

# Unclear and Present Danger in Australia – Incorrect Use of “Independent Contractor” Arrangements May Have Expensive Consequences

Article By:

Dominique Hartfield

---

The ever-vexed question of whether a worker is an employee or independent contractor has once again come before the **Australian** courts. The recent decision of ***Balemian v. Mobilia Manufacturing Pty Ltd & Anor*** provides a reminder to employers of the potential financial ramifications of getting this wrong.

Mr Balemian was engaged in a continuous working relationship with Mobilia for over 21 years, though they never entered into a written agreement. After leaving Mobilia, Mr Balemian claimed that he was an employee and so entitled to receive pay in lieu of accrued leave and superannuation contributions. Mobilia disputed this claim on the basis that he had been an independent contractor.

The Federal Circuit Court heard evidence that Balemian had obtained an Australian Business Number, submitted fortnightly invoices for his hours worked and had repeatedly described himself as self-employed in his taxation returns. It also found that there had been no real agreement or discussion about the nature of their contractual relationship and accepted Balemian’s evidence that he had been “very naïve” and too “embarrassed” to discuss the legal standing of his working arrangements in greater detail with Mobilia.

The Court decided that Mobilia had control over important aspects of the working arrangement, including the work Balemian performed and the manner in which he carried out his duties. For the most part, it concluded, Balemian was not free to use his own discretion and the manner in which he performed the work was “*clearly demonstrative of a contract of employment*”.

In reaching this decision the Court also took into account the following details:

- Mobilia’s director supervised and authorised Balemian’s work more or less daily;
- Balemian was paid an hourly rate and used a Company car;
- He worked for at least 45 hours per week and was provided with a factory key and an office;
- He had to inform the boss if he was unable to attend work due to illness or was leaving early,

---

and to seek approval in advance of holidays;

- He had no ability to delegate the performance of his work;
- He did not hold himself out as operating his own business but as a person working for the Company;
- Over time, Balemian's role had widened such that he was responsible for training new employees in some aspects of the business.

The Court found the arrangement set up by Mobilia “*at the very least recklessly disguised the true legal nature of the relationship*”, in contravention of the sham contracting provisions in the *Fair Work Act 2009* (Cth) (**FW Act**). Its failure to pay Balemian the correct rate, accrued leave payments or superannuation contributions resulted in a financial loss to the employee of approximately AU\$230,000. The decision has been re-listed to determine civil penalties and costs, along with the sum of compensation, if the parties are unable to agree upon the compensation payable between themselves.

Varying decisions on this issue in recent years show that despite how much can turn upon it, the distinction between an employee and independent contractor can be complex and often unclear. There is no definitive definition of an independent contractor. The Courts have pointed to identifying and evaluating relevant factors arising from the evidence and weighed them (with some having greater importance than others) against established principles to see where the balance lies. A Court will look at the reality behind the wording of a contract and/or the use of an interposed entity to look at the true nature of the relationship; therefore these are not sufficient on their own to establish an independent contracting relationship.

Liabilities for getting it wrong can include compensation and penalties, not only from non-compliance with the employment legislation but also tax and superannuation legislation. In *Fair Work Ombudsman v Grouped Property Services Pty Ltd* last year, the Federal Court directed that the Court Registrar forward a copy of the judgment to ASIC and the ATO. This may result in further investigations, prosecution and liabilities. In addition, a misrepresentation of the relationship, or dismissing an employee in order then to engage him/her as a contractor to avoid employment obligations will trigger the sham-contracting provisions of the FW Act.

## Lessons for Employers

- with the evolution of a growing number of non-traditional working arrangements over time, we expect to see even more cases litigating this issue. It is important to ensure that a worker's status and the legal character of the relationship is well documented with the worker from the outset and reviewed over time in the light of actual practice;
- employers should exercise caution in characterising working relationships as contracting arrangements when it is not abundantly clear. In such circumstances, it is important to take legal advice to determine whether a genuine independent contractor arrangement exists;
- it is not safe to rely on the individual's seeming outward acceptance of independent contractor status through his lack of objection or even positive assertion on his own tax returns. Especially where there may be perceived to be an inequality of bargaining power or

(like here) the arrangement is entered into perhaps in ignorance of what contractor status means for the individual, the Courts will be willing to override this;

- keep an eye on the development of the relationship over time. It is perfectly possible that someone who joins entirely properly as an independent contractor can later slide unnoticed into employment by the conduct of the parties.

---

© Copyright 2025 Squire Patton Boggs (US) LLP

---

National Law Review, Volume VII, Number 142

Source URL: <https://natlawreview.com/article/unclear-and-present-danger-australia-incorrect-use-independent-contractor>