

Why we oppose the government's 'employee-like' agenda/plan

June 2023

The federal government plans:

- To legislate to pull self-employed, independent contractors into the employment (IR) controlling system.
- This will be done by redefining self-employed, independent contractors as employees.
- They say we are being exploited by big business and need 'protection'.

We say this will destroy:

- Our right to be our own boss (i.e., to be self-employed).
- Protections already in place which we have fought hard to achieve.

This is why we oppose the government's plan and ask Senators to reject it.

The government's position:

- Is explained in an April Consultation Paper from the Department of Employment and Workplace Relations (DEWR). We put in a detailed submission (11,000 words).
- In late May, the ACTU released a 'research paper' detailing its 'demand' for 'employee-like' laws. It (a) heavily criticises the High Court and (b) alleges that there is multi-layered exploitation by big business using existing law. It strongly backs the government's 'employee-like' agenda.

Our replies

The government and the ACTU/unions raise a significant number of issues/problems that have already been fixed, but more fixes are needed. The government and ACTU/unions effectively reject existing fixes and want different fixes. We can/will explain this to Senators by:

- (a) presenting each of the fixes and how they work;
 - (b) outlining the next fixes needed; and
 - (c) showing why the government's/ACTU/unions proposed fixes will do harm.
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Some Detail

1. Existing Protections for the self-employed

Australia's self-employed, independent contractors have arguably the strongest protections in the world.

These have been built over the last 2 decades. Secured through commercial/competition law. Self-Employed Australia has been at the forefront of pushing for these protections (and others).

Current protections include:

1. Sham contracting laws that are possibly the strongest in the world.
2. The *Independent Contractors Act*: This outlaws payments below similar pay to an employee.
3. Unfair contract laws: 'Beefed-up' laws begin in November 2023. Handled by the ACCC.
4. Collective bargaining for the self-employed: Already available through the ACCC.
5. Small business Commissioners/Ombudsmen provide dispute resolution. More can be done.
6. OHS law applies to the self-employed.

What's needed:

1. New 'pay on time' laws: Are currently being considered. Needed urgently.
2. Independent contractors allowed to register with workers' compensation schemes.
3. Government entities to be subject to unfair contract laws.
4. Taxpayer Advocate to ensure fairness in tax-dispute processes.

2. Fact: Commercial contract = Being your own boss

- Being a self-employed, independent contractor means you earn your income using the *commercial contract* (not the employment contract).
- Using a commercial contract denotes being a small business person (even if it's a business of just one person, oneself.)
- This means the self-employed are regulated/protected through commercial and competition law.

3. Fact: The 'employee-like' agenda = Stops you being your own boss

The government's/ACTU's 'employee-like' agenda intends to:

- Take commercial (self-employed) contracts and treat those as employment contracts.
- Dictate the terms of commercial (self-employed) contracts.

This effectively:

- Strips self-employed people of control of their own contracts.
- Denies people the right to be self-employed.
- Throws into chaos the existing hard-won protections for self-employed people.

The agenda is a small business (self-employed, independent contractor) 'killer'.

4. Fact: The 'employee-like' agenda = Conflict with competition law/High Court

The agenda will:

- **Subvert the High Court's** ruling on what a commercial contract is. The High Court said "The employment relationship with which the common law is concerned must be a *legal* relationship. It is not a social or psychological concept like friendship..."

The 'employee-like' idea is a social/psychological concept. The government's plan is to 'invent' a new legislative contract form to thwart common law contract. It is legal radicalism.

- **Breach Australia's International Labour Organisation obligations** where the [ILO declared in 2006](#) that: "National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships..." Australia signed up to this.
- **Clash with Competition law and subvert the ACCC:** The provisions will set up a clash between competition law and employment regulation.

The ACCC and the Fair Work Commission (FWC) would both be required to regulate commercial contracts that have been declared 'employee-like', but each with different and opposing public policy objectives. The ACCC to prevent collusion over pricing and ensure competition. The FWC to facilitate price collusion thereby creating the circumstances for anti-competitive behaviour.

5. Fact: A practical example of needless complexity – destroying small business

The government says it will regulate to give ride-share drivers holiday pay.

How would this work? Here's a scenario:

Say a driver delivers a passenger from A to B. The passenger is charged \$45 and the driver receives (say) \$40.

- a) The FWC will need to determine that a certain portion of the \$40 must be attributed to holiday pay. Let us suppose the FWC says this should be 50c.
 - Will the platform be required to deduct the 50c from the \$40 paid to the driver? (or)
 - Will the platform be required to add 50c to the \$45 charged to the customer?Either way, the driver will be denied access to the 50c up front.
- b) Where will this 50c be parked?
 - Will the platform be required to establish an account for the driver where the 50c is to be stored? (or)
 - Will the government set up a fund where the 50c is deposited? (or)
 - If the driver is employed in another job, will the 50c be required to be paid to their employer? (The vast bulk of gig workers, such as ride-share drivers, etc, only work part-time. Gig income is 'top up' money.)
- c) How and when will the driver access the 50c?
 - Would the driver be able to decide that they want the 50c the day after they have completed the gig because they have decided to have a 'holiday'? (or)

- Would the platform/‘gig holiday fund’ determine when the driver is entitled to take the 50c? Would ‘employee-like’ laws determine when the driver takes a ‘holiday’, or would that be the driver’s decision? (or)
- If the driver decides to take a holiday (however defined), would the FWC be able to withhold the 50c from the driver?

This simple example demonstrates that the ‘employee-like’ agenda strips people of the practical capacity to be self-employed, to be one’s own boss as a small business person.

Being a small business means:

- being paid fully for each job one does; and
- deciding for oneself when to take holidays.

This will be denied to such small businesses. They will be denied the right to be in business for themselves.

6. Fact: Profile of gig workers

[The Victorian report into gig work](#) identified the type of work performed by gig workers (page 34).

Note: The report says that just 0.19 percent of all workers use gig for full-time income

Question: Which workers does the federal government intend to treat as ‘employee-like’?

Type of digital platform work		%	Yes? No?
Transport and food delivery	Taxi services; food delivery; package delivery of goods	18.6	
Professional services	Accounting; consulting; financial planning; legal services; human resources; project management	16.9	
Odd jobs and maintenance	Running errands; general maintenance; removalist	11.5	
Writing and translation	Academic writing article writing; copy writing; creative writing; technical writing; translation	9.0	
Clerical and data entry	Customer service; data entry; transcription tech support; web research; virtual assistant	7.8	
Creative and multimedia	Animation; architecture; audio; logo design; and multimedia photography; presentations; voice overs;	7.7	
Software development and technology	Data science; game development; app, and technology software or web development; server maintenance; web	7.2	
Carer	Aged or disability care; pet care; pet services; babysitting; nanny services	7.0	
Skilled trades work	Carpentry; plumbing; electrical work	5.8	
Sales and marketing support	Social media; marketing; ad posting; lead generation; search engine optimisation; telemarketing	5.0	
Education	Tutoring; teaching; mentoring; online coaching	1.2	
Personal services	Sport / fitness coaching; massage; adult entertainment; tattoo and piercing	0.9	

7. Recommendation – Victorian code makes sense

In May 2023 the Victorian government released a code for [‘Fair Conduct and Accountability Standards for Platforms’](#).

Self-Employed Australia strongly recommends this as a basis for development of a national code for gig platforms. This should be under the jurisdiction of the ACCC and could operate in a similar manner to the existing Franchising Code.