

# The Scope of Australian Labour Law and the Regulatory Challenges Posed by Self and Casual Employment

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## I. Introduction

Australian labour law<sup>1</sup> draws a key distinction between workers who work under contracts of service/employment, employees and those who perform work under contracts for services, independent contractors. This distinction emerges from the fact that the bulk of labour legislation is devoted towards the former. So much so that it has been said the contract of employment forms the ‘cornerstone’<sup>2</sup> of the Australian labour law system. Inroads have, however, been made into the dominance of the contract of employment by generic labour legislation, that is, labour legislation that apply equally to employees to independent contractors.

The first two parts of this paper will respectively survey Australian labour legislation which is confined to employees (‘employment-based labour legislation’) and generic labour legislation. This is followed by a brief discussion of the prevailing approach for determining whether a worker is an employee. The last two parts are devoted to considering the regulatory challenges posed by two key forms of non-standard work in Australia, self-employment and casual employment.

## II. Employment-Based Labour Legislation

The centrality of the contract of employment stems mainly from the fact that such a contract triggers the system.<sup>3</sup> This is apparent from the scope of federal awards and statutory agreements.<sup>4</sup> Federal awards are limited to preventing and settling an ‘industrial dispute.’<sup>5</sup> Such disputes, in turn, are restricted to interstate industrial disputes ‘about matters pertaining to the relationship between employers and employees.’<sup>6</sup> The principal industrial statute, the *Workplace Relations Act 1996* (Cth) (‘*Workplace Relations Act*’), essentially ascribes the common law meaning of ‘employee’ to its statutory equivalent. Accordingly, the content of federal awards is primarily confined to workers considered employees at common law.<sup>7</sup>

The same applies to ‘industrial dispute’ enterprise agreements.<sup>8</sup> Similarly, statutory individual agreements under the *Workplace Relations Act*, Australian Workplace Agreements, may only be made between an employer and employee. Further, such agreements may only deal with matters relating to their employment relationship.<sup>9</sup> A slightly more liberal situation applies to ‘corporations’ enterprise agreements: these agreements may only be made between an employer directly with its employees or organisation/s of employees but the subject-matter of

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<sup>1</sup> For reasons of space, this article will focus on labour regulation at the federal level and those of Australia’s two most populous states, New South Wales and Victoria.

<sup>2</sup> Breen Creighton and Richard Mitchell, ‘The Contract of Employment in Australian Labour Law’ in Lammy Betten (ed), *The Employment Contract in Transforming Labour Relations* (1995) 129, 136.

<sup>3</sup> Breen Creighton, ‘Reforming the Contract of Employment’ in Andrew Frazer, Ron McCallum and Paul Ronfeldt (eds), *Individual Contracts and Workplace Relations* (1998) 77, 81.

<sup>4</sup> For a more detailed discussion of federal awards and statutory agreements, see Joo-Cheong Tham, *The Framework of Australian Labour Law and Recent Trends in Regulation*, paper presented to the Japan Institute for Labour Policy and Training’s International Seminar on Comparative Labour Law, 9-10 March 2004, 3-7.

<sup>5</sup> See *Workplace Relations Act* ss 88B-89A. Section 89A does further restrict that Australian Industrial Relations Commission’s (‘AIRC’) power to make awards but specifying the ‘allowable award matters’.

<sup>6</sup> *Workplace Relations Act* s 4.

<sup>7</sup> *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138.

<sup>8</sup> *Workplace Relations Act* s 170LO.

<sup>9</sup> *Ibid* s 170VF(1).

the agreements is not restricted to matters pertaining to their employment relationship.<sup>10</sup>

Key statutory entitlements are also restricted to employees. A worker needs to be an employee before s/he can access the federal unfair dismissal scheme.<sup>11</sup> In the main, only such workers benefit from the obligation of employers to contribute nine per cent of the employee's<sup>12</sup> wages to a superannuation fund.<sup>13</sup> This obligation has, however, been extended to embrace workers who work under contracts that are wholly or principally for the labour of the worker.<sup>14</sup>

Standard leave entitlements are typically conferred only on employees. For instance, the statutory minimums relating to annual and sick leave in New South Wales<sup>15</sup> and Victoria<sup>16</sup> are cast in such terms. The same applies to the unpaid parental leave entitlements under the *Workplace Relations Act*.<sup>17</sup>

Finally, the centrality of the common law notion of 'employee' is also reflected in some workers' compensation schemes. The federal scheme which only covers workers engaged by the Commonwealth government restricts entitlement to workers' compensation to 'employees'; a term which tacitly imports the common law meaning of 'employee.'<sup>18</sup>

### III. Generic Labour Legislation

In Australia, there are key pieces of labour legislation which are generic in the sense of applying equally to both employees and independent contractors.

Both groups of workers receive statutory protection against discrimination at the workplace under anti-discrimination statutes. For instance, there are statutory prohibitions against discrimination against employees and independent contractors on the ground of their sex in the offering of work and the terms and conditions upon which such work is offered.<sup>19</sup> The freedom of association provisions in the *Workplace Relations Act* are of comparable scope with hirers of labour, for example, prevented from altering the position of an employee or independent contractor to his or her prejudice on the ground of the worker's union membership.<sup>20</sup>

Similarly, the duties imposed by occupational health and statute statutes on the hirers of labour largely do not depend on whether the worker hired is an employee or independent

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<sup>10</sup> Ibid ss 170LK. The restrictions that federal awards, 'industrial dispute' certified agreements and AWAs be confined to matters dealing with the employment relationship do not mean that there cannot be clause dealing with independent contractors. For example, if the use of independent contracts is pertinent to the employment relationship, it is seriously arguable that it is a matter dealing with the employment relationship, see Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (2000) 80-1. For more detail, see Tham, above n 4.

<sup>11</sup> *Workplace Relations Act* s 170CB. It should be noted that term 'employee' in the *Industrial Relations Act 1988* (Cth), the previous principal industrial statute, has been given a construction that goes beyond the common law meaning of 'employee': *Konrad v Victoria Police* (1999) 165 ALR 23. This broader construction, however, has not been applied to the corresponding term in the WR Act, see *Williams v Commonwealth of Australia* (2000) 48 AILR ¶4-353.

<sup>12</sup> *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(1) defines the term, 'employee' as having an ordinary meaning.

<sup>13</sup> Ibid s 12(3). This obligation primarily stems from the *Superannuation Guarantee (Administration) Act 1992* (Cth) but is also supplemented by award provisions that deal with matters not covered by the legislation, for instance, the superannuation fund to which the employer is to contribute (see, for example, Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995 [AW783479] cl 25). Federal awards also require employers to make superannuation contributions. These contributions reduce the amount the employer is required to contribute under the *Superannuation Guarantee (Administration) Act 1992* (Cth): *ibid* s 23.

<sup>14</sup> Ibid s 12(3).

<sup>15</sup> *Annual Holidays Act 1944* (NSW) s 3. It should be noted that the operative term in the preceding statute is 'worker'; a phrase that is slightly wider than the common law concept of employee. In New South Wales, a defacto minimum entitlement to sick leave is prescribed via the requirement that all State awards must provide for at least one week's of sick leave per year: *Industrial Relations Act 1996* (NSW).

<sup>16</sup> *Workplace Relations Act* Schedule 1A cl 1.

<sup>17</sup> *Workplace Relations Act* Schedule 14.

<sup>18</sup> *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 5.

<sup>19</sup> *Sex Discrimination Act 1984* (Cth) ss 14(1) and 16; *Anti-Discrimination Act 1977* (NSW) s 8 and *Equal Opportunity Act 1995* (Vic) ss 13-4.

<sup>20</sup> *Workplace Relations Act* s 298K.

contractor. This is so for two reasons. In some jurisdictions, the statutory term, 'employee,' has been defined so as to include independent contractors. For example, under both the federal and Victorian statutes, the employer's general duty to provide, as far as practicable, a safe working environment to its 'employees' includes a duty to independent contractors engaged by the employer.<sup>21</sup> Furthermore, occupational health and safety statutes typically require an employer to take all reasonably practicable steps to ensure that all persons are not exposed to risks to their health and safety due to the conduct of the employer's undertaking.<sup>22</sup> This duty would oblige an employer to take the requisite steps with respect to affected independent contractors.<sup>23</sup>

The prior status of a person as an employee or independent contractor is also irrelevant to the question whether s/he can claim unemployment income support under Australia's tax-payer funded social security system. Eligibility for such support will primarily depend on a person demonstrating that s/he meets the means test and is actively seeking work.<sup>24</sup>

Moreover, the distinction between employees and independent contractors is largely immaterial from the perspective of Australia's income tax system. Until recently, there was a concern that individuals were increasingly supplying labour services as self-employed contractors in order to minimise their tax liability.<sup>25</sup> This has now been remedied by legislation with this avenue for tax minimisation/avoidance largely closed off with the passage of the *Alienation of Personal Services Income Act 2000* (Cth). Among others, this Act requires workers who derive more than 80% from a particular client to be taxed on the same basis as employees.

Lastly, there are workers' compensation schemes which are quasi-generic in the sense that they cover a significant proportion of independent contractors. Under the New South Wales' scheme, a worker who enters into a contract with another party to perform work exceeding \$10 in value:

- which is not work incidental to a trade or business regularly carried out by the worker; and
  - does not either sublet the contract or employ any other worker;
- is deemed to be an 'employee' of the other party.<sup>26</sup> The Victorian scheme contains a similar provision<sup>27</sup> but goes further in extending its reach to many other independent contractors.<sup>28</sup>

#### **IV. The Approach for Determining Whether A Worker is An 'Employee'**

The prevailing approach for determining whether a worker is an 'employee' considers a range of factors with the key factor being the degree of control the alleged employer has over the worker's activities. Other factors include:

- whether the worker supplies her or his own tools and equipment;
- whether the worker bears any financial risk in performing the work;
- whether the worker is free to perform work for other persons;
- whether the worker is free to delegate the performance of work to others;
- whether the worker is paid wages; and

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<sup>21</sup> *Occupational Health and Safety (Commonwealth Employees) Act 1991* (Cth) s 16(4) and *Occupational Health and Safety Act 1985* (Vic) s 21(3).

<sup>22</sup> *Occupational Health and Safety (Commonwealth Employees) Act 1991* (Cth) s 17; *Occupational Health and Safety Act (NSW) s 16* and *Occupational Health and Safety Act 1985* (Vic) s 22.

<sup>23</sup> For a detailed discussion of these issues, see Richard Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking' (1999) 12 *Australian Journal of Labour Law* 73-112.

<sup>24</sup> A cluster of work-seeking requirements is contained in the 'activity test': *Social Security Act 1991* (Cth) ss 541 and 601.

<sup>25</sup> There were two well-recognised avenues for minimising the tax liability in such circumstances. First, services could be rendered through an interposed entity. This then allows the splitting of income for tax purposes. Second, workers in such situations tended to claim a greater range of income tax deductions: Review of Business Taxation, *A Tax System Redesigned: More certain, equitable and durable: Overview, Recommendations and Estimated Impacts* (1999) 286-94. For discussion of the position prior to the 2000 legislative reforms, see John Buchanan and Cameron Allan, 'The Growth of Contractors in the Construction Industry: Implications for Tax Reform' in John Buchanan (ed), *Taxation and the Labour Market* (1999).

<sup>26</sup> *Workplace Injury Management and Workers Compensation Act 1998* (NSW) Schedule 1, cl 2(2).

<sup>27</sup> The \$10 threshold does not, however, apply: *Accident Compensation Act 1985* (Vic) s 8.

<sup>28</sup> *Ibid* s 9.

- the degree to which the worker is integrated into the alleged employer's business.<sup>29</sup>

An affirmative answer to all but the last two factors will point to the worker being an independent contractor. On the other hand, if a worker is paid wages and highly integrated into the alleged employer's business, s/he is more likely to be considered an employee.

There are two noteworthy points regarding this above approach. First, the economic reality of the relationship between the supplier and hirer of labour does not figure. For example, the fact that the supplier of labour is economically dependent on the hirer of labour is not expressly a factor pointing towards a contract of employment.<sup>30</sup> Secondly, the courts have tended to adopt a formalistic approach in determining whether a particular factor exists. This approach has meant, for instance, that the contractual terms have dictated the answer as to whether the worker is free to work for others or free to delegate the performance of work to others. Courts have clung to this formalistic approach despite situations where the formal freedom conferred by the contract has been insubstantial.<sup>31</sup>

## V. The Challenge of Self-Employment

A recent study has estimated that, in 1998, self-employed contractors, that is, workers who supply labour services through their own business while not engaging any employees, constituted 10.1% of all employed persons in Australia; an increase from an estimated 7.3% in 1978.<sup>32</sup>

A key challenge posed by this growth is the proportion of self-employed contractors who are 'dependent' contractors. These are contractors who share the attribute of employees in being economically dependent on a single hirer of labour but do not have the legal status of an 'employee.' The above study found that, in 1998, between 2.6% to 4.2% of the employed workforce were 'dependent' contractors.<sup>33</sup>

The phenomenon of 'dependent' contractors is undoubtedly fuelled by well-recognised ways to evade the characterisation of a dependent work relationship as one of employment. The interposition of a legal entity between the worker and the hirer of labour is one such method. For example, a worker who supplies labour to another through a company will not have an employment relationship with the hirer of labour. Neither will the company since it is assumed that employees can only be natural persons.<sup>34</sup> This is even when the company's sole purpose is to function as a vehicle for the supply of the worker's labour.

Alternatively, the contours of the work relationship could be shaped in a way that it does not satisfy the various indicia of employment. For instance, a party with stronger bargaining power could engage a worker with the contract requiring the worker to supply his or her own equipment and formally leaving the worker free to delegate the performance of work. A worker that is economically dependent on the hirer of labour will not, however, avail her or himself of this formal freedom to delegate because of the need for income. In such circumstances, the hirer of labour is able to secure the supply of labour through a dependent work relationship while avoiding the characterisation of such a relationship as one of employment. Given that the contract of employment is the regulatory pivot of the Australian labour law system, such avoidance enables the evasion of labour legislation and the attendant imposts.<sup>35</sup>

The challenge posed by dependent contractors has been primarily met in two ways. First, courts and tribunals have been conferred remedial powers to rectify unfair contracts.<sup>36</sup> Second,

<sup>29</sup> *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 and *Hollis v Vabu Pty Ltd* (2001) 75 ALJR 1356.

<sup>30</sup> A lonely exception is Gray J's approach in *Re Porter* (1989) 34 IR 179, 184-5.

<sup>31</sup> See discussion below n 35.

<sup>32</sup> Matthew Waite and Lou Will, *Self-Employed Contractors in Australia: Incidence and Characteristics* (2001) 23, 32.

<sup>33</sup> *Ibid* 35-6.

<sup>34</sup> See *Australian Mutual Provident Society Ltd v Chaplin* (1978) 18 ALR 385, 389-90.

<sup>35</sup> See Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 235.

<sup>36</sup> WR Act s 127A and Part 9 of the *Industrial Relations Act 1996* (NSW).

certain statutes contain provisions deeming certain groups of independent contractors to be employees.<sup>37</sup> These responses have been criticised as inadequate on the ground that they fail to reform the general test for determining whether a worker is an employee.<sup>38</sup>

## VI. The Challenge of Casual Employment

In Australia, a casual employee is statistically defined an employee without entitlement to paid annual or sick leave. This definition largely conforms to the award system under which workers considered casual employees are denied such leave entitlements while being paid a hourly premium called the casual loading.<sup>39</sup> Of note is the fact that casual employees in Australia are not necessarily engaged on short-term contracts.<sup>40</sup>

In the past three decades, there has been phenomenal growth in casual employment as defined above.<sup>41</sup> The employment share of such workers grew from 13.3 per cent of all employees in 1982 to 20.0 per cent in 1989.<sup>42</sup> This sharp growth has persisted over the last decade with casual employees constituting 27.3 per cent of all employees in 2000.<sup>43</sup> Such growth, in the context of lower employment growth, has also seen the increase in casual employment assume greater importance in terms of new jobs created. In the 1990s, for instance, the growth in casual employment accounted for slightly over 70% of net employment growth.<sup>44</sup> Moreover, while casual employment in Australia remains highly feminised, it is now permeating most sections of the workforce.<sup>45</sup>

A key challenge that casual employment poses for Australian labour law is that it is, in many instances, a degraded form of work. This is largely due to the fact that casual employees are not properly compensated for the benefits and security that they are denied. This inadequate compensation or 'an officially sanctioned gap in protection'<sup>46</sup> arises, in part, because of inadequacy of the casual loading.

The casual loading is inadequate for various reasons. It is sometimes not even paid either because the casual employee is not covered by an award or because the relevant award is not properly enforced. Even when paid, the loading falls short of proper compensation as it is primarily aimed at compensating for foregone award benefits.<sup>47</sup> Its compensatory reach does not extend to statutory entitlements denied to certain casual employees, for example, statutory protection against unfair dismissal.

This gap in protection means that casual employment allows work to be performed at a lower cost to the employer than if it were performed by a non-casual employee. The regulatory risks are two-fold: degraded work for casual employees and the ability to evade standard protection by employing labour through a particular mode of employment.

Three responses to the challenge posed by casual employment have been identified in the

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<sup>37</sup> See generally Alan Clayton and Richard Mitchell, *Study on Employment Situations and Worker Protection in Australia: A Report to the International Labour Office* (1999) 52-8.

<sup>38</sup> See Stewart, above n 33, 268-70.

<sup>39</sup> ABS, *Labour Statistics: Concepts, Sources and Methods* (2001) para 4.38

<sup>40</sup> See Joo-Cheong Tham, 'Employment Security of Casual Employees: A Legal Perspective' in Michael Barry and Peter Brosnan (eds), *New Economies: New Industrial Relations: Proceedings of the 18th AIRAANZ Conference: Volume 1: Refereed Papers* (2004) 516-24.

<sup>41</sup> It should be noted that casual employees in Australia are not necessarily subject to employment insecurity.

<sup>42</sup> Peter Dawkins and Keith Norris, 'Casual Employment in Australia' (1990) 16 *Australian Bulletin of Labour* 156, 164. Workers classified by the ABS as casual employees will henceforth be referred to as ABS casual employees. For the ABS definition of casual employment, see discussion above nn 139-40.

<sup>43</sup> Alison Preston, 'The changing Australian labour market: Developments during the last decade' (2001) 27 *Australian Bulletin of Labour* 153, 160.

<sup>44</sup> Iain Campbell and John Burgess, 'Casual Employment in Australia and Temporary Employment in Europe: Developing a Cross-National Comparison' (2001) 15 *Work, Employment & Society* 171, 175.

<sup>45</sup> See Iain Campbell, 'The Spreading Net: Age and Gender in the Process of Casualisation in Australia' (2000) 45 *Journal of Australian Political Economy* 68.

<sup>46</sup> Iain Campbell, 'The Growth of Casual Employment in Australia: Towards an Explanation' in Julian Teicher (ed), *Non-Standard Employment in Australia and New Zealand* (1996) 43, 49.

<sup>47</sup> *Re Metal, Engineering and Associated Industries Award, 1998 - Part 1* (2002) 110 IR 247.

literature:

- *limiting* casual employment;
- *compensating* casual employees for the disamenities of such employment, for example, through the casual loading; and
- *attaching conditions* to casual employment so as to narrow the gap between such employment and non-casual employment.<sup>48</sup>

All three approaches have been adopted by unions. While the pursuit of the first approach is now circumscribed because the AIRC is prevented from awarding clauses which limit the proportion or number of employees in a particular type of employment,<sup>49</sup> unions have sought to limit casual employment through conversion clauses. The Australian Manufacturing Workers' Union for instance, was successful in limiting casual employment by means of a clause entitling casual employees who have had six months of regular employment with an employer to request a conversion to 'permanent' status. This entitlement, however, is heavily qualified as it is subject to the employer's right to refuse on reasonable grounds. In the same case, the union also successfully pursued a compensatory approach in achieving an increase of the casual loading from 20% to 25%.<sup>50</sup> Lastly, the approach of attaching conditions is evident in the Australian Council of Trade Unions' present application to the AIRC which seeks, among others, the extension of severance pay benefits to casual employees who have had more than 12 months' continuous service with an employer.<sup>51</sup>

## VII. Conclusion

It should be apparent from the previous discussion that the scope of Australian labour law significantly depends on the demarcation between workers who are employees and those who are independent contractors. At the same time, key pieces of labour legislation have ignored this distinction by embracing both groups of workers.

The centrality of the contract of employment has meant that the dependent self-employed poses a serious challenge to adequacy of Australian labour law. Another key challenge arises not from this centrality but from the fact that Australian labour law sanctions an under-compensated form of non-standard work, casual employment.

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<sup>48</sup> Barbara Pocock, John Buchanan and Iain Campbell, ' "New" Industrial Relations: Meeting the Challenge of Casual Work in Australia' in Michael Barry and Peter Brosnan (eds), *New Economies: New Industrial Relations: Proceedings of the 18th AIRAANZ Conference: Volume 2: Un-refereed Abstracts & Papers* (2004) 208, 213-4.

<sup>49</sup> *Workplace Relations Act* s 89A(4).

<sup>50</sup> *Re Metal, Engineering and Associated Industries Award, 1998 - Part 1* (2002) 110 IR 247.

<sup>51</sup> See <http://www.e-airc.gov.au/redundancycase/>

For a discussion of the compensatory and conditions-attachment approaches in the context of two specific cases, see Gillian Whitehouse and Tricia Rooney, 'Employment Entitlements and Casual Status: Lessons from Two Queensland Cases' (2003) 29(1) *Australian Bulletin of Labour* 62.