

The Results Test

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The Legislative Framework

1. Section 11 of the WCR Act provides the definition of worker for the purposes of the legislation, as follows:-
“**11 Who is a ‘worker’**
(1) A ‘**worker**’ is an individual who works under a contract of service.
(2) Also, a person mentioned in Schedule 2, Part 1 is a ‘**worker**’.
(3) However, a person mentioned in Schedule 2, Part 2 is not a ‘**worker**’.”

2. Part 1 of Schedule 2 provides for “persons who are workers and includes as the second section in that Schedule the following:
“2. A person who works for another under a contract (regardless of whether the contract is a contract of service) unless -
 - (a) the person performing the work -
 - (i) is paid to achieve a specific result or outcome; and
 - (ii) has to supply the plant and equipment or tools of trade needed to perform the work; and
 - (iii) is, or would be, liable for the cost of rectifying any defect in the work performed; or
 - (b) a personal services business determination is in effect for the person performing the work under the *Income Tax Assessment Act 1997* (Cwlth), Section 87-60...
 5. A contractor, other than a contractor mentioned in part 2, section 4 of this schedule, if -
 - (a) the contractor makes a contract with some one else for the performance of work that is not incident to a trade or business regularly carried on by the contractor, individually or by way of a partnership; and
 - (b) the contractor -
 - (i) does not sublet the contract; or
 - (ii) does not employ a worker; or
 - (iii) if the contractor employs a worker, performs part of the work personally.”

 3. Section 2 (“the results test”) was first added into Schedule 2 Part 1 by the enactment of the *Workplace Health and Safety Amendment Act 2003*, which was to commence from 1 July 2003. However, that amendment was in fact introduced as part of the WCR Act, as from 1 July 2003, when that Act replaced the *WorkCover Queensland Act 1996*.

Reliable Couriers PTY LTD

4. The Appellant appealed to the Industrial Magistrates Court against the decision of Q-Comp that certain persons engaged by Reliable Couriers were “workers” for the purpose of the *Workers’ Compensation and Rehabilitation Act 2003* (“the WCR Act”).
5. The history of the dispute is that it arose out of a review of the Appellant’s operation from the perspective of determining the appropriate WorkCover Industry Classification and a consequential determination by WorkCover that the contractors used for collection and delivery of packages would be workers as from 1 July 2003 under the *Workers’ Compensation and Rehabilitation Act 2003*.

Background

6. Couriers entered into a contract with Reliable Couriers, relevant terms of which were as follows:

“2. The Contractor shall supply its own vehicle/s. Such vehicle/s shall be suitable for the work and shall be maintained by the Contractor in good working condition.

13. The Contractor is engaged under this agreement as an independent contractor and nothing contained herein shall constitute the relationship of partnership or employer and employee between the parties hereto and it is the express intention of the parties that any such relationships are denied.

15. Save as otherwise provided in this agreement -

- (a) The Company shall have no right of control/direction over the Contractor’s performance at work;
- (b) The Contractor shall not be subject to precise hours of work but rather will advise the Company of when it wishes to work;
- (c) The Contractor shall not be obliged to accept work;
- (d) The Contractor shall provide its own vehicle;
- (e) The Contractor shall be responsible to its own tax;
- (f) The Contract has the right to employ staff and delegate work;
- (g) The Contractor is not required to wear a uniform, but may do so by purchasing them from the Company at its own expense.

18. The company recognizes that the Contractor is independent of the Company and cannot be restrained in its provision of work to customers other than the customers of the Company.

20. The Contractor shall be responsible for and shall indemnify the Company against liability for all loss, damage or injury to persons or property (including company owned equipment) caused by the Contractor, or its employees or agents, and the amount of all claims, damages, costs and expenses which may be paid, suffered or incurred by the Company in respect to any such loss,

damage or injury shall be made good at the Contractor's expense and may be deducted from any monies due or becoming due to the Contractor."

7. The issues to be determined were:
- Whether there was a contract of service or a contract for services;
 - Whether the couriers were paid to achieve a specific result or outcome;
 - Whether the couriers had to supply the plant and equipment or tools of trade needed to perform the work;
 - Whether the couriers were, or would be, liable for the cost of rectifying any defect in the work performed.

Contract of Service or Contract for Services

8. The leading authority is **Hollis v. Vabu** (2001) CLR 21.
9. The decision in **Hollis v. Vabu** supports the proposition that it is necessary to look past the contract to the true nature of the agreement between the parties. In the joint majority judgment, the following passage appears in paragraph [24]:

"It should be added that the relationship between the parties for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by **Vabu** go to establishing 'the totality of the relationship' between the parties; it is this which is to be considered (**Stevens v. Brodribb Sawmilling Co. Pty Ltd** (1986) 160 CLR 16 at 29)."

10. The conclusion reached in the joint majority judgment of the High Court in **Hollis v. Vabu** is that, in the circumstances of that case, the bicycle couriers contracted by the respondent company, were employees and not independent contractors (see [47] and [61]). It was submitted that many of the features of the evidence in that case are at least similar to the situation of Reliable Couriers Pty Ltd (see [48] - [57]).

11. President Hall found that there were sufficient differences to distinguish **Hollis** and find that the Couriers worked under a contract for services.

"The first point of difference is that in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, the couriers were not able to refuse work. The second point of difference was that the couriers whose situation was dealt with in *Hollis v Vabu Pty Ltd*, *op cit*, were required to commence work at 9 am. The couriers engaged by the Appellant were not required to work for the Appellant during "radio hours" and indeed were free to work for others during "radio hours". The only impediment was the Appellant's request for a courtesy phone call on days on which a courier was not to work. The third point of difference was that the couriers whose situation was discussed in *Hollis v Vabu Pty*

Ltd, op cit, used bicycles to perform their work whereas the couriers engaged by the Appellant were required to provide motor vehicles. Notwithstanding the decision in *Hollis v Vabu Pty Ltd, op cit*, the conventional view continues to be that the person who has to provide expensive items of equipment such as a motor vehicle is not an employee.”

Disqualification Factors - Part 1 of Schedule 2

Disqualification Factor s.2(a)(iii) - “Is, or would be, liable for the cost of rectifying any defect in the work performed”

12. As the contractors are or would be liable for the cost of rectifying any defect in the work they performed the requirements of 2(a)(iii) of the results test would be satisfied.

Disqualification Factors s.2(a)(ii) - “The supply of plant and equipment or tools of trade needed to perform the work”

13. President Hall found:

“The system of work described could not be embarked upon and carried out if without what was obviously an advanced communication network. Further, it seems to me that even the radios were provided by the Appellant”

14. The contractors had to supply their own motor vehicles for the performance of the work. However it was also apparent that Reliable Couriers Pty Ltd provide some essential equipment, being the communications equipment. The communications equipment was essential to the performance of the work. The requirement in s.2(a)(ii) of the results test is that the contractor “has to supply the plant and equipment or tools of trade needed to perform the work”. This requires the contractor to supply all of the plant and equipment or tools of trade needed to perform the work (or at least substantially all of such equipment). This was not the case. The overall communications network including the radio was as essential as the scaffolding in the example in the explanatory notes, namely:

“2.The person performing the work has to supply the plant and equipment or tools of trade needed to perform the work.

To satisfy this test the person would be required to provide the tools of trade, or plant and equipment actually needed for the person to carry out the work under the contract, taking into account the particular circumstances of the work situation involved. However, a failure to meet this test means that for the purposes of this clause the person is a “worker”.

A painter contracted to paint the outside of a newly constructed building is required under a contract to complete the work, including provision of all necessary tools, plant and equipment (eg. Brushes, paint, trestles, etc.). In some instances the painter may also have to supply scaffolding if the work is to be performed above a certain height. However, if the scaffolding is

already set up or is still in place from previous construction activity (as is often the case), then the painter does not actually need to supply the scaffolding. Provided the painter supplies all the other equipment actually required to perform the work, part 2 of the results test would be satisfied.”

Disqualification Factor s.2(a)(i) - “Is paid to achieve a specific result or outcome”

15. President Hall also found that the first aspect of the qualification, that the contractor “is paid to achieve a specific result or outcome” was not satisfied.
16. The President had “some difficulty in applying the language of s.2(a)(i) to a case in which the “results or outcomes” (were) not specified at the time of commencement of the engagement but become identified as the contract is performed”.
17. The President gained assistance from the example given in the explanatory notes, namely:

“1. The person performing the work is paid to achieve a specified result or outcome.
In order to satisfy this test:

 - a person’s contract or quote would require him or her to complete a set task; and
 - payment would need to be for an agreed price, based on completing the set task.

The contract or quote should specify the result or outcome which is required. Generally, payment would not be made until the work is completed, although progress payments may be paid at agreed intervals. For example:

A builder has engaged an owner-driver of a truck to move 100 cubic metres of fill to another site. The owner-driver would be considered to be contracted to complete a set task. Furthermore, if the builder and the owner-driver negotiated a price for the delivery of the fill and this is to be paid for on completion of the work, the owner-driver would be considered to be receiving payment for an agreed contract price, based on completing the set task.

In this situation the owner-driver would be working for a specified result and part 1 of the results test would be satisfied. A failure to meet this test means that for the purposes of this clause the person is a “worker”.”