

**SUBMISSION TO THE INQUIRY INTO
INDEPENDENT CONTRACTORS AND LABOUR
HIRE ARRANGEMENTS**

Organisation: Joint Response from Representatives of the
National Working Women's Centres comprising:

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BACKGROUND

The National Working Women's Centres (NWWC) provide an advice and advocacy service to women on work related issues. The work undertaken by the NWWC involves, but is not limited to, unfair dismissals, equal employment opportunities, workplace harassment and employment conditions.

The service provided is free and confidential and is available to women who do not have any other representation available to them.

The NWWC is pleased to have this opportunity to respond to the Inquiry into Independent Contractors and Labour Hire Arrangements.

INTRODUCTION

This submission summarises the experiences of the NWWC by identifying trends and issues, discussing gaps in current legislation and providing examples of case studies [names have been changed to protect client's confidentiality], which demonstrate issues arising from the lack of clarity surrounding the independent contractors and labour hire arrangements. Issues discussed in this submission are:

1. lack of information
2. inconsistent legislation
3. contract vs employee
4. labour hire and host employers
5. pay and conditions
6. dismissal/redundancy
7. workplace bullying and discrimination
8. OH&S, Worker's Compensation/Public Indemnity, Superannuation & Taxation

The NWWC continues to provide assistance and support to women who have been affected by the misunderstanding and confusion surrounding their employment status. Women are often misled about the true nature of their employment. In most cases, clients do not have the resources or understanding of the legislative processes to formally test their status to determine if they are employees or contractors and in many cases knowledge of how to pursue outstanding claims for money or entitlements is limited.

DISCUSSION

1. LACK OF INFORMATION

The NWWC is regularly contacted by women who are seeking advice in relation to their rights and responsibilities as contractors. The majority of women are ill-informed about their responsibilities associated with becoming a contractor or sub-contractor at the commencement of employment.

In many instances a contract is simply offered and signed or accepted on face value without consultation, legal advice or negotiation. Offers of employment made by employers often come with the ultimatum that if the employee does not agree to be an independent contractor then the employer will not agree to hire them.

Problems then arise when there are variations in circumstances that need to be considered and which contracts are often silent on, eg, performance guidelines, workplace injuries, access to sick leave, holidays and termination clauses.

Many employers ask women to sign as independent contractors when, more appropriately, they should be classified as employees. These contracts fail to mention that the added responsibilities for taxation, superannuation, business registration, insurance and workplace health and safety and local government regulations now are expected to be met by the employee signing the contract as a contractor or sub-contractor. Many women are also uncertain about the process to obtain an ABN number on the demand of the employer that they must have one. The employer does so in an attempt to avoid their legal obligations as employers.

The NWWC is aware of contracts that have included clauses for sub-contractors to accept liability for damage to property or actions taken in the course of the delivery of services.

Case Study 1

The Queensland Working Women's Service refers to a case of a sub-contractor, being under 18 years of age, requiring her parents to sign a guarantee, on her behalf, for damages to property up to the value of \$5,000. The employer threatened that if the guarantee was not provided then he would refuse to offer the young woman work.

2. INCONSISTENT LEGISLATION

One of the common problems identified in assisting women to determine their status as either an employee or a contractor were that the definitions found within relevant legislation were inconsistent. Examples of this inconsistency can be demonstrated by comparing definitions use by the Australian Taxation Office (ATO) and WorkCover Corporation of South Australia. The ATO provides information to employers to assist them in determining the status of their workers either as an employee or as a contractor while SA WorkCover Corporation refers to a "prescribed class of work" to determine whether an employee is a "worker" under the legislation.

The inconsistency of approaches that are taken by the various industrial commissions and private bodies (eg. labour hire firms, insurance agencies, employers and contractors themselves) in determining the definition for contractor or employee, also leads to confusion and uncertainty.

It is clear from clients that approach the NWWC for assistance and advice, that women who do sign contracts without seeking advice, do not fully appreciate or understand the legal obligations placed on them when entering into employment as contractors. These obligations include OHS&W, Worker's Compensation, Insurance, ABN, business registrations, taxation, public liability and local government legislation.

3. CONTRACTOR VS EMPLOYEE

The NWWC is aware of a number of cases where clients have been incorrectly deemed as a contractor. However, when taking into consideration all the facts of the employment relationship, the working relationship would have been more correctly defined as employer/employee.

These are cases where the workers had no direct control over their work, were paid for hours worked on a weekly basis and were not required to provide any tools to do the work required.

By classifying a worker as a contractor rather than an employee, employers are able to circumvent their responsibilities to their workers, particularly the responsibility to provide a safe workplace environment. Workers have also been excluded from entitlements to workers compensation. They are also precluded from getting assistance from DEWR and State Industrial Relations Commissions in pursuing wages owed to them. This makes many workers very vulnerable to exploitation. Outworkers are particularly exploited by employers claiming their workers are contractors. When the outwork completes the job the employer claims they did a poor job and uses that excuse to pay them less than the agreed amount or not pay them at all.

The Northern Territory WWC states that exploitation is compounded particularly in their area because of the physically isolated nature of much contracting work and as well as the fact that many contract workers are very transient, moving from place to place to take up employment on stations, farms or mines. These transient workers are unable to lodge small claims as they follow the work around remote areas of NT, WA and QLD. In SA, the transient workforce is made up primarily of workers involved in the fruit growing and wine making areas of the state.

The NWWC identify industries such as cleaning, laundry services, food processing, construction, factory work, pickers and packers (including orchard and vineyard hands) as industries whose workers are especially vulnerable to exploitation due to their limited English and understanding of their rights and entitlements.

Sex workers are almost always classified as contractors. Some managers use this definition to abrogate responsibilities to provide minimum wages and safe workplaces and practices. Workers are forced to purchase their own condoms and lubricants which raises significant OH&S concerns.

Sub-contracting also is increasingly common in the sales area, particularly telemarketing or pay as you use premium phone services such as information or conversational services (like for psychic or horoscope services). Health and Fitness and the Exhibitions/Conventions areas significantly employ sub-contractors.

The following case studies serve to illustrate the issues of concerns raised in this section.

Case Study 1

A private cleaning firm employed a woman from a non-English Speaking Background as a cleaner.

After she had been working for several weeks, her employer informed her that she should be a contractor, and told her to apply for an ABN, which she did. The next time she got paid, the woman received a tax invoice rather than a payslip.

Following this, the woman was injured at work, and discovered that she was unable to submit a claim for worker's compensation due to her status as a contractor.

The woman had limited English, and at no point did she have a full understanding of the situation, or of the ramifications of a switch in status from employee to contractor. She did not have her own insurance.

Case Study 2

Jill and her boyfriend James were offered 40 hours work per week on a cattle Station in remote Northern Territory and were told that they were to be engaged as contractors. Their duties would include fencing, stock handling, etc. Each day the manager would direct them in the tasks they had to complete that day. Despite the fact that Jill and James would regularly work up to 60 hours per week at the direction of the manager, they were paid monthly and were only paid for 40 hours of work per week.

During their second month working there, James injured his arm whilst using a faulty piece of equipment, and had to seek medical attention in town. That evening, the station manager told Jill that she and James were no longer needed and they were to leave the property immediately.

The manager would not pay any wages owing from the second month they had worked. When Jill demanded the wages, the manager refused. Jill came to see the Northern Territory WWC and when told that she would need to make a Small Claim [because she was a 'contractor' in name, though not in role] through the magistrates court to retrieve her money, she decided that wasn't practical as she was moving to Queensland to pursue work.

She reported that throughout the station industry many people are incorrectly labeled 'contractors' though they are directed daily and are subsequently underpaid and they don't pursue it. She later found out that this particular station had a terrible reputation for underpaying staff, and refusing to pay the final amount.

Case Study 3

A brother and sister came to see the Northern Territory WWC, they had been employed to pick mangoes on a farm out of Darwin. They had been employed as 'contractors' by a labour hire firm.

This firm refused to pay them for their final week's work. Again, they were transient workers who decided it was not practical to pursue a small claim in the magistrates court.

4. LABOUR HIRE AND HOST EMPLOYERS

A number of workplaces are increasingly using a mixture of employee and contract labour with uncertainty surrounding processes for transferring from one status to the other.

A number of women reported that their status had changed several times with the same employer/organisation.

The NWWC has been involved in cases where host employers have avoided their obligations of fairness and equity, especially in relation to unfair dismissals, by the use of labour hire agencies.

In particular, industrial legislation in SA does not have provision for host employers to be respondents to unfair dismissal applications. The WWC provided comments on the review of the proposed amendments to that legislation which would allow, if passed, both labour hire agencies and host employers to be joint respondents.

5. PAY AND CONDITIONS

The majority of queries throughout the NWWC have raised concerns about payment of monies for services provided, however some women have raised concerns about the physical environments/conditions of employment where there is no access to toilets, staff rooms or lockers. Conditions like breaks and overtime often do not apply for contractors, despite coverage by Health and Safety Legislation.

Many women looking for work feel they have been forced into self-employment as a contractor and had no option but to accept. At the same time many women have reported that after long-term employment they have been instructed to change their status to contractor.

The most common concerns in this area were:

- Outstanding wages/monies for time worked while still a contractor
- Outstanding monies owed when contract has been terminated
- Money not paid at the outset – i.e. told it was a trial period or they did not meet the requirements of the contract
- Changes made to invoices by services contractor
- Agreements made verbally then rescinded or not upheld in respect of payment or conditions
- Payments based on outputs equating to less than award wages, i.e. payment for number of cartons packed or sales made
- Commission arrangements not forthcoming
- Inconsistent payment or long periods without payment

The issues with pay and conditions also related specifically to clients who are employed as contractors or labour hire employees. Clients reported they were undertaking the same duties as an employee of the host employer only to be paid less money or required to work longer hours with no additional pay for overtime or shift work.

6. DISMISSAL/REDUNDANCY

Women have reported several instances where they were not made aware of their contract status until termination, at which time they were denied access to unfair dismissal legislation. It is often necessary for the NWWC to refer clients for legal advice as to their ongoing obligations to a contract. These obligations would include providing services in situations where their contract conditions change or were not upheld. If they wish to cease providing the service they have been contracted to provide, they may face significant claims against them, or if a contract ends and payment is owed for work completed, the further legal advice is required.

Outworkers are often contracted to fulfill unrealistic orders and when they fail to meet the required number of items then payment is not paid and the contract severed.

7. *WORKPLACE BULLYING AND DISCRIMINATION*

Many of the calls received relate to reports of poor treatment and extend to abusive behaviours being experienced while performing services. These vary from complaints against employers, co-workers or in areas work is performed, such as private homes. Many of the complaints registered came from women in cleaning and domestic/carer areas. One woman reported being threatened with having her house damaged when she attempted to negotiate payment for cleaning services performed.

Women reported being discriminated against or sexually harassed in different contexts: private homes, by other contractors, supervisors and co-workers.

8. *OH&S, WORKER'S COMPENSATION/PUBLIC INDEMNITY, SUPERANNUATION & TAXATION*

Many clients have little understanding or knowledge of their obligations in these areas and have fallen short of statutory requirements and may be facing claims against them. The issue of what employment status the client is deemed by which authority will also impact on what statutory obligations are required to be met.

SUMMARY

The majority of women who enter into employment as a contractor or sub-contractor are often ill-informed of the responsibilities associated with the steps to take in becoming a contractor or sub-contractor at the commencement of employment. They are especially vulnerable to exploitation due to issues such as they are from non-english speaking backgrounds or have limited reading and/or numeracy skills. In many instances a contract is simply offered and signed or accepted on face value without consultation, legal advice or negotiation

The NWCC recommends the following strategies to ensure independent contract arrangements are legitimate and that employers do not use the "system" to avoid their legislative obligations:

- consistent definitions for "contractor" and "employer" and "employee" across legislation

which allows for clear, precise and accurate interpretation

- recommend that there be an administrative system in place to ensure employers provide relevant information to employees prior to the signing of contracts and that this system be monitored and scrutinised by an independent party
- ensure information provided to employees of their legal obligations as contractors, if they are “true” contractors, is relevant and easy to understand and available in languages other than english
- legislate for state minimum wages across states and territories
- resources are provided to ensure that employees are able to access services which can explain contracts, etc.

Again, the NWWC is pleased to have this opportunity to respond to the Inquiry into Independent Contractors and Labour Hire Arrangements.