'When your rooster crows...' — it's not a duck!

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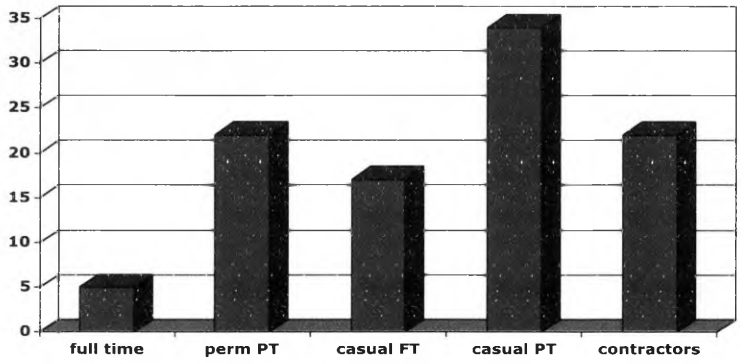
A dominant feature of today's labour market is the surge in non-standard employment. The last decade has seen virtually no increase at all in the number of traditional, full-time jobs in Australia. While the federal government is entitled to point to an overall increase in available positions during its period in office, almost all of this growth has been in part-time, casual and independent contractor work [see chart below]. The library and information sector has been strongly affected by this trend.

Of particular significance is the proportion of workers now regarded as self-employed, or independent contractors: now more than one in five. This makes more than twenty per cent of Australian workers non-employees. More importantly, it removes them legally from the protection afforded by traditional labour law and the industrial relations system. Over time, more than seventy per cent of library workers have been covered by awards and industrial agreements certified and regulated by the industrial tribunals. That percentage is now shrinking. Part of this results from a reduction of the public sector generally. Further impetus is added by increased employment through labour hire companies. And employer preference for hiring short-term people on contracts that allow quick and easy turnover of staff completes the picture.

AUSTRALIAN JOB GROWTH 1992-2002



These arrangements have attractions for many employers — flexibility in handling peaks and troughs in work volumes, for example — and for some employees with special skills. But unpleasant surprises can occur if they are carelessly constructed. They can also create serious problems for many workers. Non-employee contracts offer little protection from unfair termination. No independently-regulated terms and conditions are provided. And there is minimal access to review if things go wrong. Most importantly, many supposed non-employment contracts do not stand up to scrutiny when assessed against proper legal standards.

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Concern about these developments has caused a Full Bench of the Australian Industrial Relations Commission to outline once more the tests to be used in deciding whether a worker is an employee or an independent contractor. Space does not allow me to list all the legal elements involved, but the Bench describes the fundamental point this way: 'the ultimate question will always be whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business on his or her own behalf'. That question is answered by considering 'the totality of the relationship ... the nature of the work performed and the manner in which it is performed'. If the hirer exercises [or has a right to exercise] control over the way work is done, the place of work or the hours of work, the person engaged is almost certainly an employee. If she has her own separate place of work and advertises services to 'the world at large' she is almost certainly an independent contractor, and not an employee. The tests are, however, much more complex than this and every case may require individual assessment. ALIA members can review the legal issues in detail on our website at http://alia.org.au/members-only/employment/contracts/.

The most disturbing circumstance arises when workers are asked to accept classification as 'non-employees' primarily to avoid conditions guaranteed by industrial awards or agreements that would regulate an employment relationship. This is an artifice that flies in the face of proper legal compliance. Parties to contracts constructed for that purpose should understand that they breach basic legal requirements, whether or not the worker agrees to them. And they need to know that intent is not a major factor in determining a contract's real legal status. As the Full Bench firmly re-iterated, parties to a contract cannot change its nature merely by *asserting* that it is something other than what it appears to be. The innate nature of the relationship establishes its legal status. The convenience or preference of employers [or employees, for that matter] does not. In the memorable words of His Honour Justice Gray [*Re Porter and Transport Workers Union of Australia (1989) 34 IR 179*].

> *'...the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck...'* ■