

# SHAM CONTRACTS – EMPLOYEES Vs CONTRACTORS

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Health

AMA ACT PRESENTATION

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# Introduction - Key Summary

- **Employee or Contractor**
  - Written Agreement
  - The Multi-Factor Test (not one size fits all)
  - Legal Risks and Tips

# Why is it important?

- Time and Money
- Employees receive the right minimum wage, entitlements and all appropriate leave, allowances, penalty rates
- Cost-saving
- Avoid negative publicity
- Put the business in the best position possible to deal with any issues that may arise
- For both parties

# Employee vs. Contractor

- Can be of benefit to both parties to engage as a contractor, provided not subsequently deemed an employee
- Contractor may be eligible to be paid superannuation by the business and may be a worker for workers compensation purposes





# Common Law Contract (not contractor)

- It's professional so the market applies
- Commonly % of billing
- ABN number but Courts ultimately decide:
  - definition of the relationship (the Vabu test)
  - whether restraint / release penalty enforceable

## **Is there a practical difference?**

NO when simply being a Doctor and caring for patients

YES when it comes to money and risk

## *Hollis v Vabu Pty Ltd (2001) 207 CLR 21*

“The totality of the relationship” between the parties; it is this which is considered [Vabu (2001) CLR @33]

Issues	Multi Facet Tests
How work paid	Does the doctor submit an invoice on completion of the task?
How is the contract determined	Does the Doctor contract provide for termination by a number of weeks notice or payment in lieu?
Individual of broader legal entity party to contract	Is the Doctor legal entitled employed to do the work a partnership or company?
Provision and maintenance of equipment	Does the Doctor provide their own work equipment?
Hours or work	Are hours set for attendance on site?
Leave	Are hours set for attendance on site?
Taxation	Is PAYE paid?
Capacity to select own employee as delegate	Can work be delegated at the Doctor's discretion to another Doctor of the Doctor's choice?
Risk – Capital investment	Is the Doctor exposed to a loss of capital investment in the contract?
Superannuation	Are superannuation contributions being made?
Other jobs	Is the Doctor free to carry on other jobs at the same time?
Professional Indemnity	Does the Doctor carry their own PI Insurance
Clinical Independence	Does the Doctor have complete clinical control?

# Sham Contracting

- **Sections 357 – 359 of the Act**
- Civil Penalty Provision
- ATO Prosecution
- Unfair Dismissal if deemed an employee
- Penalties: fines, tax penalties, unpaid entitlements, employee claims

# Involved in a Contravention

## Section 550 of the Fair Work Act 2009

- 1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision
  - 2) A person is **involved in** a contravention of a civil remedy provision if, and only if, the person:
    - a) Has aided, abetted, counselled or procured the contravention; or
    - b) Has induced the contravention, whether by threats or promises or otherwise; or
    - c) Has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
    - d) Has conspired with others to effect the contravention.
- Coles and 7-Eleven cases are fairly recent, examples of head companies being 'involved in a contravention' despite no direct involvement



# Contracts of Employment

- Allows an employer to set out in writing the terms and conditions on which an employee is employed
- In addition to standard clauses can include restraint of trade, garden leave, set-off clauses, grounds for immediate termination and conditions of engagement, e.g. maintaining a qualification, admission to a professional body, drivers licence etc.
- For Award covered employees, a contract provides an option for paying an 'all-inclusive' salary

# Contracts of Employment

- Contracts should be regularly reviewed and updated to take into account changes in the law
- Good to review an employee's contract when their role changes or when increasing salary
- Employer needs to ensure that they comply with contractual obligations
- Probation periods – use them wisely!



# Independent Contracts

- Independent Contractor
- Associateship
- Partnership
- Importance of Written Agreement

# Contractor Fundamentals

- Administrative Obligations
- Taxation
- Superannuation
- WorkCover
- Paying “on costs” (costs of staff, information management and utilities etc.)
- Self Funded Annual Leave, Sick Leave etc.
- Risk
- Clinical Independence



# Making Arrangements – The Key Points – Being Proactive

- **Don't Be Complacent**
  - It is a binding contract
  - It represents self interest
- **Want control? – negotiate**
  - Put the effort into the agreement NOT the dispute
- **Get advice (before sign) (and/or seek representation)**
  - Does the contract actually say what was intended

# The Written Agreement

**If it can't be read in the contract it probably doesn't apply**

- How the contract ends
  - At the end of the fixed term
  - Either party a period of certain notice
- Termination
  - Reasons (i.e. misconduct / deregistered etc.)
  - Process (i.e. procedural fairness – opportunity to respond)
- What happens if illness and can't work
- Dispute Resolution (deliver a binding result?)
- Medical records (who owns them?)
- And, potentially enforceable / unenforceable
- Release penalties
- Restraint of trade (time / geographic)

# Written Agreement

- **Plain English reading applies**
  - If ambiguous – give context and define
- **Breach of Agreement**
  - Via Dispute Resolution Clause (agreed process, less costly, quicker)
  - Via the Courts (relationship broken, costly and slow – bigger returns?)

# Key Takeaways

- **Get advice**
  - Accountant
  - Lawyer
  - Associations
- **Ensure relationship is documented**
- **Address issues as they arise**
- **Where do I get help**
  - Association
  - MDO/Insurer
  - Fair Work Ombudsman - [www.fwo.org.au](http://www.fwo.org.au)



# QUESTIONS



# Team Contacts



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