

DEVINE LAW AT WORK



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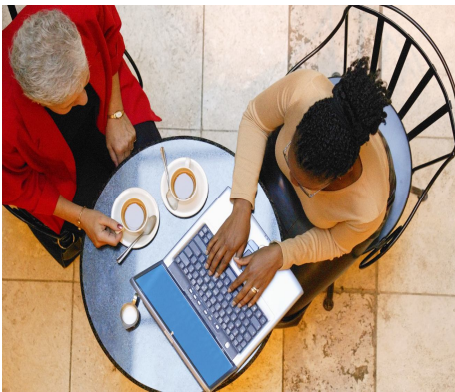
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THE RISE OF THE SELF-EMPLOYED CONTRACTOR

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The Australian workplace is in constant evolution. From its convict and indenture origins, it has evolved from a strong rural and agricultural base to an urbanised and corporate focus. Just some of the changes to the Australian workplace in the past thirty years include: widespread organisational restructure and subsequent loss of employment; the rise of human resource management; globalisation of markets; the dominance of corporations and a pre-eminent focus on the concerns of shareholders; an increasing amount of workplace regulation and employee entitlements; the enhanced education and expectations of the Australian workforce; the rise of service industries; the rise of information technology and the consequent development of the 'new economy'; the move away from collective bargaining to individualised bargaining; and the move away from industry wide awards to enterprise based bargaining.

Accompanying these changes has been the rise of the non-traditional worker, a category of worker which includes: casual employees; fixed term contract employees; self-employed contractors; and labour hire workers. For reasons of both demand and supply, this category of worker now represents around one-third of the Australian workforce. Of these non-traditional workers, only one sub-category has the potential to fall outside the traditional realm of industrial regulation in Australia: the self-employed contractor.

The focus of this article is upon the self-employed contractor. In it the following matters are explored: the role of the non-traditional worker in the Australian workplace; the demand and supply factors which have influenced the rise of non-traditional work; the heterogeneous nature of non-traditional work; the extent to which there has been a rise in the independent contractor; the perennial issue of whether a contractor is truly independent or an employee in disguise; and, the regulation of independent contractors.

BACKGROUND

The Role of Non-Traditional Workers in the Australian Workforce

The Australian work force is approximately 10 million in number. Around 3.3 million of these are engaged in non-traditional work. This category of employment includes persons engaged in casual employment, fixed-term employment, self-employed contracting and labour hire/agency employment or contracting. Within the group of non-traditional workers, it is estimated that 800,000 are self-employed. These self-employed workers are the second largest group of non-traditional workers, outweighed significantly in number by casual employees who, at 1.9 million in number, are the largest group of non-traditional workers.

There is a demand for non-traditional work by business for two key reasons: a need to have a flexible workforce in response to changing market conditions; and a need to minimise employment costs (including the costs and risks associated with recruitment, training, supervision and termination). Workers are available to meet this demand for three key reasons: preferences for greater autonomy and flexibility; financial incentives; and for the unemployed, the use of non-traditional work as a stepping stone to ongoing employment. Workers are more likely to secure their preferred form of employment if their skills are in high demand.



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According to Dual Labour Market theory, work requiring general skills with a low task frequency will more commonly be suited to casual employment, whereas work requiring specific skills with a low task frequency will more commonly be suited to either fixed-term employees or self-employed contractors. This compares with work requiring general skills with a high task frequency being more suited to outsourcing (labour hire) and work requiring specific skills with a high task frequency being more suited to ongoing employment.

In its May 2006 research paper, "The Role of Non Traditional Work in the Australian Labour Market", the Productivity Commission found that: "*(i)n general, non-traditional work can help firms achieve better production efficiency through greater flexibility in managing their workforce and by lowering costs. Workers are likely to prefer non-traditional work, in some cases, because it represents a more flexible option than ongoing work*" (page 9). Further it noted, at page 47 of its report, that the specific reasons why firms and workers choose non-traditional work vary according to the form of employment considered:

- casual and labour hire employees—for employers, temporary positions can be filled more easily and a better match can be made between working hours and fluctuating demands, and for employees work hours are more flexible and this form of work can be a stepping stone to ongoing employment;
- fixed term employees—for employers, specialist workers who are difficult to replace can be employed for the period required, and for employees there is certainty of employment for a period of time while the option of changing roles at the end of the term remains open to them;
- self-employed contractors—for the entity, tasks can be performed by a temporary resource at a lower cost than the recruitment of a permanent employee and for the worker there is greater autonomy and potentially greater financial advantage than being employed.

The Productivity Commission observed that it was uncertain whether or not demand or supply side reasons are more prominent in explaining the existence of non-traditional work, however it noted that self-employed contracting and fixed-term employment may be more supply side drive. They observed that: "*The high degree of job satisfaction reported by self-employed contractors (Cohany 1998; Benz and Frey 2004; Evans and Sikora 2004) suggest that this form of employment is largely voluntary, and fulfils a desire for autonomy and independence in workers...*" (at page 48).

Characteristics of the self-employed contractor

So what kind of person becomes a self-employed contractor?. The Productivity Commission found that self-employed contractors:

- are predominantly male;
- are predominantly aged between 35 and 54;
- are more likely to be married and have dependent children;
- predominantly live in Western Australia, Queensland and South Australia and outside capital cities;
- are more commonly found in higher skilled occupations;
- work long hours;
- are more likely to have variable earnings.

Within this group, dependent contractors are more likely than independent contractors to be from a non-English speaking background and want more hours of work and less likely to have variable earnings.





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Like other non-traditional workers, self-employed contractors had less job security than employees but reported being better able to achieve work-life balance.

The Productivity Commission's research found that:

- while the numbers of those persons engaged in non-traditional work probably increased between 1998 and 2004, their share of the Australian workplace remained relatively constant in this period – contrary to conventional wisdom;
- in the period 1998 to 2001 the number of self-employed contractors fell, however it grew in number between 2001 and 2004, although not as a proportion of the workforce;
- the decline in the number of self-employed contractors was due to a fall in the number of independent contractors – by contrast, 'dependent' contractors increased in number and share between 1998 and 2001.

This research presented in the paper also supported a number of broad conclusions, including that:

- while non-traditional worker makes up a large segment of the Australian labour market, its continued expansion is not inevitable, as some have argued;
- non-traditional workers are a heterogeneous group, so that generalisations about them are often unfounded – each category of non-traditional worker differs from the others and important differences exist within each category and the question of whether or not non-traditional work is satisfactory, from the worker's perspective, depends on the individual forms of employment and to particular socio-demographic groups within them;
- non-traditional work is the main source of income for one quarter of Australian families and as this is represented through all income levels, reliance on non-traditional work is not synonymous with low family income.

REGULATION OF DIFFERENT WORKPLACE RELATIONSHIPS

Introduction

Employment relationships are regulated by the common law of contract, a myriad of State and Federal laws and, where applicable, industrial instruments. In contrast to this, commercial relationships are primarily the subject of the common law of contract, and trade practices law.

What the two different types of workplace relationships therefore have in common is the common law of contract. The common law of contract is heavily influenced by the principle of laissez-faire, which in this context means that there should be little interference by a Court in a contract which, it is assumed, has been freely entered into by both parties. In the context of legislation, it means that governments should minimise the amount of regulation of contractual relationships.

An entity will ordinarily have a greater number of legal obligations towards employees than a principal contractor will have towards sub-contractors. For example:

- an employee has entitlements to: minimum terms and conditions of employment (through awards and, if they are subject to the federal industrial system, the Australian Fair Pay and Conditions Standard); leave (annual, personal/carer's, long service and parental); superannuation; protection from unfair dismissal (subject to eligibility requirements being met) and unlawful termination; protection from unlawful discrimination; trade practices protection; workers compensation; occupational health and safety (OHS) protection;



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- whereas a contractor only has entitlements to: trade practices protection; protection from unfair contracts; protection from unlawful discrimination; workers compensation only *if* they are deemed to be an employee under relevant legislation; and, OHS protection only if they visit the entity's workplace.

Difficulties with distinguishing employment relationships from certain commercial relationships have long been a feature of the common law. The method of distinction between these two categories of workplace relationships was originally the control test, however it has for some time been the multiple-indicia test, whereby Courts are required to examine all the features of the contractual relationship in order to properly determine whether it is a contract of service (employment) or a contract for service (commercial). This is discussed in more detail below.

Independent contractor or employee?

From a practical perspective, the distinction between an employee and an independent contractor can often be unclear. Some workers will often be called a contractor by the parties to the arrangement; however under the law the person may in fact be an employee. From a legal perspective, the process of determining whether a worker is an employee or a contractor involves weighing all of the relevant indicia, which can include:

- how the person is paid – is the person paid for his/her time or for the results s/he produces?, is the person paid by the hour or by a fixed/invoiced rate?;
- what level of control there is over the worker and whether they can delegate the services (e.g. to their own employee or to another contractor);
- whether the worker has freedom in the way s/he performs the work required;
- whether the worker is free to accept or refuse work;
- whether the worker has to work at set times, is obliged to work and works exclusively for a company;
- whether PAYG income tax is deducted on behalf of the worker and whether provision is made for paid leave;
- whether provision is made for the payment of insurances, superannuation and workers compensation coverage;
- whether the worker is required to wear a uniform;
- whether the worker is required to provide his/her own tools and equipment to provide the services required;
- whether the worker takes any commercial risks and whether s/he can make a profit or loss from the work performed;
- whether the parties intended to enter an employment contract or an independent contracting arrangement.

The question of whether a particular relationship between parties to a contract is commercial or employment in nature can only be answered on a case by case basis. Getting to this answer is not necessarily a straightforward matter.

Dependent contractor or independent contractor?

While many independent contractor arrangements are exclusively commercial in nature, in others the contractor may be independent in name only. In practice, they may have many of the characteristics of an employee while being treated as an independent contractor, missing out on both the benefits of employees and truly independent contractors.

It has been estimated that in 1998 between 26 and 41 per cent of all self-employed contractors met the criteria for dependent contractors. The Productivity Commission has reported that between 1998 and 2001 the number of independent contractors fell and the number of dependent contractors increased, leading to dependent contractors representing almost thirty per cent of self-employed contractors, up from at least the twenty six per cent in 1998. This



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corresponds with the result of audits conducted by the Australian Taxation Office between 2002 and 2005, which led to around one third of self-employed contractors having their status changed to that of employee.

Regulation of Independent Contractors

Since March 2007, federal regulation of commercial relationships involving self-employed contractors has been taken out of the industrial system and established independently. The key legislation is the *Independent Contractors Act 2006* (IC Act). The IC Act, among other things:

- excludes State and Territory laws which regulated independent contractor arrangements, including those which deemed contractors to be employees for certain purposes but not in respect of workers compensation or tax law;
- overrides the unfair contract provisions in State legislation in respect of contractors engaged by corporations and other entities the subject of the federal industrial system;
- created a national system for the review of unfair contracts between contractors and other entities.

The IC Act has application to 'service contracts' only, which are defined as being those between an 'independent contractor' and which relates to the performance of work by the independent contractor for an entity the subject of the federal industrial system (e.g. a corporation). The term 'independent contractor' is not defined in the IC Act and accordingly the common law indicia referred to above applies when determining whether a self-employed person is an independent contractor for the purposes of the IC Act.

Businesses employing 'independent contractors' need to also bear in mind certain provisions of the *Workplace Relations Act 1996* which permit the imposition of civil penalties against employers (of up to \$6600 for an individual and \$33,000 for corporations), which: misrepresent either a current or prospective employment relationship as an independent contractor relationship; dismiss or threaten to dismiss an individual who is an employee and performs particular work for that employer and the employer's sole or dominant purpose in dismissing or threatening to dismiss the employee is to engage the individual as an independent contractor to perform the same or substantially the same work under a contract for services; or, knowingly make a false statement to an individual who is currently employed or has previously been employed for the purpose of persuading or influencing the individual to enter into a contract for services, under which the individual will perform the same or substantially the same work as an independent contractor.

CONCLUSION

Non-traditional workers represent a significant portion of the Australian workforce. Approximately one in every 12 workers is a self-employed contractor. Within this group, a significant portion are dependent contractors. Our current systems of regulation mean that where a self-employed contractor is truly independent, one system will apply which reflects the essentially commercial nature of the relationship, while another system will apply if the relationship is dependent and is essentially an employment relationship in disguise.

As the legal obligations an entity owes to its employees are far greater in number than the obligations it owes an independent contractor, correct categorisation of workers is an essential means by which businesses can minimise legal risks. Otherwise a business can get a nasty surprise when a 'contractor' claims to truly be an employee.



Devine Law at Work is a law firm and consultancy which specialises in Australian workplace law and workplace relations and is in the business of helping people work together for better results. Elizabeth Devine founded Devine Law at Work in 2002 to realise an ambition to practice workplace law in a holistic manner; bringing together skills and expertise in the law, adult education, communication (including negotiation, conflict resolution and facilitation) and business development. Elizabeth has practiced law for 17 years and has specialised in workplace law and workplace relations for 12 years. Elizabeth is passionate about enhancing the knowledge of others about workplace law and regularly presents to a broad range of corporations and business, professional and industry groups. A professional speaker and enthusiastic educator, Elizabeth is well known for her engaging, easily understood and approachable style.