

Independent contracting

- 2.1 Over the last twenty years there has been growth in the number and proportions of independent contractors in the Australian workforce. Around ten per cent of people in employment worked as self-employed contractors in 1998.¹ This figure is an estimate as there is difficulty in identifying such contractors from other employment types.
- 2.2 Differentiating between independent contractors and employees has required the common law to provide guidance. This chapter provides an overview of the need for the courts to determine employment status using factors rather than a definition. It also includes reference to dependent contractors, the occupations and industries in which the majority of independent contractors work, and the advantages and disadvantages of working under independent contracting arrangements for businesses and workers. Finally the chapter reviews current legislative provisions.
- 2.3 Evidence to the Committee provided substantial detail on many of these matters. The report provides a summation of the volume of evidence received.

¹ Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. 56.

Definitions

An overview of employee, independent contractor and employer

- 2.4 The different definitions of 'employee', 'independent contractor' and 'employer', in both Commonwealth and state jurisdictions have been the subject of long-standing concern.²
- 2.5 In Australia, industrial or workplace relations regulation generally identifies employees as those in an employment relationship under a contract of service, where the control of a person's work is exercised by an employer, and therefore is a contract of employment. This is separate from those who are self-employed and work as independent contractors, contracting their services out to a number of clients, being in business for themselves and operating under commercial contracts.³
- 2.6 Where there is a difficulty in differentiating between the two groups, these matters are left to the courts to determine on the basis of various common law tests and criteria.⁴
- 2.7 The *Small Business Deregulation Task Force Report* examined this issue of employee definition in 1996. The Government responded to improving understanding with *Unravelling the Threads – Who is or is not an Employee*, a guide on some of the most common areas of Commonwealth, state and territory legislation which cause confusion to employers.⁵
- 2.8 The guide is available on the internet. It provides some introductory comments and then provides links to each state and territory site with an overview, definitions and legislation on a range of employee requirements including:
- annual holidays;

2 DEWR, *Exhibit No. 25*, p. 11.

3 NSW Government, *Submission No. 35*, p. 11; Prof. A. Stewart, *Submission No. 69*, p. 4, provides further elaboration of the concept of employment. It assumes the existence of a contract of employment (or contract of service) between a person who pays for work to be performed and a person who is to perform that work. As such, it excludes a range of work relationships which either (a) are not contractual in nature at all, as where work is performed voluntarily or for purely domestic purposes; (b) do not involve a contract directly between the parties; or (c) involve a contractual relationship which is characterised as something other than a contract of employment, as where the worker is said to be an 'independent contractor' engaged pursuant to a 'contract for services'.

4 Qld Government, *Submission No. 66*, p. 7.

5 DEWR, *Exhibit No. 25*, pp. 11-12.

- anti-discrimination;
- long service leave;
- occupational health and safety;
- payroll tax;
- workers' compensation;
- fringe benefits tax;
- income tax;
- superannuation; and
- common law.⁶

2.9 The website, which seeks to provide guidance, also demonstrates the range of legislative requirements that employers must meet. Other descriptions of definitions for the Commonwealth include the *Workplace Relations Act 1996 (Cth)* (WR Act). Subsection 4(1) of the WR Act uses the common law meanings, that is:

- 'employee' includes any person whose usual occupation is that of employee, but does not include someone undertaking a vocational placement;
- 'employer' is a person who is usually an employer, but is expanded to include an unincorporated club; and
- 'independent contractor' takes its common law meaning in subsection 4(1A) of the Act but is limited to natural persons except in regard to the freedom of association provisions in Part XA of the WR Act.⁷

2.10 The terminology for an individual contractor can vary, depending on the industry involved. Independent contractor, sub-contractor or self-employed contractor are often interchanged terms used to describe business arrangements. Other definitions suggest that a contract for services is a commercial contract where control of the work is exercised through the terms of the contract and both parties have an

6 Australian Government, Department of Industry, Tourism and Resources, *Unravelling the Threads. Who is or is not an employee*. For NSW this leads to a document with 89 pages; accessed 25 May 2005, <www.isr.gov.au/content/itrinternet/cmscontent.cfm?ObjectID=5DB70DAB-0B1D-4737-8F2E2E224EAC7A42>.

7 DEWR, *Exhibit No. 25*, p. 11; IR Australia, *Submission No. 31*, p. 1.

equal right to control the terms through the offer and acceptance process.⁸

Differentiating between employees and independent contractors

- 2.11 The common law definitions have been criticised because their application has required developing a multi-factor test to assess whether a worker is an employee or a contractor. The NSW Government submission provides a more detailed overview of the background to identify the existence of a contractual relationship, and then distinguish between contracts of service and contracts for services, and the application in the courts.⁹
- 2.12 In summary, the approach adopted by the courts in applying the common law principles as to employment status relies on a test which involves the consideration of a number of established factors or indicia. It was determined by the High Court in cases such as *Stevens v Brodribb Sawmilling Co Pty Ltd (1986)*. Some of these indicia are characteristic of a contract of service and others suggest a non-employment relationship. The task of the court or tribunal is to assess the status of a worker considering the parties' relationship in respect of each of these indicia and to determine, on balance, if an employment relationship exists.¹⁰
- 2.13 The NSW Government submission citing Professor Andrew Stewart states that there is no unanimously accepted understanding of how many indicia, or what combination, must point towards a contract of service before the worker can be characterised as an employee. Essentially, this 'multi-factor' test proceeds on the assumption that the courts will know an employment contract when they see it.¹¹
- 2.14 As to the relative importance of each indicia, the extent of the hirer's right to control not just what work is done, but the way it is done, is very important. The greater the hirer's capacity for control, the more likely it is that the worker is an employee. Additionally, having the power to delegate or sub-contract is another very important

8 Small Business Development Corporation (SBDC), *Submission No. 58*, p. 3; Waite, M and Will, L, 2001, *Self Employed Contractors in Australia*, Productivity Commission Staff Research Paper, p. 1.

9 NSW Government, *Submission No. 35*, pp. 13-17.

10 Stewart, A, 2002, *Redefining Employment? Meeting the Challenge of Contract and Agency Labour*, 15, *Australian Journal of Labour Law*, p. 243.

11 NSW Government, *Submission No. 35*, pp. 15-16.

determinative factor.¹² Other relevant indicia are summarised in Table 2.1. Additional information on differentiating between employers and independent contractors and the implication for legislation requirements is included in Appendix E.

Table 2.1 Indicia for multi-factor test to determine if an employment relationship exists.

Indicia	Explanation
1 The degree of control the worker has over the work	For example, is the worker subject to direction on how the work will be done, not just what the job is?
2 The degree to which the worker is integrated into, and is treated as part of the hirer's enterprise	For example, if the worker wears the hirer's uniform and represents the hirer's enterprise to the public, this supports the worker being an employee
3 Whether the worker is making a significant capital contribution (such as by using his or her own motor vehicle and carrying the maintenance and running costs) to the enterprise	If the worker is doing this, it supports finding an independent contractor arrangement exists. If all the worker brings, on the other hand, are the ordinary tools of his or her trade, this is not likely to be a significant factor
4 How the hirer pays the worker – for example, by results or on an hourly basis.	If the worker is paid by the results achieved, it supports finding an independent contractor arrangement exists;
5 Whether the worker has an obligation to work	If the hirer has the right to dictate hours of work and the worker cannot refuse tasks, this supports the worker being an employee
6 The provision of leave, superannuation and other entitlements	These usually apply to employment and not to an independent contractor
7 The place of work	If the worker works at his or her own premises, this supports the worker being an independent contractor
8 Whether the worker has the right to delegate the work to others	If the worker can employ other people to do the work (that is, 'subcontract the work out'), this supports the worker being an independent contractor;
9 Whether income tax is deducted by the hirer	This supports the worker being an employee
10 Whether the worker provides similar services to the general public	For example, if a worker advertises his or her services to the public or tenders for work, this supports an independent contracting arrangement
11 Whether there is any scope for the worker to bargain for the rate of remuneration	If there is no scope, this supports a finding that the worker is an employee
12 Whether the worker is providing skilled labour or labour that requires special qualification	If so, this supports an independent contracting arrangement
13 Whether the issue of deterrence of future harm arises	For example, where the hirer is in a position to reduce accidents by efficient organisation and supervision, this may support the worker being an employee, particularly in cases concerning vicarious liability.

Source *Compiled from Australian Government, Department of Employment and Workplace Relations, Exhibit No. 25, Appendix 2, p. 36.*

12 Stewart, A, 2002, Redefining Employment? Meeting the Challenge of Contract and Agency Labour, 15, *Australian Journal of Labour Law*, p. 243.

- 2.15 The application of this approach has not led to uniform outcomes. It has been suggested that the lack of a clear, objective distinction between employee and contractor status results in significant compliance costs for businesses engaging a diverse workforce.¹³
- 2.16 However, this is not a universal view. Some in the business sector submit that differentiating between employment and genuine independent contracting arrangements should be determined only by courts using the well established common law principles.¹⁴
- 2.17 It is also argued that it is not a fault with the principles which leads to what some consider to be subjective outcomes; rather it is the complex factual situations to which they apply.¹⁵
- 2.18 Further discussion of definitions continues in Chapter 4, and concerns with contracting arrangements in Chapter 5.

Dependent contractors

- 2.19 The difficulty in identifying the working relationship has given rise to new terminology, which in turn adds to the complexity. This is illustrated in the notion of 'dependent contractors'. The term attempts to describe those workers that are not considered to be genuinely independent of the principal business for whom the work is being performed. They are described as sharing most of the characteristics of an employee, and having economic dependency on one organisation.¹⁶ It is estimated that around 25 per cent of independent contractors are in a dependent employment relationship.¹⁷
- 2.20 However, some submissions to the inquiry strongly reject the notion of dependency, and state that workers are either employees and therefore should be regulated under workplace legislation, or are independent contractors and should be regulated under commercial legislation.¹⁸

13 DEWR, *Exhibit No. 25*, p. 12.

14 SBDC, *Submission No. 58*, p. 3.

15 DEWR, *Exhibit No. 25*, p. 12.

16 NSW Government, *Submission No. 35*, p. 11; Australian Rail, Tram and Bus Union, (RTBU) *Submission No. 45*, p. 3.

17 Australian Council of Trade Unions (ACTU), *Submission No. 60*, p. 11.

18 Australian Chamber of Commerce and Industry (ACCI), *Submission No. 25*, pp. 23-25; Independent Contractors Association (ICA), *Submission No. 20*, pp. 6-8.

- 2.21 In the Australian Government discussion paper *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements* it states that:
- ... the common law appropriately maintains the distinction between employment and independent contracting arrangements. Unlike many statutory definitions, it does not 'deem' classes of workers to be one or the other, but looks to the individual circumstances involved. It does not recognise the 'half-way house' notion of 'dependent contractors' which can serve to blur the distinction between commercial relationships and employment relationships.¹⁹
- 2.22 This is contrary to the position of a number of state government submissions which include the deeming of individuals to be employees in certain occupations. State legislation to support this approach has been introduced in some jurisdictions because of the perceived dependency involved, and the lack of bargaining power of one party to enable fair and effective contracting arrangements.²⁰
- 2.23 On one front, the Australian Government has sought to clarify independent contractor arrangements in relation to taxation with the introduction of the *Alienation of Personal Services Income Act 2000* (PSI). This was to ensure that taxation of those that are essentially in an employment relationship continues under the Pay As You Go (PAYG) system, rather than as a business and at a lesser rate with more access to deductions in the PAYG instalment system.²¹
- 2.24 The issues of the common law, deeming and consistency with the personal services income assessment and the effectiveness of these measures are considered in more detail in Chapter 4. This is fundamental to the consideration of strategies that can be pursued consistently and legitimately across state and federal jurisdictions.

Other legislation

- 2.25 The identification of an employment relationship is necessary as there are responsibilities relating to: industrial relations; occupational health and safety (OHS); workers compensation; liability; minimum labour standards; collective bargaining rights; employment

19 DEWR, *Exhibit No. 25*, p. 12.

20 NSW Government, *Submission No. 35*, pp. 35-36; Qld Government, *Submission No. 66*, p. 34; Vic. Government, *Submission No. 71*, p. 7, in relation to outworkers.

21 Qld Government, *Submission No. 66*, p. 36.

termination; taxation; and superannuation.²² Where an employment relationship is not identified then, these responsibilities, in the main, do not fall on the host business but on the independent contractor to make their own arrangements. OHS legislation generally imposes obligations in relation to employees and contractors alike, although the details of the duties may differ.

- 2.26 However, for some legislation the definition of employment is broad and includes work under a contract for services, including independent contracting arrangements. This includes, for example, the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1992* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Aged Discrimination Act 2004* (Cth). This reflects a policy approach which seeks to provide protection from discrimination in all areas of work no matter the form of the relationship.²³
- 2.27 This section on definitions has sought to identify the key features of the difference between employees and independent contractors, and the importance of the common law approach in differentiating between them. Further discussion of this continues in Chapter 4 where strategies to respond to these issues are discussed.
- 2.28 The difficulties, in identifying who's who, also spill over into determining the prevalence of independent contractors, which is discussed in the next section.

Prevalence of independent contractors

- 2.29 As mentioned briefly in Chapter 1, difficulties in definition and identification present problems for estimating the prevalence of independent contractors (or self-employed contractors) in Australia. However, researchers agree that in the last twenty years there has been growth in the overall numbers and proportions of independent contractors in Australia.²⁴
- 2.30 According to estimates by the Productivity Commission, around 10.1 per cent of people in employment in Australia worked as self-

22 IR Australia, *Submission No. 31*, p. 1; DEWR, *Exhibit No. 25*, p. 12.

23 DEWR, *Exhibit No. 25*, p. 12.

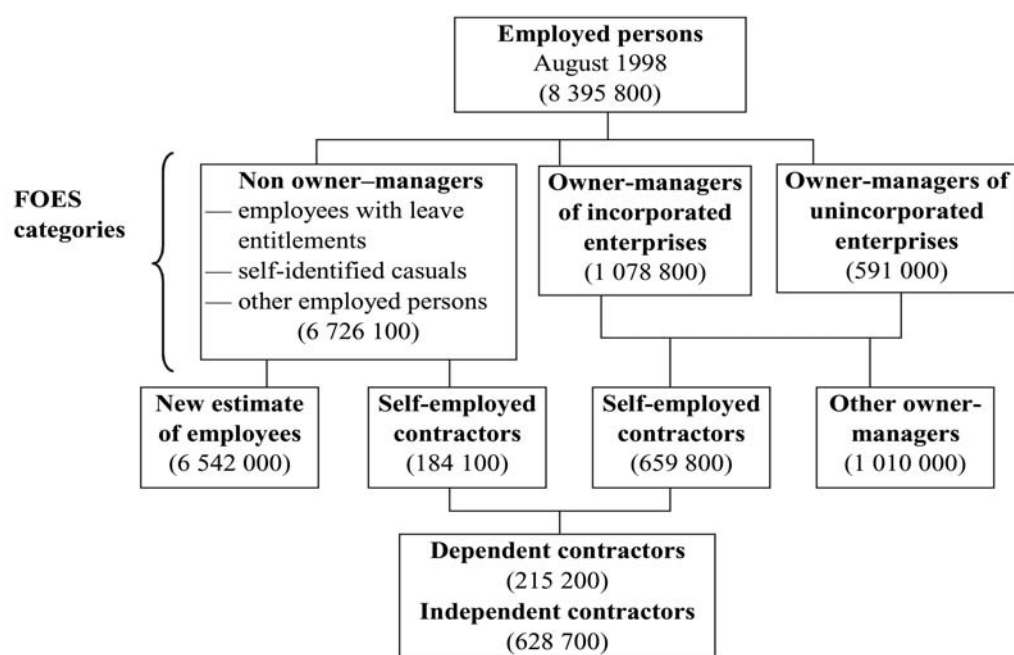
24 Qld Government, *Submission No. 66*, p. 10. Refer to Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, for a full discussion of estimation difficulties.

employed contractors.²⁵ Other researchers cite a growth of around 15 per cent from 1978 to 1998.²⁶

2.31 The ABS Forms of Employment Survey (FOES) provides the most recent data on self-employed contractors. However, previous research has required estimates developed from unpublished data from this survey. Owner-managers are considered to make up the majority of self-employed contractors (up to 80 per cent).²⁷ Notwithstanding this, self-employed contractors are potentially located in most of the FOES categories.

2.32 Figure 2.1 indicates the overlap in the data types, and provides an estimate of prevalence of working arrangements. This is the most in-depth analysis currently available.

Figure 2.1 Distribution of employment by type, August 1998(a)



Source: Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, Figure 4.1, p. 37. (a) Persons who work as contributing family members and only for payment in kind are excluded. Data source: ABS, *Forms of Employment Survey*, Cat. No. 6359.0.

25 Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. 56.

26 DEWR, *Exhibit No. 25*, p. 7, citing research by VandenHeuvel, A and Wooden M, 1995, *Self employed contractors in Australia: how many and who are they?* *Journal of Industrial Relations*, vol 37, no. 2.

27 Qld Government, *Submission No. 66*, p. 10.

2.33 The most recent FOES published in May 2005 provides a comparison of employment types from 1998 to 2004 (Table 2.2). Prior to this, time-series data on self-employed contracting does not exist.

Table 2.2 Employed persons aged 16-69 years (a) (b), Employment type – August 1998 to November 2004 (excerpt).

<i>Employment type</i>	August 1998		November 2004	
	<i>'000</i>	<i>%</i>	<i>'000</i>	<i>%</i>
Employees with paid leave entitlements(c)				
Works on a fixed term contract	198.3	2.4	201.5	2.1
Does not work on a fixed term contract	4 881.1	58.4	5 537.6	57.8
Employees without paid leave entitlements (c)(d)				
Works on a fixed term contract	67.8	0.8	82.1	0.9
Does not work on a fixed term contract	1 613.9	19.3	1 895.4	19.8
Owner managers of incorporated enterprises				
Works on a contract basis	205.1	2.5	132.9	1.4
Does not work on a contract basis	314.1	3.8	544.2	5.7
Has employees	336.3	4.0	432.1	4.5
Does not have employees	182.9	2.2	244.9	2.6
Owner managers of unincorporated enterprises				
Works on contract basis	369.4	4.4	314.1	3.3
Does not work on a contract basis	701.3	8.4	875.6	9.1
Has employees	293.9	3.5	288.3	3.0
Does not have employees	776.9	9.3	901.4	9.4
Total	8 351.0	100.0	9 583.0	100.0

Source Adapted from ABS, *Forms of Employment, Cat. No. 6359.0, November 2004, Table 1.* (a) Excludes persons who were contributing family workers in their main job; (b) Scope of 2001 survey was restricted to persons aged 15-69 years; (c) Excludes owner managers of incorporated enterprises. (d) Includes persons who did not know whether they were entitled to paid holiday leave and paid sick leave in their main job.

- 2.34 Given that more detailed analysis has not been completed since the 2004 information was released in May 2005, these most recent figures allow for some comparison using owner-managers as a proxy.²⁸ The figures show that for both types of owner-managers there has been a decrease in the proportion that works on a contract basis from 1998 to 2004. That is, a decrease from 6.9 per cent to 4.7 per cent of all employed persons for owner-managers of incorporated and unincorporated enterprises.²⁹ Those working on a non-contract basis have increased. Without further breakdown of the data, meaningful analysis and interpretation is not possible.
- 2.35 As an example of one state's figures provided to the inquiry, Queensland reports that self-employed contractors represent 6.7 per cent of their total employment (June 2004). They also cite a decrease in proportions compared to overall employment since 1998 figures, but an overall increase in numbers.³⁰
- 2.36 Given that some of the data deficiency also occurs in relation to labour hire, the Committee has addressed this issue with a recommendation relating to both labour hire and independent contractors in the following chapter on labour hire. (See Recommendation 1 in Chapter 3.)

Occupation

- 2.37 Independent contractors are found in every occupation type. Referring to the most comprehensive analysis by the Productivity Commission, tradespersons and related workers are by far the largest group of self-employed contractors. Tradespersons and related workers account for only 11.9 per cent of all employees. Twenty seven per cent of all self-employed contractors work in the trades.³¹

28 Other surveys use own-account workers as a proxy, Australian Manufacturing Workers Union (AMWU), *Submission No. 46*, p. 13.

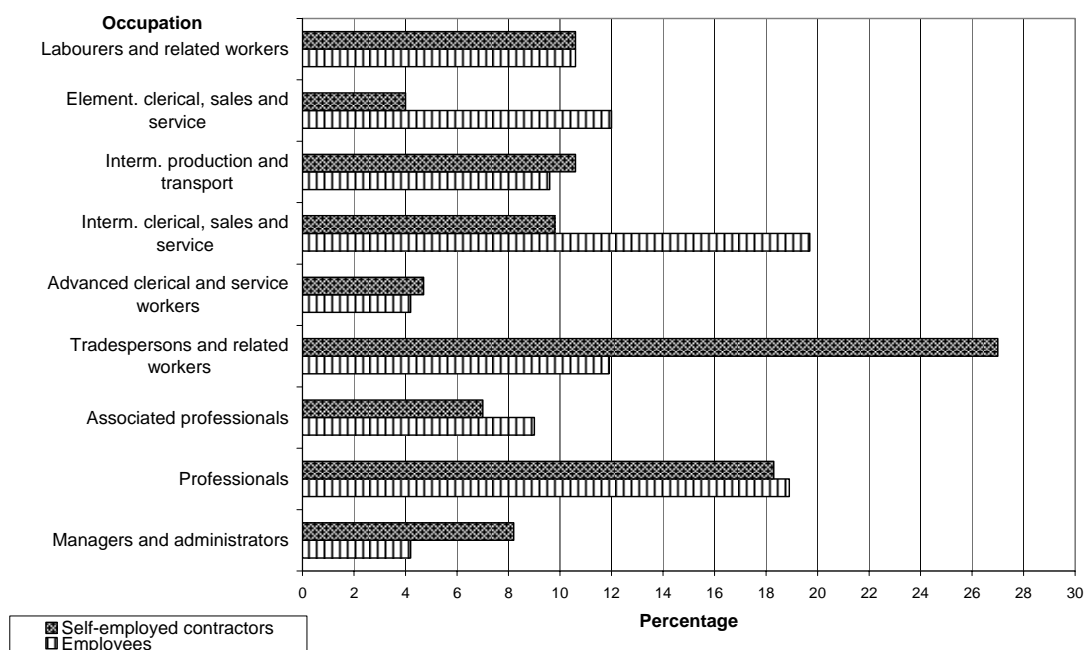
29 ABS, *Forms of Employment*, Cat. No. 6359.0, November 2004: Glossary: *Owner managers*: persons who work in their own business, with or without employees, whether or not the business is of limited liability. *Incorporated enterprise* is an enterprise which is registered as a separate legal entity to its members or owners. Also known as a limited liability company. *Unincorporated enterprise* is a business entity in which the owner and the business are legally inseparable, so that the owner is liable for any business debts that are incurred; p. 41.

30 Qld Government, *Submission No. 66*, p. 11.

31 Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. 45.

- 2.38 Professionals were the second largest group of all self-employed contractors at 18.3 per cent, with a similar proportion of employees. The Association of Professional Engineers, Scientists and Managers Australia (APESMA) has reported significant growth of a special interest group for independent contractors and consultants, with a 120 per cent increase from 2001 to 2005.³²
- 2.39 Together, the occupations of intermediate production and transport, and labourers and related workers make up 10.6 per cent each of the total amount of self-employed contractors in the Australian workforce. The proportion of employee labourers and related workers to all employees is also 10.6 per cent. The proportion of intermediate production and transport workers who work as employees is 9.6 per cent.³³

Figure 2.2 Percentage distribution of employees and self-employed contractors by occupation, August 1998 (a).



Source Adapted from Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, Table 5, p. 47. Estimates derived from unpublished data from ABS Cat. No. 6359.0. (a) The category 'employee' includes employees and self-identified casuals.

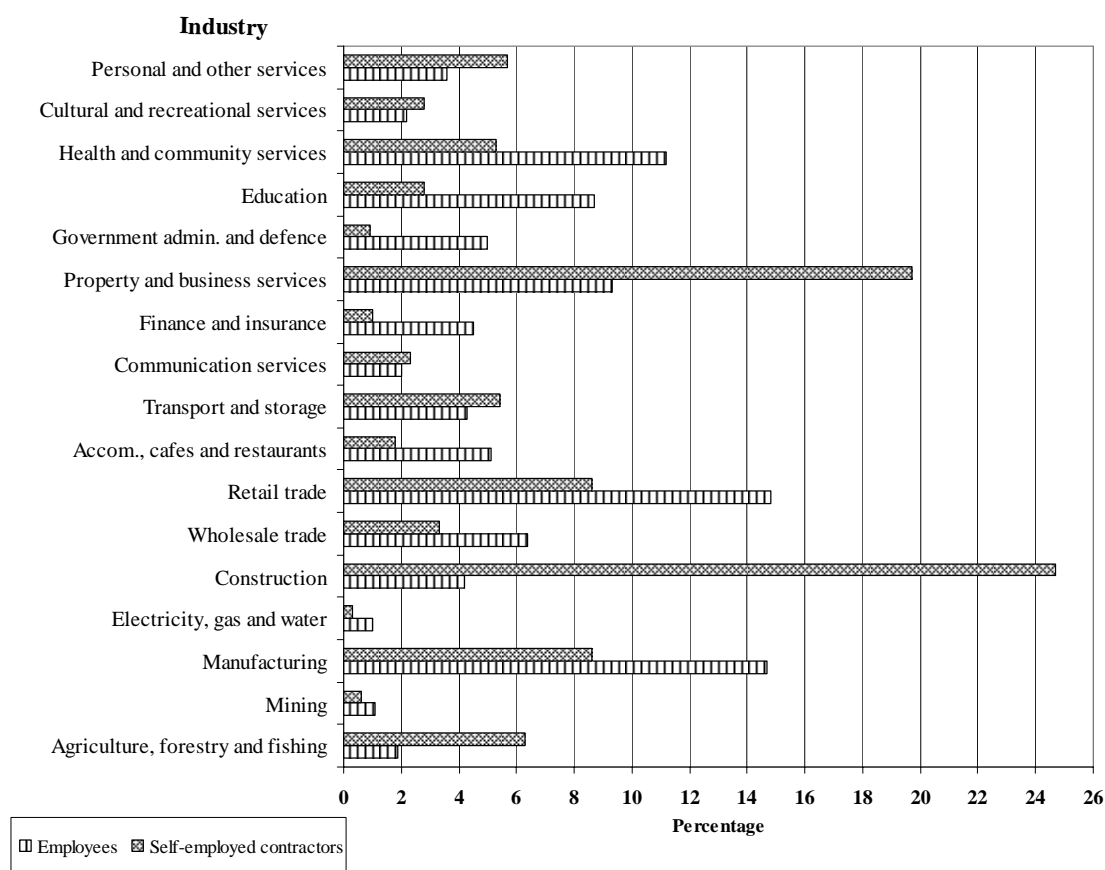
32 APESMA, *Submission No. 7*, p. 6.

33 DEWR, *Exhibit No. 25*, p. 8.

2.40 For detail on state and territory comparisons, and distribution of self-employed contractors across occupations and industries refer to the publication *Self-employed Contractors in Australia: incidence and characteristics*.³⁴

2.41 This publication includes the category of dependent contractors and states that they share many characteristics with employees. However, Professor Stewart states that not all dependent contractors are likely to be disguised employees, since it is possible for some genuine businesses to work for a single client at a time, and for lengthy periods.³⁵

Figure 2.3 Percentage distribution of employees and self-employed contractors by industry, August 1998(a).



Source Adapted from Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, Table 5, p. 47. Estimates derived from unpublished data from ABS Cat. No. 6359.0. (a) The category 'employee' includes employees and self-identified casuals.

34 Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra.

35 Prof. A. Stewart, *Submission No. 69*, footnote 3, p. 3.

Industry

- 2.42 Independent contracting is apparent across all sectors of industry, but tends to be concentrated within a number of industries.
- 2.43 Around one-third of self-employed contractors work in construction (34.6 per cent), followed next by a significant proportion in property and business services (18.4 per cent). Transport and storage (9.0 per cent) and manufacturing (8.3 per cent) had high concentrations of self-employed contractors in 2001.³⁶
- 2.44 In construction, especially in housing as opposed to commercial construction, it was stated that sub-contracting is prevalent. Explanations of this high rate of contracting suggest that the construction industry is sensitive to the economic cycle which means that the demand for labour fluctuates with the peaks and troughs of the cycle.³⁷ The Construction Forestry Mining and Energy Union (CFMEU) from their research support the finding of a significant proportion of independent contractors in the construction industry.³⁸
- 2.45 Property and business services includes computer services such as help desk services, hardware installation and system design and maintenance. These services are often contracted out to skilled workers in Australia.³⁹
- 2.46 The most common type of independent contractors in the transport services industry is owner-drivers. Owner-drivers supply their own vehicle to deliver goods for a client. In 1998, 5.4 per cent of all self-employed contractors worked in the transport and storage industry.⁴⁰
- 2.47 Victoria has recently completed an extensive review of owner-drivers and forestry contractors. Around 10 per cent of all employed persons in the Victorian transport and storage industry were identified as contractors. The key factor that distinguishes owner-drivers from employees is that they provide a vehicle or vehicles for hire, along with services of driving the vehicle.

36 Qld Government, *Submission No. 66*, p. 12. The figures cited from 1998 in Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Table 5.7, p. 47 differ but the proportions are similar.

37 DEWR, *Exhibit No. 25*, p. 7.

38 CFMEU, *Submission No. 5*, Appendix 2: Speech of Mr J. Sutton National Secretary CFMEU Construction and General Division, p. 3.

39 DEWR, *Exhibit No. 25*, p. 8.

40 DEWR, *Exhibit No. 25*, p. 8 citing Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, p. 47.

- 2.48 However, the review found and submissions to this inquiry state that, owner-drivers have working conditions similar to employees, and are often referred to as dependent contractors (as opposed to the traditional notion of independent contractors who work for many clients), or as 'disguised employees'.⁴¹ This issue will be raised further in the next section under arrangements and in Chapter 4.
- 2.49 In 1998, the manufacturing industry accounted for 8.6 per cent of self-employed contractors. There are different types of contract workers in manufacturing. These range from business-to-business relationships (where the contractor supplies finished parts or components for the production process), to the self-employed contractors who are paid according to their output and produce part, if not most, of the finished goods. Additionally, contractors also include those whose input is not directly related to the finished product (for example, cleaners and maintenance).⁴²
- 2.50 The National Farmers' Federation (NFF) states that there is insufficient data to provide a breakdown of independent contractors and labour hire workers in agriculture, other than 14.5 per cent of workers describe themselves as self-employed contractors in that industry.⁴³

Working arrangements – advantages and disadvantages

- 2.51 Although there is debate about the legitimacy of distinguishing between independent contractors and dependent contractors (and use of the term), evidence has been provided to the Committee that suggests that not all contracting arrangements are fully meeting the tests of independency.
- 2.52 As reviewed earlier in this chapter in Table 2.1 showing the indicia for establishing an employment relationship, how the independent contractor works and is managed will vary.

41 Vic. Government, *Submission No. 71*, pp. 8-9; TWU-Vic./Tas. Branch, *Submission No. 56*, pp. 4-7.

42 DEWR, *Exhibit No. 25*, p. 8.

43 NFF, *Submission No. 39*, p. 6.

- 2.53 Some workers seek to be classified as an independent contractor, prompted by at least two conditions, which are not necessarily mutually exclusive:
- free choice and seeking more independent working arrangements and the opportunities to grow a small business; and
 - if already employed, the option for a worker to increase weekly take home pay, but be required to take on additional costs and responsibilities.
- 2.54 Some industry sectors are dominated by independent contractor arrangements and workers seeking to enter these sectors are obliged to enter into these types of arrangements.
- 2.55 Evidence from a range of contracting organisations indicated that independent contracting is being embraced by workers who see advantages in working under less regulated structures with opportunities to improve their standard of living. This may include more freedom to choose working hours, decide when to take holidays, who they work for, what type of work they undertake and what rates they wish to charge.⁴⁴
- 2.56 Other individuals, responding to a survey of professionals, engineers and managers, also cited the following reasons for choosing independent contracting:
- better lifestyle;
 - better balance between work and family; and
 - better money.⁴⁵
- 2.57 The majority indicated that they were satisfied operating under contractor arrangements. However, while many workers indicated that they chose independent contracting for a better balance between work and family, many reported that family disruption had occurred, so their expectations had not been met. Other disadvantages included:
- lack of income security, and difficulty in securing loans;
 - difficulty in locating clients; and
 - few holidays and long hours.⁴⁶
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44 AICA, *Submission No. 64*, pp. 7, 20; Tasmanian Contracting Services, *Submission No. 62*, p. 1; ICA, *Submission No. 20*, p. 5; Mr J. O'Sullivan, DEWR, *Transcript of Evidence*, 12 May 2005, p. 30.

45 APESMA, *Submission No. 7*, p. 10.

- 2.58 The advantages for independent contractors appear to be more apparent for those at higher skilled work levels which would apply to professionals, engineers and managers.⁴⁷ Other submissions suggest that those that are less able to have control over working procedures, are unable to subcontract, and who are reliant mainly on one client have poorer economic and social outcomes.⁴⁸
- 2.59 If a distinction of independent and dependent contractor is appropriate, in a comparison of contractors, the Productivity Commission (2001) found that workers in lower skilled occupations often with less control over their working arrangements are more likely to fit into a dependent contractor category:
- 72 per cent of independent contractors were in skilled occupations; and
 - 72 per cent of dependant contractors were in the lower skilled occupations such as plant machine operators and drivers.⁴⁹
- 2.60 However, this use of the classification of higher skilled and lower skilled is not supported in some cases. Independent Contractors Australia questioned its use,⁵⁰ and the Australian Services Union (ASU) provided an example of an IT worker who they considered was in an employee type arrangement while classified as an independent contractor.⁵¹
- 2.61 In summary, the reasons for the growth of independent contracting (and labour hire) are attributed to employer driven and employee (or worker) factors. These include:
- employer driven factors:
 - ⇒ responding to fluctuations in demand – a trend to engage ‘just-in-time’ labour to avoid continuing costs;
 - ⇒ needing specialist skills;
 - ⇒ reducing overall administration and labour costs through an all-inclusive fee (plus the provisions of specialised services);

46 APESMA, *Submission No. 7*, pp. 10-11.

47 This is perhaps reflected in the APESMA survey mentioned earlier.

48 Vic. Government, *Submission No. 71*, p. 11.

49 Qld Government, *Submission No. 66*, p. 4.

50 Mr K. Phillips, ICA, *Transcript of Evidence*, 26 April 2005, p. 63.

51 Mr P. Slape, ASU, *Transcript of Evidence*, 27 April 2005, p. 65.

- ⇒ engaging labour under contracts for service as opposed to employment to reduce exposure to industrial relations regulation;
 - ⇒ removing the influence of unionised workers; and
 - ⇒ reducing staffing numbers for reporting purposes.⁵²
- employee or worker driven factors:
 - ⇒ own choice to work on a self-employed basis;
 - ⇒ flexibility;
 - ⇒ working culture reluctance to be an employee;
 - ⇒ incentives in certain skill areas, such as recently in information technology;
 - ⇒ a trend for higher income earners to become contractors for income tax purposes; and
 - ⇒ predominant industry working arrangement trends.⁵³

Advantage for business outweighing the advantage for individuals?

- 2.62 Some argue that the growth in independent contracting mainly rests on the advantages to the business. As stated, the benefits include the reported capacity to pay lower rates overall and lower conditions, contracts can be terminated more quickly and there is less regulation without the need for employee protection or benefits.⁵⁴
- 2.63 The Australian Rail, Tram and Bus Union (RTBU) state that this advantage is offset by the disadvantages to the independent contractor taking on additional costs and the risks outweigh the benefits.⁵⁵
- 2.64 One labour hire agency notes that it is not only the client sector that specifies a preference for independent contracting arrangements. Individuals request these arrangements, mainly for the flexibility and tax advantages they offer. It was suggested that with the current skill shortages facing businesses, many professionals will only provide their services as an independent contractor. Ross Human Directions

52 Qld Government, *Submission No. 66*, pp. 15-16; Ms V. Nock, *Manpower, Transcript of Evidence*, 31 March 2005, p. 29; Mr D. Cameron, *AMWU, Transcript of Evidence*, 31 March 2005, p. 70.

53 Vic. Government, *Submission No. 71*, p. 10; Qld Government, *Submission No. 66*, pp. 16-17; TWU-Australia, *Submission No. 24*, p. 5.

54 Mr A. Thomas, *RTBU, Transcript of Evidence*, 30 March 2005, p. 65.

55 Mr A. Thomas, *RTBU, Transcript of Evidence*, 30 March 2005, p. 65.

state that the claims that employees are being coerced into signing “contracts for service” in order to get work are not applicable to clients of responsible members in the recruitment industry.⁵⁶

- 2.65 The Committee has received a range of evidence on this matter not just within the labour hire industry, with examples that workers are either:
- being encouraged to become independent contractors and are inappropriately categorised; or are
 - not negotiating reasonable rates to ensure that they are financially able to meet their obligations.
- 2.66 These include workers in a broad range of industries and occupations. For example in the sex industry, manufacturing, aged care, transport and owner-drivers, security, cleaning, clerical and interpreters and translators,⁵⁷ among others.
- 2.67 If this is the case then avenues of redress should be and have been considered. It was stated that independent contractors are meant to be regulated under commercial law. The next section provides a summary of the legislation that is applicable.
- 2.68 Due to concerns about worker welfare, state governments have introduced unfair contracts provisions and deeming legislation to ensure that such workers have protections under the industrial relations legislation. They consider that many of these workers are dependent contractors or disguised employees.

Trade practices and contracts legislation

- 2.69 Business groups and those specifically representing independent contractors indicate that contractors are individuals who organise their work through a commercial contract, rather than through an

56 Ross Human Directions, *Submission No. 54*, p. 6.

57 Australian Sex Workers Association, *Submission No. 74*, p. 1; NT AIDS and Hepatitis Council, *Submission No. 63*, p. 1; Australian Institute of Interpreters and Translators, *Submission No. 37*, pp. 11-12, Department of Employment and Consumer Protection WA, *Submission No. 33*, pp. 1-3; Liquor Hospitality and Miscellaneous Workers Union, *Submission No. 12*, pp. 1-2; TWU-NSW, *Submission No. 40*, pp. 6-7; The Salvation Army Moneycare Service ACT, *Submission No. 68*, p. 1; NUW, *Submission No. 47*, p. 13.

employment contract.⁵⁸ Independent Contractors of Australia (ICA) argue they are 'businesses in their own right'.⁵⁹

2.70 Independent contractors are subject to the obligations and protections which are regulated under commercial law such as the *Trade Practices Act 1974* (Cth), (TPA). The Housing Industry Association (HIA) summarises that:

- contracts are negotiated individually and their contents will reflect competitive forces and relative bargaining power;
- unlike employee entitlements under Awards, contracts can not be changed or varied by central authority across whole classes of contractors;
- individual harsh and unconscionable contracts can be re-made by courts and Industrial Commissions, but only in exceptional circumstances; and
- the *Trade Practices Act 1974* regulates the abuse of market power and prohibits a range of unfair practices including collusive bargaining, price-fixing and resale price maintenance ...⁶⁰

2.71 As noted in point three above, the TPA contains provisions proscribing unconscionable conduct in business to business transactions. These transactions are mirrored in state corresponding legislation such as the *Fair Trading Act 1999* (Vic).⁶¹

2.72 Other state legislation includes:

- NSW - s106 *Industrial Relations Act 1996* -- provides that a tribunal may declare a contract void if, in the view of the tribunal, the performance of the work constituted an unfair contract where:
 - ⇒ it is unfair, harsh or unconscionable;
 - ⇒ unfair tactics or pressure were exerted on the parties to get agreement;
 - ⇒ it is against the public interest;
 - ⇒ the total remuneration is less than that received by an employee performing the work;

58 ACTU, *Submission No. 60*, p.11.

59 ICA, *Submission No. 20*, p. 5.

60 HIA, *Submission No. 61*. pp. 7-8.

61 Vic. Government, *Submission No. 71*, pp. 39-40.

⇒ it avoids, or is designed to avoid, the provision of an award or agreement.⁶²

- South Australia – *Industrial and Employee Relations Act 1994* and *Industrial Law Reform (Fair Work) Act 2005*. Attempts to include unfair contract provisions, and contractor deeming provisions were not supported in the final bill.⁶³
- Victoria – referred its workplace relations powers to the Commonwealth, thereby covered by federal legislation which includes unfair contracts; *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003* provides some protection for clothing industry and contract workers.
- Tasmania – *Industrial Relations Act 1984* incorporates outworkers in its definition of employee. It currently contains no deeming or unfair contracts provisions. However, the Tasmanian Government released a discussion paper last year which would add these kinds of provisions.
- Western Australia – *Industrial Relations Act 1979* (expansion of common law definition)
- ACT and Northern Territory – covered by the WR Act
- Queensland – s275 and s276 *Industrial Relations Act 1999*. Section 275 of the Qld IR Act allows the Commission to declare a class of contractors to be employees; section 276 gives the Queensland Industrial Relations Commission power to investigate contractual remedies.⁶⁴

2.73 As an example, the Queensland Government provides a Fact Sheet on Unfair Contracts based on Section 276 of the Queensland *Industrial Relations Act 1999*. It states that the purpose of the section is to provide a review process: for contractors (a contract *for* service) that is an unfair contract; or a contract *of* services (with respect to an employee) that is not covered by an award or agreement which is an unfair contract.⁶⁵

62 DEWR, *Exhibit No. 25*, pp. 15 -17.

63 Government of South Australia, Hon Michael Wright MP, *Fair Work Laws Start*, News Release, 16 May 2005; *Workplace Express*, 10 March 2005, 'Finally SA's new IR bill gets through Parliament'.

64 DEWR, *Exhibit No. 25*, pp. 17-19.

65 Qld Government, Department of Industrial Relations, *Wageline: Unfair Contracts: Fact Sheet*, p. 1, accessed 31 May 2005, <www.wageline.qld.gov.au/pdfs/publications/fctsht_unfaircontracts_v1mar05.pdf>.

Workplace Relations Act 1996

- 2.74 The Queensland unfair contracts provisions in the legislation are similar to the Commonwealth WR Act 1996. However the Australian Government in 1996 and 1999 sought to remove these provisions.⁶⁶ The removal of these provisions would be consistent with the Government's policy that independent contracting arrangements should be regulated by commercial law, not workplace relations law.
- 2.75 The Victorian Government supports at the minimum the retention of the existing Commonwealth workplace relations unfair contracts jurisdiction in ss127A-C of the WR Act 1996 and the existing criteria in s127A(4).⁶⁷
- 2.76 These include the allowance of a court to attach a financial consequence to certain kinds of relationships that indicate poor bargaining power, lack of information, undue pressure or vulnerability, but do not meet the legal test of employment. The Court may examine all of the relevant factors, which are listed in section 127A(4) as:
- the relevant strength of the bargaining positions of the parties to the contract and, if applicable, any persons acting on their behalf;
 - whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract;
 - whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
 - any other matter that the Court thinks relevant.⁶⁸
- 2.77 An opposing view to the restriction of independent contractors' regulation to commercial law was also provided to the Committee. The Australian Nursing Federation supports changes to industrial relations law that ensures that independent contractors are covered by awards and collective agreements; have the right to participate in their unions; and are generally subject to the relevant industrial tribunal. 'Industrial relations systems do, and should continue to accommodate non-standard forms of employment'.⁶⁹

66 DEWR, *Exhibit No. 25*, p. 20.

67 Vic. Government, *Submission No. 71*, p. 41.

68 Vic. Government, *Submission No. 71*, p. 37.

69 ANF, *Submission No. 19*, p. 7.

2.78 Concerns about restricted access to provisions in Section 127 of the WR Act were also in submissions to the Committee.⁷⁰ Strategies to address these issues are discussed in more detail in Chapter 4. One strategy includes proposals by the Australian Government to amend the *Trade Practices Act*. The *Trade Practices (Amendment) Bill 2005* (TP Bill 2005) contains provisions that make it easier for small businesses to collectively deal with a single larger principal contractor.

In summary

- 2.79 The growth in independent contractors to approximately 10 per cent of the workforce has enabled more individuals to develop their business skills and realise self-employment aspirations.
- 2.80 Independent contractors are in most industry sectors, but particularly in the construction industry, some sectors of the transport industry and in trade and professional occupations. Both identification and quantification are hampered by varying approaches, inadequate data collection and analysis. This probably represents the range of different arrangements that independent contractors work in, but more analysis is required.
- 2.81 The advantages and disadvantages of independent contracting were reviewed from the business and worker perspective. The appropriateness of the category of dependent contractors was briefly discussed, and the view presented by a range of organisations and governments that such workers are disadvantaged.
- 2.82 How independent contractors and their commercial contracts are regulated indicates the differing perspectives of state and Commonwealth government. Legislative responses were reviewed and issues highlighted that are investigated further in Chapter 4.

70 ASU, *Submission No. 53*, pp. 5-6.

