



**Submission by the Civil Contractors Federation
to the
House of Representatives Standing Committee on Employment, Workplace Relations
and Workforce Participation
Inquiry into Independent Contracting and Labour Hire Arrangements**

1. Summary

- 1.1 The Civil Contractors Federation is the peak employer association for the civil construction sector.*
- 1.2 A fundamental problem that exists in the industry is that principal contractors delay, or do not make, payments of amounts due to independent contractors. This results in cash flow problems for the independent contractors who may not be able to make payments due to independent contractors engaged by them. Security of Payments legislation is required at a federal level as recommended by the Cole Royal Commission.*
- 1.3 Building and construction, including civil construction, makes a significant and important contribution to the Australian economy (of the order of \$18bn p.a. for civil construction).*
- 1.4 The civil construction industry is characterised by operators who perform the work as independent contractors. The decision by governments and principal contractors to use the services of independent contractors in the civil sector makes for a highly efficient sector.*
- 1.5 Neither the Courts nor the various Parliaments have developed a precise definition of what constitutes an independent contractor that can be applied with precision. “Taxation Ruling TR2000/14 – Withholding Payments From Employees” in Appendix B, which sets out the features of an independent contractor – contract for services, provides an appropriate basis for a legislative definition.*
- 1.6 It is important that the legislative definition answers the question of whether a person is an independent contractor or not with precision rather than be a generalised definition.*
- 1.7 Access to labour through labour hire companies by independent contractors has traditionally occurred in the civil construction industry and contributed to its efficiency.*
- 1.8 Incentives to principal and independent contractors engaging labour through labour hire companies include:*
- 1.8.1. The labour hire company remains the employer and if a person’s employment is terminated the labour hire company is the respondent to any unfair dismissal proceedings.*
- 1.8.2. The labour hire company is responsible for having employment systems in place which employment gives rise to, for example, workers compensation insurance.*
- 1.9 A system of registration of independent contractors needs to be introduced, either by a government authority or by accredited industry associations on delegation.*

2. The Civil Contractors Federation (CCF)

- 2.1 CCF is the peak industry body for all civil construction contractors, demolition contractors and related industry suppliers.
- 2.2 CCF is a national organization with a branch in each state and territory of Australia and a membership in excess of 1700 civil construction companies including suppliers. CCF's membership includes civil construction companies ranging from small and medium to large civil construction, excavation and demolition companies, many of which are subcontractors.
- 2.3 In preparing this submission CCF has sought information from its membership. As such, this submission represents a broad range of views from large contracting companies to small subcontracting organizations, owner operators and suppliers in the industry.
- 2.4 The Civil Construction sector is distinctly different from the commercial building sector and the residential sector of the building and construction industry.
- 2.5 Civil contractors employ staff with specific civil competencies and use sector specific (heavy) earth-moving equipment.
- 2.6 The civil construction sector primarily constructs roads, railways, tunnels, bridges, dams and other major infrastructure projects. The sector is also engaged in continuous maintenance and repair of these structures. The sector overlaps with the commercial building sector primarily on building sites for excavation prior to the construction of buildings or in the housing sector for construction of subdivisions including roads, drainage and utilities are required.
- 2.7 The industry accounts for some \$9 billion of works annually, collectively employs some 50,000 people and owns around 40,000 items of heavy equipment (refer attached industry profile).
- 2.8 Typically civil contractors are the first onto a building or infrastructure site, but tend also to be at the end of the supply chain of clients, principals and head contractors, specialist and subcontractors etc.

3. Key Issues

- 3.1 The key issue involving the engagement of independent contractors and their employees in the civil construction industry is that the contractual terms can be onerous and unilateral and where principal contractors delay or do not make payment of amounts due to the independent contractors. This results in cash flow problems for the independent contractors who may not be able to make payments owing to contractors they have engaged, or they may be obliged to delay them.
- 3.2 Under the Queensland Industrial Relations Act 1999 (the Qld IR Act) wages payable to employees employed on any contracted work are, subject to the prime contractor's rights as

prescribed under the Act, a first charge on the amount payable to the employer by the prime contractor for the work (section 378). Under section 127 of the Industrial Relations Act NSW (the NSW IR Act) the principal contractor is liable for the payment of any remuneration of the relevant employees that has not been paid for work done in connection with the contract during any period of the contract unless the principal contractor has a written statement given by the subcontractor under the section for that period of the contract.

- 3.3 In New South Wales the Security of Payments Act applies. The Act emphasises the quick adjudication of disputes over progress payments and provides for a quicker payment system for all parties in the industry. Similar legislation applies in Victoria and Queensland; (see Building and Construction Industry Security of Payment Act 2002 (Vic), Building And Construction Industry Payments Act 2004 (Qld). We also note that the Northern Territory Construction Contracts (Security of Payments) Act 2004 commences on 1 July 2005. There is no counterpart legislation at the federal level.
- 3.4 The cash flow problems which arise flow down the chain leading to compromising pressures on the conduct of the first unpaid independent contractor and, as a direct result, the conduct of others. Security of Payments and similar legislation at a federal level is required.

4. Independent Contractors

- 4.1 As with many commercial arrangements the independent contractor generally obtains work by tender for a specific project.
- 4.2 Typically this form of procurement negates any scope for contractors to manage margins through negotiated contract pricing.
- 4.3 Whether a person is an independent contractor or an employee has been the subject of judicial consideration over many years. The ‘control test’ which examined the degree of control and supervision that was exercised over a person (*Zuijs v Wirth Brothers Pty Limited (1955) 93 CLR 561*) no longer applies though it can form an important part of the examination. The current test is that “the totality of the relationship between the parties must be considered” (*Stevens v Brodribb Sawmilling Pty Limited (1986) 160 CLR 16; per Mason J at page 29*) however this provides little certainty.
- 4.4 The various Workers Compensation Acts deal with the issue, but only from the workers compensation point of view and are not intended to determine whether the person is an employee. Industrial relations legislation also contains definitions, but these also do not assist. ‘Employee’ is defined as a person who is employed in any industry (NSW IR Act s 5); persons employed (Qld IR Act s 5); a private or state employee (Tasmanian Industrial Relations Act 1884); and any person employed by an employer to do work (Western Australian Industrial Relations Act 1979). The South Australian Industrial and Employee Relations Act 1994

defines an employee as meaning “a person employed for remuneration under a contract of employment and includes a public employee;”

4.5 An area where a person’s status as an independent contractor versus an employee is of particular significance is in the area of taxation. In Attachment B to “Taxation Ruling TR2000/14 – Withholding Payments From Employees” the Australian Taxation Office (ATO) sets out a summary of the indicators that a person performing work is an independent contractor. Briefly stated they are:

- The contract is for a given result and the contractor works on his/her account;
- The contract is for a specific task or tasks and the contractor has a high level of discretion and flexibility about how the work is performed.
- Performance of the task may result in a profit or a loss and the contractor bears the risk and may carry insurance;
- The contractor provides assets or equipment
- The contractor sets his or her own hours;
- Employee entitlements such as annual leave sick leave and the like are not included in the contract;
- Payments are subject to the contract being performed;
- The contractor incurs expenses;
- The contractor advertises their services to the public;
- The principal contractor can only terminate the contract where its terms are not fulfilled; and
- The contractor may delegate tasks to others and engage others.

4.6 It is not necessary that all of the above key features are present, nor is it necessary that even most be present. It may be enough that the contractor provides key pieces of equipment such as backhoes, bulldozers, tractors, loaders or dumpers to perform the work under the contract. The majority of operators in the civil construction industry (and members of CCF) however would meet most, if not all of the above criteria. Therefore, at least in so far as the ATO criteria is concerned, they are genuine independent contractors.

4.7 CCF considers the ATO criteria appropriate and that it provides a basis for a comprehensive legislative definition. The definition could include a points system. For example, if a person scored more than fifty points out of a hundred they would be an independent contractor. A person who owns and supplies a piece of equipment worth \$100,000.00 may get 60 points for that alone and therefore qualify as an independent contractor. Payments being subject to the contract being performed may be worth 10 points, which when added to other factors that are present may meet the 50% threshold.

4.8 There are some operators who may genuinely believe that, because they have an ABN number, they are an independent contractor for this reason alone. It is acknowledged however that some operators who are not independent contractors claim to be purely to obtain a taxation benefit. Minimising or avoiding taxation is an incentive to claim to be an independent contractor and a comprehensive formula in the Taxation legislation that proof that certain requirements have been met would reduce this incentive.

5. Labour Hire

5.1 The hiring of labour from labour hire companies by independent contractors is common in the civil construction industry. This is primarily due to fluctuations in work levels and skills and experience and/or technical requirements.

5.2 Independent contractors are often small Proprietary Limited companies that may have no employees or one or two permanent employees. For example: a company wins a contract which it has the necessary equipment to perform the work but the project will require additional persons full time. The company engages the additional labour from a labour hire company because the project will come to an end, at which time it will have no more work for the additional employees. These employees are then allocated work elsewhere by the labour hire company which has been their employer throughout.

5.3 For sole traders who usually perform all of the work under contracts they obtain themselves, employing persons would involve them setting up systems that are required when an employment relationship arises, greatly adding to overheads in a commercially unsustainable way. The labour hire company should already have these policies in place.

5.4 The labour hire company remains the employer and is responsible for all wage and associated payments to their employee. At the end of a project, task or works when the labour is no longer required a contractor has no obligations towards the employee of the labour hire company. This avoids any possibility of 'unfair dismissal' and redundancy claims to the contractor.

5.5 Unfair dismissal laws are a disincentive to a contractor to directly employ labour. CCF notes and supports the Government's proposed amendments to the legislation to exempt small business from these laws (although many small civil contractors will fall outside the thresholds of the proposed legislation) as this may encourage small businesses in the sector to directly employ rather than use labour hire.

5.6 There has recently been a trend, particularly by the Industrial Relations Commission of New South Wales (the NSW Commission), to make project awards which apply by common rule and are therefore intended to apply to employees of labour hire companies, and employees of independent contractors. Such awards can cause more problems than they solve.

5.7 On the M7 project in Sydney the principal contractor reached agreement on the terms and conditions to apply on the project with unions. A consent award was then made by the NSW Commission and the award included a significant site allowance. The subcontractors who employed the labour, and who would therefore be expected to pay the allowance, were not consulted about the award and did not know of the proceedings. The principal contractor nevertheless demanded that they pay the site allowance under the State project award, notwithstanding that they were covered by a Federal award and withheld progress payments to subcontractors. The subcontractors had tendered without any knowledge of the site allowance that was to be paid, substantial difficulties were experienced by them and disputes arose over whether they were entitled to reimbursement by the principal contractor. The pursuit of project awards by Unions in the State jurisdiction is a blatant exercise in membership recruitment and acquiescence to union demands by project managers amounts to commercial expediency and passing on of risk at the expense of contractors.

5.8 The NSW Commission is currently hearing a Secure Employment Case which would impose the conditions of employment of the principal contractor's employees on the employees of any independent contractor engaged by it, however hearings have not concluded and no decision is expected in the near future. Unions seek to:

- follow the 2002 Federal metals casuals case in establishing a formula to give regular casuals the option of converting to permanent after 6 months. The application goes a step further in requiring host employers to offer a permanent job to labour hire casuals working continuously on their site for more than 6 months;
- establish a set of criteria, covering areas such as consultation, that employers have to follow before contracting out any areas of work; and
- require labour hire companies to pay host rates and conditions when work is contracted out.

5.9 Such proposals deny the commercial realities of project based industries, would add to overheads and compromise resource management flexibility essential to efficient and cost-effective project construction.

6. Industrial Regulation of Contracts

6.1 As a result of a series of truck blockades of New South Wales by independent contractors/owner drivers the State Parliament gave effect to an earlier report by the then President of the NSW Commission. Beattie J had said that owner drivers were contractors and it was not appropriate to deem them to be employees. The NSW Commission should however

have the power to fix minimum conditions in certain areas. The NSW Government amended the then Industrial Arbitration Act 1940 (NSW). These provisions remain, with some expansion, in the current NSW IR Act.

- 6.2 The amendments conferred power on the NSW Commission to make contract determinations which set minimum rates payable to owner-drivers in various transport sectors on a common rule basis. There have been numerous jurisdictional arguments in this area which now includes the NSW Commission having the power to reinstate the contracts of owner-drivers whose contracts have been terminated. Increasingly in New South Wales owner-drivers are moving closer to employee status in so far as the NSW Commission is concerned.
- 6.3 In the case of deemed employees Schedule 1 to the NSW IR Act does deem a limited number of persons to be employees for the purposes of the Act.
- 6.4 There has been a tradition in New South Wales of the Industrial Relations Commission in Court Session and its predecessors examining contracts under which work is performed in the industry to determine if the contracts are unfair (Section 106 of the Industrial Relations Act 1996 NSW). Such contracts include subcontractor arrangements. If a contract is found to be unfair the Commission can vary the contract and order the payment of an amount of money that it considers just in the circumstances.
- 6.5 The intervention of the NSW Commission into contracts freely entered into between the parties has created uncertainty with respect to the status of a contract under which work is performed in industry in the State. The term 'unfairness' is not capable of a precise definition and its application will vary from judge to judge. Ultimately it is an untenable incursion into commercial market arrangements.
- 6.6 Under Section 127A of the Workplace Relations Act 1996 the Federal Court of Australia is empowered to examine contracts for services binding on an independent contractor which relate to the performance of work. If the Court finds that the contract is unfair or harsh the Court can set aside or vary the contract even retrospectively. To date there has not been a significant number of cases under this section.

7. Regulation of Independent Contractors

- 7.1 The CCF proposes federal regulation of independent contractors as a response to ensuring independent contracting occurs consistently across state and federal jurisdictions.
- 7.2 The problem is, as noted above, ensuring there is a clear, commercially practical definition of an independent contractor. The use of ABNs in the industry is inadequate for many reasons.
- 7.3 One solution is a registration system involving issuing a Registered Contractor Number (RCN) by industry associations under delegation of the Federal Government. The associations would apply the common law *multiple indicia* test used to determine who is a contractor and not an

employee and issue registration cards or certificates on proof of (for example) a valid accident insurance policy. The card or certificate would to be produced at the commencement of a contract as proof of status rather than some form of declaration of status of an independent contractor. Failure to produce the card or certificate would automatically indicate the individual be treated as an employee for all purposes. Cards or certificates should have expiry dates and be required to be renewed at the end of each tax year, when insurance should be renewed. To check an individual's status the ASIC website should be used as it currently is for ACNs and ABNs. Such a system is simple, efficient and cost effective.

7.4 An alternative would be for an appropriate government authority or licensees to issue such a card or certificate, but raises real difficulties in relation to assessing the commercial bona fides of applicants.

8. Details of the CCF proposal are as follows:

8.1 The Problem

The current situation where individuals present themselves as independent contractors when they are not bona fide contractors, but prospective employees who hold an ABN is unsatisfactory to the community, business, unions and government.

For the parties to a contract it causes:

- confusion in determination of status;
- uncertainty of insurance liability;
- risk of prosecution;
- potential liabilities for entitlements by employers; and
- potential tax evasion by the individuals.

This is a major and growing issue in the construction industry due to a shortage of skills and the enhanced bargaining power of skilled operators (due to skill shortages), particularly on short term projects commonplace in the industry.

Allowing this to continue is expensive for the industry and clients and government. Allowing it to pervade the construction industry is commercially irresponsible.

Attempts to deem workers under state jurisdictions is a poor substitute for effective regulation of “non-employees”.

8.2 The Solution

Currently under *multiple indicia* tests used to determine who is a contractor and not an employee, the existence of a Proprietary Limited company or Corporation is seen as a strong indicator of contractor status. The holding of an ACN is an effective way to check such status.

The existence of an ABN is not as strong an indication of such status, as ABNs are issued with little scrutiny and with no reference to the status of individuals under common law principles. Some contractors do not register for ABNs for GST purposes.

A proposed **Registered Contractor Number (RCN)** would enhance the identification of bona fide contractors whether sole traders, partnerships or corporations.

ABNs and ACN generally use the same series for the last 9 numbers.

e.g. ACN 123 456 789
 ABN 12-123 456 789

The RCN could use the same series of numbers as the ABN & ACN with additional digits added specifying which industry by letter and a number.

e.g. RCN C12-12-123 456 789

Cards should have expiry dates and be required to be renewed at the end of each tax year, when insurance should be renewed.

The issuing of RCNs and the cards should be on delegated authority to industry associations who are registered industrial organizations under the Workplace Relations Act.

These industry bodies, such as the CCF, are in a position to assess whether individuals have the skills, tools and business status to be approved as independent contractors, effectively applying the *multiple indicia* common law test to each applicant particularly in relation to control, capital investment and exposure to risk etc. The ASIC could issue RCNs in special circumstances e.g. when there is no appropriate registered industry association.

Independent contractors registering through this process should be required to prove they have accident insurance or take out insurance through the industry association. Industry associations, such as the CCF, have strong links with insurers that specialise in their specific industry and will be able to provide this at commercial rates for the specific industry type.

The issuing of RCN registration cards or certificates will enable the holders to prove independent contractor status and that they have no need to be covered by the workers compensation insurance of the principal to whom they contract.

The absence of such a card during the contract process would then automatically require the principal to ensure the individual is covered by the principal's workers compensation premiums and that payroll tax is paid.

To check an individual's status the ASIC website should be used as it currently is for ACNs and ABNs.

8.3 Benefits to Business

- No individuals would “fall through the cracks” for injury compensation.
- Certainty for all parties that insurance is in place and liability is clear.
- Would help to eliminate “sham” arrangements.
- Workers Compensation premiums would fall as the funding of insurance would be more accurate.
- The need for contractors declarations such as those in NSW would not be required if the card and/or number is produced at the commencement of a contract.
- There would be proof of status rather than declaration of status of an independent contractor.

8.4 Recommendation

The CCF strongly commends this recommendation for consideration by the Committee for inclusion in the proposed Independent Contractors Act or that the above be carried out by an appropriate government authority.

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