those who bid, work for numerous, election to be contractor, control over selves, ABN?

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- **Employee** – totality of the relationship and within that totality, control is an important part. Hence:
- tied to one employer; control of work direction; emanations; tax, superannuation, exclusive service.
- Legal intervention on human rights grounds

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- **Significance of Distinction:**
- 1. DUTIES owed eg tax, superannuation (although note superannuation rulings)
- 2. LIABILITY – employer is liable for employee wrongs (and wrongs of agent), but independent contractor is liable for self.

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- **Sweeney v Boylan Nominees**
- Customer injured by fridge door.
- Financially - sue companies not individual mechanic.
- Mechanic liable – why?
- Discuss reasoning...

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- Points to whole problem in Construction Sector – Grey area and significance of distinction.
- Second reading of Independent Contractor legislation notes significance of contractors in construction sector.

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- Between obvious employee and obvious contractor is grey area (eg) labour hire, outsourced work, franchises.
- Part 22 *Workplace Relations Act* 1996 (sections 900-902) speak of prohibition on sham contractors and need not to allow dismissal of employees so as to make them become contractors.

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BUT

- Sections also speak of dominant purpose of changing employee status; and
- Defence of belief/state of mind/intent.
- These are inherently difficult concepts – Floyd on TPA and waterfront dispute.

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AND

**Employee Test is inherently difficult to
apply:**

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Difficulties include:

1. Shams eg *Corporations Law* allows for \$1 company – what if job only available for those who have ABN but that person works in substance as an employee and only for one company?
2. Beneficial and Punitive Legislation cases.
3. Phoenix Companies – interface between genuine corporate and genuine contractor?
4. Sub Class 457 Visas.

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Possible Future Developments

THE WORKER

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- The Worker is found in Work Cover and some reference made to it superannuation rulings. That is, if a person, no matter how engaged, supplies, labour, they are covered.

Further Developments:

- Final Report of Royal Commission into the Building and Construction Industry (2003) – misuse of ABNs and cost to tax income of country
- Possible discrimination against employees due to preferential tax treatment – although they do the same job?

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- Further developments:
- Security of Payments legislation;
- Minimum standards legislation and prohibitions on unfair contracts;
- Promote collective bargaining – see TPA changes – when is collective bargaining for the commercial good (given then commercial paradigm)?
- State Purchasing Policy?