

Business will need to rethink their labour structures following the decision of the Federal Court of Australia in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 (13 April 2011). The case represents a significant victory for the Australian Taxation Office (ATO) in its quest to crack down on businesses claiming their labour structure is that of Principal/Independent Contractor and not Employer/Employee.

Consequently countless Australian Businesses will be affected by this important decision which represents the latest word on the correct characterisation of the labour structure within a business. Over many years businesses have transformed their labour requirements from the traditional employer/employee relationship to that of principal/independent contractor and in doing so have avoided paying PAYG Tax, Superannuation, Workers Compensation and Payroll Tax.

In the On Call case, On Call operated an interpreting and translating services business which engaged individuals skilled in interpreting and translating on a self-employed independent contractor basis. On Call did not provide superannuation benefits to the vast majority of interpreters that it utilised. The ATO considered that those interpreters treated as independent contractors, were in fact employees within the meaning of the Superannuation Guarantee Act.

Typically, an On Call interpreter entered into a written contract with On Call which specifically described the relationship as an independent contract and denied any employee relationship. There was no obligation to take on an assignment, and On Call paid in accordance with a schedule of rates. An interpreter could work for other companies in competition with On Call, and in many cases had their own ABN and were registered for GST.

In a 57 page Judgement Bromberg J, despite the above, regarded the relationship as that of Employer/Employee with the consequent result that Superannuation was required to be paid. On Call had in excess of 5000 interpreters so the effects of the decision were devastating. In coming to its conclusion the court examined the “real substance of the relationship” which involved a detailed analysis and an understanding of what constitutes a personal services business. The Court pays

little attention to what the parties term the relationship. Many issues need to be considered: is there a risk of loss, who takes the benefit of the goodwill, who provides the equipment, is there a power of delegation, who controls the manner of performance of the task?

The effect of the decision will mean that many businesses are exposed to paying hundreds of thousands of dollars back to the ATO.

But the pain doesn't stop there. The decision will also trigger audits by the Office of State Revenue (OSR) for unpaid Pay Roll Tax. The OSR has been issuing rulings and warnings for years on these issues and now that the Federal Court has given its decision, I think they will be eager to collect many years of unpaid Pay Roll Tax.

This is extremely worrying for many industries including the Real Estate Industry, Transport, Mining, Resources, and Heavy Industries. Business needs to urgently review its labour structure so as to avoid paying penalties and interest if they are caught by the decision in On Call.

There is considerable confusion as to what constitutes contractor status. To add to the confusion some third party companies are spruiking the provision of personal services through intermediaries or trusts and are representing that these arrangements avoid Payroll Tax and Superannuation obligations. We urge careful and meticulous scrutiny of these companies and their documents as the arrangements we have examined probably fall foul of the anti-avoidance provisions of the Fair Work Act 2009 (Cth) and State/Federal Taxation Legislation.

The trend of Australian courts is to look beyond contractual descriptions and at the substance or truth of the relationship. The courts have given a wonderful name to the test to be applied in determining whether the relationship is that of Employment or Contractor. It is described as the “elephant-test” – and animal too difficult to define but easy to recognise when you see it.

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