



# CONTRACTOR OR EMPLOYEE? THE HIGH COURT RULES.

By Chris Delaney



## A few years ago we asked members if their ABN holders pass the “Duck Test” – You know the one: if it quacks, and it waddles, and has feathers it is a duck. You can call it a rooster if you want to, but it is still a duck!

The test was all about determining if an independent contractor was really a direct employee and not in a sham arrangement. The test was to consider all of the factors in the relationship – who has control, who pays tax, who decides when to work and when not to, who provides tools etc. The multi-factorial test.

That test has been around for a long time and even though the High Court of Australia in two recent decisions has put the contract ahead of the facts, employers still need to be wary of the Duck – it is not dead, it’s just winged!

The High Court decision concentrated on the rights and duties of the parties found in the contracts, rather than what has historically been a broader focus on the conduct of the parties, the totality of the relationship and the impression of the arrangement.

It said the focus should be on whether the work of the worker is so subordinated to the business of the alleged principal as to mean the worker is in fact performing work for the principal’s business as an employee, rather than providing their services from their own independent business as a contractor.

Security Industry businesses need to be very careful not to assume that because of the High Court decision having a contract describing workers as Independent Contractors will protect them against claims of sham arrangements. **It will not.**

**Any decision determining the status of the worker will come down to what is in the contract. Meticulous drafting of the contract will be essential.**

What businesses should do when engaging workers:

- Clearly record the terms and conditions of the arrangement and the rights and obligations of the parties in a written contract before any work commences.
- Just calling the parties as principal and contractor will not be enough. If the arrangement contains terms which are characteristic of an employment relationship it may still be deemed a sham.
- Any contract that gives control or direction over the worker or their performance will need to be at an absolute minimum.

In my opinion if you choose to have independent contractors, it will need to be clear in the contract that the independent contractor can decide when and where to work, how long they will work for and how to do the job. If the contract does not allow that level of freedom, or if the contract gives those controls to the business or principal, there is a strong possibility that a multi factorial test will indicate an employer / employee relationship – or sham contract.

### WHAT IS “SHAM SUBCONTRACTING”?

Sham contracting is when an employer attempts to conceal an employment relationship by calling it an independent contracting arrangement. This is usually to avoid paying legal minimum rates of pay, workers compensation, insurances, tax, and entitlements, such as annual leave and sick leave. It gives the Principal Contractor a distinct advantage over competitors by reducing their costs by as much as 25% or more. Arrangements such as these are not genuine and may be deemed by a court of competent jurisdiction, as sham contracting.

### WHAT’S THE DIFFERENCE BETWEEN A CONTRACTOR AND AN EMPLOYEE?

Although this can be a complex area of law there are some simple rules and tests that can be applied to the relationship to determine what it really is. (ASIAL has a checklist available as well as an Independent Contracting Toolkit)

The individual who must work at a particular location, during specified hours (perhaps involving a roster), performing the work under the control of another, either directly or indirectly, is most likely to be an employee. Standard operating procedures (SOPs) that must be followed may also point to an employer / employee relationship.

A contractor is engaged under a ‘contract for services’ to achieve a defined result or agreed outcomes. A contractor is not under the direction and control of the principal. Contractors may not be required to perform the work personally. They can often delegate the work to others (their own employees). Contractors may also be Corporations (Pty Ltd Companies), through which they contract the work.

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## RESOLVING DISPUTES

The High Court considered what happens after the contract commences and there is a dispute. Situations such as:

- the written contract not covering the full arrangement and what may have been implicit in the agreement;
- the contract is a sham with intent to disguise an employment relationship;
- the contract does not reflect the conduct of the parties;
- there is a breach of the contract; or
- there is an application for relief under the unfair contracts regime created by the *Independent Contractor's Act 2006* (Cth).

While 'control' is an important aspect of determining if there is an employment relationship, the multi factorial test is the approach preferred by Courts today.

This approach seeks to make a balanced evaluation of all the features of a relationship including: the form of remuneration, the provision and maintenance of materials and equipment, the obligation to work, the ability to be dismissed, the hours of work and provision of holidays, the deduction of income tax and the delegation of work by the worker.

Being paid an hourly rate, providing labour only, not providing materials and tools, being required to attend work at certain defined times may all be indicators that the worker is a direct employee.

## THE HIGH COST OF GETTING IT WRONG

There are significant potential costs in getting it wrong.

As an example, a company and its director were fined more than \$286,000 for breaches of the Fair Work Act, stemming from the incorrect classification and payment of its employees as independent contractors. Its director **was personally fined approximately \$48,000.**

The case serves as an important reminder to businesses to correctly engage and remunerate employees and the perils associated with sham contracting arrangements.

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## THE END USER CAN ALSO BE FINED


The former Fair Work Ombudsman and current Fair Work Commissioner, Nick Wilson, warned that:

*"Turning a corporately-sanctioned 'blind-eye' to outsourced work that is performed by another enterprise using contractors on below-award rates of pay may expose enterprises up the procurement chain to liability.*

All parties should undertake due diligence when outsourcing work to contracted workers, particularly to lowest-cost providers, to ensure lower costs are attributable to efficiencies in the business and not due to the potential exploitation of workers on below award rates."

While ASIAL recognises that due to the nature of the protective security industry there will be commercial imperatives for security businesses to subcontract work to meet short term peaks in client demand, the practice of sham subcontracting, misclassification or using ABN holders who are really employees, is an unacceptable practice that negatively impacts the entire industry, as well as clients.

A key part of the solution to this ongoing issue rests with end users, including government at all levels. When procuring security services, end users must ensure that the contract price allows for the security contractor to provide a sustainable professional service and offer pay and conditions commensurate with a legal industrial instrument.

Members requiring assistance or tools to help educate others, can contact the ASIAL Secretariat on 1300 127 425. And, if you have information of suspected sham subcontracting share it with us. 

## About the Author:

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Chris Delaney is a highly regarded employee relations professional with over 40 years' experience in industrial relations and human resources.

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