

# Independent Contractors

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AUSTRALIAN DEMOCRATS ACTION PLAN  
INDEPENDENT CONTRACTORS  
WORKPLACE RELATIONS

## Action Plan to Define Employees and Contractors

*“The Australian Democrats believe that it is crucial a clear and single national definition of employment is legislated.”*

The Australian Democrats believe that it is crucial a clear and single national definition of employment is legislated to ensure employers, employees and the self-employed are in no doubt as to when a person is legally an employee. We also believe it is in the national interest for the self-employed to be required to make provision for superannuation, workers compensation and income insurance, as if they were employees.

## Democrats Action Plan

**Senator Andrew Murray**  
Spokesperson on  
Workplace Relations

- Legislate a genuine single national system negotiated with the states and territories, governing independent contractors.
- Amend the Workplace Relations Act and the Independent Contractors Act to insert a definition of employee.
- Investigate the extent of cost shifting from private to public as a result of shifts in labour markets away from employment relationships to contractual relationships, and if the absence of a mandatory requirement for superannuation payments, workers compensation, and income insurance results in significant, large and long-term burdens on taxpayers; then
- Amend appropriate legislation to ensure that where no other scheme exists, independent contractors are required to make provision for their superannuation, workers compensation and income insurance.

## Issue One: Democrats Support the Right to Choose to be a contractor or an employee

The Democrats support the right of every person to choose to operate their own business rather than to work for someone else. The Democrats also support the right of a worker to choose to be an employee rather than a contractor. If a person does work as an employee, they are entitled to the benefit of laws established for their protection, if artificially styled a contractor by their employer.

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There is a fundamental distinction between being an employee and being a genuine contractor. Where an employer contrives to convert employees into contractors, it is to make them much cheaper to hire. They have the appearance of contractors, but are employees except in name. The consequence of their change of status is that they lose the range of protections provided by labour laws, and lose superannuation, workers compensation and income insurance.

Research shows that there are an increasing number of employees disguised as contractors. Dependency is sometimes an indication of this situation. The ACTU estimate that 25 to 41 per cent of contractors are dependent contractors. Another recent study found up to 40,000 workers currently classified by the Government as independent contractors each actually do all their work for one employer.

For a large number of contractors real independence is a myth. Any choice and flexibility in their working conditions and arrangements as contractors have been constructed largely for the benefit of those who hire them.

## Issue Two: Independent Contractors Act Fails

In 2006 the Coalition Government introduced the Independent Contractors Act to "protect the rights of independent contractors". The legislation introduced a national scheme for independent contractual arrangements; it removed protection for certain independent contractors who were deemed employees under State legislation; and provided penalties for parties who entered into 'sham' independent contractual arrangements.

Critically, the legislation failed to tackle the central issue of who is a genuine contractor, and who is a genuine employee. The Act has no definition of a genuine contractor. Nor does the Act define who is not a genuine contractor, that is, who is really an employee engaged as a disguised contractor. Instead, the Act relies on common law principles describing employee status. The common law changes over time as jurisprudence advances, and the common law definition is fraught with problems.

The States had dealt with the phenomena of employers forcing employees to become contractors, but in reality remaining employees, by deeming and other laws that treated certain types of work and groups of workers as employees. Rather than the Federal Government dealing with the complex problem of who is a genuine contractor and who is a genuine employee, they instead chose to override the States' laws, with some arbitrary exceptions.

## Issue Three: Definition of Employee Needed

Because there is no statutory definition of employee, any competent lawyer can take a legitimate employment relationship and reconstruct it as something that the common law accepts as a contractual relationship between principal and contractor. Many businesses are taking advantage of weak laws to engage employees disguised as contractors.

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The Democrats recognise that this is a difficult legal area to resolve. Contractors may be independent or dependent, employees can be both contractors and employees, and that can be with respect to a number of different working relationships in the same tax year. Nevertheless, the common law is not the answer, and experts have developed workable legal definitions.

The common law definition of an independent contractor is not a definition as such, it is a set of principles, and it is not about 'defining' who is an 'independent' contractor, but defining who is not an employee. The common law approach relies on a test which involves the consideration of a number of court established factors or indicia. Effectively, this means a case-by-case approach, which is an unsatisfactory way to proceed with employee/contractor definitional disputes that affect many hundreds of thousands of Australians

The Democrats argue the most effective approach is to define employees in legislation. Experts have been able to draw a more realistic boundary between the two categories of genuine contractor and employee which reduces the ease with which hirers can disguise employment arrangements. This will have the effect of reducing the numbers of disguised employees, which is why this approach has been rejected by the Coalition.

The Democrats have failed on three occasions to have an employee definition accepted into federal law. This may be a complex area, but the current situation is most unsatisfactory, and a statutory definition of an employee is the best solution.

## Issue Four: Independent Contractors Act shifts cost to Public

A worrying aspect of the Act is that it essentially supports cost shifting from private to public. If workers choose to make their living as genuine independent contractors, then it is their duty to meet the universal obligations imposed on employers, such as providing for their own superannuation, workers' compensation and income insurance. They are costs taxpayers should not pick up.

The Government argues it is up to the individual to decide what protection they should have, if any. Many contractors, particularly disguised employees, simply make no provision at all. This is irresponsible, because lower costs for the contractor now will often translate into higher costs for taxpayers later. Among other things, this contradicts a key Government policy, which is to encourage retirees to be self-funded, and to reduce the cost of taxpayer funded pensions. Cost shifting of this sort is clearly not in the public interest.