

CFMEU Submission to:

The Board of Taxation - Post-implementation Review – Alienation of Personal Services Income (APSI) rules

Contents

Executive Summary	2
1. Introduction – Purpose of Review	4
2. The Policy Intent of APSI	5
3. Effectiveness of legislation in delivering policy intent.....	7
3.1 Projected tax revenue gains.....	7
3.2 Extent of bogus contracting	9
3.3 Improved equity in tax transfer system	12
4 Problems with operation of the rules.....	13
4.1 ABNs too easy to obtain	13
4.2 PSI tests.....	17
5 Improving the rules.....	18
5.1 Construction Industry Worker Deeming Proposal	18
5.2 ABNs	21
5.3 PSI tests.....	22
5.4 Compliance monitoring	22
5.5 ATO publication of data.....	23
5.6 Building and construction industry forum.....	23
Attachment 1 Job ads stipulating ABN required	24
Attachment 2 CFMEU Submission to the Cole Royal Commission on Illegitimate Subcontracting in the Construction Industry	

Executive Summary

The CFMEU welcomes the opportunity to make a submission to this post-implementation Review into the provisions relating to the alienation of personal services income (APSI). We believe this Review is long overdue, the Report of the Cole Commission having recommended such a review be conducted after June 2003; and our submissions over many years pointed to clear evidence of serious deficiencies in the operation of these provisions.

The purpose of the Review is to gauge how effective the legislation has been in delivering the policy intent; identify any problems with the operation of the rules; and to consider options for improving the rules. The legislation is the *New Business Tax System (Alienation of Personal Services) Act 2000*.

The policy intent of the 2000 legislation can be summarised as being to:

- Achieve projected tax revenue gains
- Improve equity in the tax-transfer system
- Reduce the extent of bogus contracting, where persons providing services in an employee-like manner are treated as contractors rather than employees for tax purposes.

Effectiveness of legislation

On the available evidence, the legislation has failed to achieve its policy intent.

Projected increased revenue from the alienation measure was \$1.43 billion over 4 years, commencing with \$190 million in 2000-01 rising to \$515 million in 2003-04.

It is impossible to say whether the projected tax revenue gains claimed for the measures have been achieved or not. The ATO has not published data and analysis on actual revenue gains, despite repeated commitments to do so. It is also not possible to assess whether the 2000 APSI measures have been more or less effective than the PPS arrangements they replaced.

In June 2005, an ATO Deputy Commissioner said that overall compliance with the alienation measure was "at a satisfactory level." This implies it was collecting the amount of tax that it should have been collecting. But this is difficult to reconcile with the Deputy Commissioner's evidence one year earlier, that non-compliance with tax requirements generally in the building and construction industry was a "significant" and "severe" problem.

The available evidence suggests that the incidence of bogus contracting has not been reduced since 2000, but has at best been stable and may have increased.

- In 2009, the culture of "no ABN, no start" remains widespread in construction and elsewhere. It is still commonplace for job advertisements to specify that applicants "must have an ABN" for labouring and other jobs, including where the remuneration is quoted as an hourly wage. There is apparently little fear of ATO action against blatant breaches of the alienation legislation.
- Until March 2009, ABNs were still being issued to categories of workers whom the ATO considers employees for tax purposes, like apprentices, trades assistants and labourers.

3 August 2009

- A 2008 ABS survey shows the estimated number of dependent contractors has increased to 338,300 (35% of all 'independent contractors') if defined as those not able to subcontract their own work, and 260,500 on a more conservative definition (27%). These are considerably higher than Productivity Commission estimates of 230,000 dependent contractors in 2001.

Equity in the tax-transfer system has been reduced, not improved, as a result of failure to achieve the policy objectives of the legislation.

Problems with operation of the rules

The failure to achieve the policy intent of the APSI legislation is a direct result of problems with:

- The rules allowing easy access to ABNs.
- The 2000 PSI rules and associated tests.
- The relatively low level of ATO compliance activity in this area.

These flaws seriously undermine the ability of the legislation to curtail the significant tax avoidance that the Ralph Review and the earlier Labor government warned of.

Improving the rules

The CFMEU submits two options for improving the rules and better achieving the policy intent of this legislation.

Our preferred option requires a complete overhaul of the current legislation and rules. The "Construction Industry Worker Deeming Proposal" will deem all workers in the construction industry as employees for tax purposes unless they can pass a more stringent business test.

This option has precedents both in Australia (the *Queensland Workers' Compensation and Rehabilitation Act 2003* (Qld Act) and overseas (a proposal of HM Treasury in Britain specific to the construction industry).

The second option is to keep the current system and to improve its integrity, though the following changes:

ABNs

There needs to be a systematic attack on the "no ABN, no start" culture in the construction industry and elsewhere.

- The issuing of ABNs should be further constrained, including through regulation.
- Tighter eligibility criteria should be considered for issuing ABNs to temporary visa holders (eg 457 visa workers, Working Holiday Makers, overseas students) with a higher risk of tax avoidance/evasion or workplace exploitation.
- All applicants for ABNs should be required to demonstrate through tangible evidence based on more stringent tests that they are in fact operating a business. This should include testing whether applicants are operating in an *employee-like* manner, based on the criteria set out in the 1999 Ralph Review.
- All ABNs already issued to apprentices, trades assistants and labourers between 2000-09 and still current should be cancelled. This is consistent with the March 2009 changes to ABN

eligibility rules which (if properly enforced) prevent ABNs being issued to these categories of workers from that date,

- The penalties for making false (or misleading) declarations in order to obtain an ABN should be substantially increased for both individuals and their advisers.

Legislation changes re APSI rules

- The test for determining whether income is to be treated as personal services income for income tax purposes should be changed. Currently it is whether the contractors are operating in a “business-like manner”. It should be changed to include whether contractors are operating in “an employee-like manner”, as recommended by the 1999 Ralph Review.
- The criteria suggested in the Ralph Review – for operating in “an employee-like manner” – are more appropriate and comprehensive than the distinct, separate and inappropriate tests now enshrined in legislation. The Ralph Review criteria should be adopted.
- The requirement that the contractor needs to satisfy only *one* of the multiple tests set out in the legislation to qualify as a business is not sufficiently demanding.
- The tests suffer from a number of significant flaws:
The unrelated clients test fails to catch a high proportion of the building industry workers who change employers at least once a year, and having more than one employer per year does not change the nature of employee-like work.
The employment test should exclude associates, thus preventing income splitting.
The business premises test needs to be tightened so would-be contractors may not erect artificial “premises” to satisfy the test.

1. Introduction – Purpose of Review

The CFMEU welcomes the opportunity to make a submission to this important post-implementation Review into the provisions relating to the alienation of personal services income (APSI).

The purpose of the Review is to gauge how effective the legislation has been in delivering the policy intent; identify any problems with the operation of the rules; and to consider options for improving the rules. The legislation is the *New Business Tax System (Alienation of Personal Services) Act 2000*.

The Board of Taxation’s Information Paper on the Review states that:

The Alienation of Personal Services Income provisions are integrity rules designed to address both the alienation of personal services income through interposing an entity and the capacity of individuals and interposed entities to claim higher deductions than employees providing the same or similar services. The provisions were introduced in 2000 and their effectiveness has not been formally reviewed.¹

In conducting the review, the Board is to have regard to the Government's taxation review headed by Dr Ken Henry.

¹ Board of Taxation webpage, *Post-implementation review into the alienation of personal services income rules*, http://www.taxboard.gov.au/content/post_imp_alienation.asp

3 August 2009

The CFMEU has a strong interest in the APSI measures. The building and construction industry was one of the main industry areas covered by the Prescribed Payments System (PPS) which the APSI replaced. Today, the construction sector still remains by far the most significant area for “independent contractors” as measured by ABS surveys. In November 2008:

- 32% of all persons employed in the construction industry in Australia were working as independent contractors as defined by the ABS (312,000 out of 989,000 persons).
- 32% of all persons working as independent contractors in Australia (in all industries) were working in construction (312,000 out of 967,100), even though construction accounted for only 9.3% of total Australian employment.²

The CFMEU believes this Review is long overdue. Our organisation has made submissions over many years, pointing to clear evidence of serious deficiencies in the operation of these provisions. We also note that the February 2003 report of the Royal Commission into the Building and Construction Industry (the Cole Commission) recommended (Recommendations 126 and 127):

- The ATO review the impact of the Alienation of Personal Services Income legislation “after 30 June 2003 when it has applied to the building and construction industry for 12 months” and critically examine the results of the review to determine the effectiveness of the legislation in ensuring contractors in the building and construction industry comply with their taxation obligations.”
- Reviewing entitlement to ABNs.³

2. The Policy Intent of APSI

The policy intent of the 2000 legislation was, according to the then Treasurer, “to improve the integrity and fairness of Australia’s taxation system”. This would be achieved because:

This bill will prevent individuals reducing their tax by diverting the income generated by their personal services to a company, partnership or trust and limit work-related deductions available in those cases (and to an individual contractor in similar circumstances).⁴

The policy intent can be summarised as being to:

- Improve equity in the tax-transfer system
- Reduce extent of bogus contracting
- Achieve projected tax revenue gains

In relation to tax revenues, the then Treasurer said in 2000 that the government estimated increased revenue of \$1.43 billion over 4 years, rising to \$515 million in 2003-04:

² ABS *Forms of Employment Survey* (FOES), November 2008. Cat 6359.0.

³ Final Report of the Royal Commission into the Building and Construction Industry, Volume 9, *Reform – National Issues Part 3*, February 2003, pp90-91.

⁴ Mr Peter Costello MP, Second Reading Speech, New Business Tax System (Alienation of Personal Services Income) Bill 2000, House of Representatives Hansard, 13 April 2000, p15975.

The government estimates that the alienation measure will result in increased revenue of \$190 million in 2000-01 financial year, \$290 million in 2001-02, \$435 million in 2002-03 and \$515 million in 2003-04.⁵

The estimated revenue impacts of the alienation measure that the Treasurer announced in his Second Reading Speech on 13 April 2000 were lower than those he released in November 1999. The Treasurer's November 1999 estimate was that the measure would recoup \$1.87 billion over 4 years and \$2.4 billion over 5 years, rising to \$530 million by 2004-05.⁶ The main differences between the two estimates are in the first two years of the scheme and may be due to the decision to exclude building, construction and other contractors in PPS arrangements from the new APSI regime until July 2002.

In his April 2000 Second Reading Speech on the 2000 APSI Bill, the then Treasurer Mr Costello also said "the measures contained in this bill implement the Ralph review's recommendations to address the alienation of personal services income."⁷

This is not accurate. The provisions of the bill differed from the recommendations of the Ralph Review in several important respects. In particular, the Ralph review placed great emphasis on testing whether the service provider operated "in an employee like manner as determined by a range of specific criteria" (Recommendation 7.2). But the bill opted instead for a much weaker test of whether the service provider was acting in a business-like manner, Recommendation 7.2 reads:

7.2 Payments in respect of personal services

That where a company, trust or partnership (the 'interposed entity') is, or is to be, interposed between a person or entity requiring services (the 'service requirer') and the individual who performs or is responsible for performing the services (the 'service provider'), payments received by the interposed entity in respect of the services be treated for income tax purposes as the income of the service provider where:

(i) the interposed entity receives 80 per cent or more of its receipts in respect of personal services, either directly or indirectly, from one service requirer, or associate of that service requirer, during the year of income; or

(ii) the services are provided to the service requirer in an employee like manner as determined by a range of specific criteria; or

(iii) the interposed entity is unable to obtain from the Commissioner of Taxation a decision that the 80 per cent/one service requirer test in paragraph (i) should not apply.

⁵ Ibid, p15975..

⁶ Treasurer Peter Costello, Media Release, *The New Business Tax System – Stage 2 Response*, 11 November 1999, Attachment O.

⁷ Mr Peter Costello MP, Second Reading Speech, *New Business Tax System (Alienation of Personal Services Income) Bill 2000*, House of Representatives Hansard, 13 April 2000, p15975.

3. Effectiveness of legislation in delivering policy intent

3.1 Projected tax revenue gains

Projected increased revenue was \$1.43 billion over 4 years, commencing with \$190 million in 2000-01 rising to \$515 million in 2003-04. The ATO has not published data and analysis on actual revenue gains, despite repeated commitments to do so.

It is impossible to say therefore whether the projected tax revenue gains claimed for the measures (at the time of their introduction) have been achieved or not. It is also not possible to assess whether the 2000 APSI measures have been more or less effective than the PPS arrangements they replaced.

As well, the ATO has made conflicting claims about the effectiveness of the alienation measure. In June 2005, ATO Deputy Commissioner Mr Mark Konza gave evidence to a Parliamentary Committee stating that:

Our preliminary view is that overall compliance with the personal services income measure is at a satisfactory level.⁸

That statement clearly implies that the alienation measure is actually collecting the amount of tax that it should be collecting.

But in May 2004, the same tax official gave evidence to a Senate inquiry stating that non-compliance in the building and construction industry “remains a significant problem”, a “severe problem” and agreed that there was “a large slab of tax forgone” as a result. The quotes refer to all tax in the industry (phoenix activity, fraud and evasion) and not specifically to APSI-related tax. It would however be remarkable if compliance with one taxation measure was satisfactory in an industry characterised by generally unsatisfactory compliance.

Extracts of the relevant evidence follow.

Mr Konza - For us, non-compliance in the building and construction industry is a significant problem and remains a significant problem. Whilst there have been changes to the law which have, I think, helped us, it remains a significant problem.⁹

And the following exchange –

Senator Cook – How much tax income is not collected in the building and construction industry?

Mr Konza – We do not have an accurate estimate of that figure.

Senator Cook – Just give us a ballpark figure.

⁸ Deputy Commissioner Mr Konza, evidence to House of Representatives Standing Committee on Employment, Workplace Relations and Employment, Reference: Independent contracting and labour hire arrangements, 16 June 2005, pEWRWP 3.

⁹ Deputy Commissioner, Small Business ATO, Mr Mark Konza, Senate Committee on Employment, Workplace Relations and Education (EWRE) p61, 19 May 2004.

Mr Konza – I do not think I would want to even put a ballpark figure on it. We say only that it is a severe problem for the Taxation Office.

Senator Cook – You say in your 2003-04 compliance program.

Building and construction remains a high-risk industry from a tax compliance perspective.

- Does that mean it is an industry in which there is a large slab of tax forgone?

Mr Konza – Yes, it is not collected.¹⁰

In July 2009 the CFMEU requested from the ATO data on the actual tax collected through the alienation measure compared with the projected increased revenue estimates made at the time the measure was introduced. The ATO declined to supply any information other than that publicly available on the ATO's website.¹¹

In 2003, the ATO said the following on the public record in relation to general (not APSI-specific) tax compliance activity in the construction industry:

Between July 2002 and October 2003, we completed 6600 enquiries, investigations and audits, and raised in excess of \$240 million in tax and penalties.¹²

In support of his 2005 view that overall compliance with the personal services income measure was "at a satisfactory level", the Deputy Commissioner went on to say:

We have seen a decline in the level of deductions for rent, motor vehicle payments to associates and retained profits by those taxpayers to whom the measure applies. We have also seen some evidence of taxpayers returning to salary and wages. There has been a large increase in the number of taxpayers declaring that they are in receipt of personal services income, although we consider that there are many others who are not correctly reporting personal services income in their tax returns. Many of these incorrectly report their income as business income instead of personal services income, and there is also some confusion among tax agents in distinguishing between personal services income and income from a business structure.¹³

The Deputy Commissioner also said in the same 2005 evidence that:

- We have done about 2,000 audits and "there are about 300,000 people affected by the measure."
- The number of people applying for a personal services determination declined markedly over past four years. In first year, 2000-01, there were 1,861 applications for a determination. In 2004-05, only 147 were received (to 16 June 2005) for a total of around 3,500 since 2000. Of these, about 13% were in the construction industry, or only around 455. The top 4 groups were construction, finance and insurance, HR and management consultancy and IT, with between 10 and 16 per cent each. (p6/7 16 June 2005).

¹⁰ Deputy Commissioner, Small Business ATO, Mr Mark Konza, Senate Committee on Employment, Workplace Relations and Education (EWRE) p69/70, 19 May 2004.

¹¹ Email communication from ATO official, 9 July 2009.

¹² ATO, *Tax and the building and construction industry booklet*, NAT 10245-11-2003, p6.

¹³ Deputy Commissioner, Small Business ATO, Mr Mark Konza, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, 16 June 2005, p EWRWP 3.

3 August 2009

- “In view of the overall position in relation to the personal services income measure as outlined, the ATO has considerably reduced the level of resources it commits to a level commensurate with its relative risk.”¹⁴

The ATO’s view - that compliance is “satisfactory” - is also difficult to reconcile with other known information, including the following:

- The fact that up to March 2009 (and possibly beyond), ABNs were still being issued to categories of workers who are clearly in a direct employee/employer relationship in the construction industry, like apprentices, trades assistants and labourers.
- The fact that job advertisements in 2009 are still specifying “must have an ABN” for labouring and other jobs, including where the remuneration is quoted as an hourly wage.
- Most importantly, the fact that the ATO has never done the systematic public report detailing the operation and outcome of the alienation measure, which would justify the claim that compliance was satisfactory. The fact that such a public report has never been done, despite the Cole Commission recommendation and CFMEU proposals for exactly this kind of report, leads to the opposite conclusion.

3.2 Extent of bogus contracting

The extent of bogus contracting is difficult to measure precisely, because the very purpose in such an arrangement is to conceal the true relationship between the entity engaging the labour and the employee.

An alternative description is “dependent contracting” or dependent contractors. Two Productivity Commission studies in 2001 and 2006 investigated dependent contractors, defined as persons employed on a commercial contract but with work arrangements consistent with them being an employee. The 2001 study found that in 1998 between 26% and 41% of all self-employed contractors met the criteria for dependent contractors. The lower-bound estimate was considered to accord more closely with ATO criteria for employee-like contractors under the APSI measure.¹⁵

- The 2006 Productivity Commission study found that between 1998 and 2001, the number of dependent contractors (using the more stringent criteria) increased by about 5%, to just under 230,000 persons; and that the proportion of all self-employed contractors who were dependent contractors increased from around 26% to 31%.¹⁶

¹⁴ Ibid, p3.

¹⁵ Productivity Commission, *Self-Employed Contractors in Australia: Incidence and Characteristics*, Staff research paper, M.Waite and L. Will, 2001..

¹⁶ Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market*, Commission Research Paper, 2006, p20.

3 August 2009

- A 2008 ABS FOES survey shows the estimated number of dependent contractors has increased to 338,300 (35% of all 'independent contractors') if defined as those not able to subcontract their own work, and 260,500 on a more conservative definition (27%).¹⁷

The ABS 2008 FOES definition of "Independent contractors" is:

Independent contractors are people who operate their own business and who contract to perform services for others without having the legal status of an employee, ie people who are engaged by a client, rather than an employer. Independent contractors are engaged under a contract for services (a commercial contract), whereas employees are engaged under a contract of service (an employment contract).¹⁸

The ABS *Forms of Employment Survey* (FOES) has been conducted since 1998 with the most recent survey in November 2008, but there are some problems in making comparisons over time. This is because the scope and definitions used in the survey have changed over time, with major changes in 2008.

The CFMEU ordered unpublished customised data from the ABS relating to the independent contractors in the November 2008 ABS survey. This data together with some of the published data is in tables 1-3 and shows the following main points.

Independent contractors, in general:

Of the 967,100 "independent contractors" working in all industries in November 2008:

- 79% (761,500 persons) had no employees, ie they were offering only their own labour to the entity engaging them as "contractors".
- 35% were not able to subcontract their own work, and 38% did not have authority over their own working procedures.
- 115,000 (12%) were classified as labourers – an occupation ineligible for ABNs since March 2009 on the basis that persons in this occupation "by their very nature...are considered employees" for Commonwealth taxation purposes.¹⁹

In the construction industry, as noted above, 32% of all persons working in this sector are classified as "independent contractors" – this is more than twice the proportion in all industries combined (13%) and more than double the proportion in the second ranked industry, Professional, scientific and technical services (15%).

Of the 312,000 independent contractors in construction:

¹⁷ From 2008 ABS FOES survey, Cat 6359.0. The higher figure is the number of "independent contractors" who reported they were not able to subcontract their own work. The lower figure is the number who were 'not usually able to work on more than one active contract'. These are broadly comparable with (but not identical to) the criteria used to define the lower bound estimate of "dependent contractors" in the 2006 Productivity Commission report. See Appendix A, Table A7, p138.

¹⁸ ABS *Forms of Employment Survey*, November 20008. Cat 6359.0, p7.

¹⁹ ATO website. See Section 4.1 below, *ABNs too easy to obtain*.

3 August 2009

- 75% (233,000 persons) had no employees, ie they were offering only their own labour to the entity engaging them as “contractors”.
- 37% did not have authority over their own working procedures (114,000 workers), and 21% were not able to subcontract their own work (66,000).
- 188,000 (60%) are Technicians and tradespersons and 52,200 are labourers (16%); and 78% are working in the construction services sector.
- 68% of all Technicians and tradespersons working as independent contractors, are working in the construction industry, as are 44% of all labourers and 20% of all machinery operators and drivers classified as “independent contractors”.

It is arguable that independent contractors who *had only one contract* were in fact in an employee-like situation. In construction, 51% were in this situation (159,100 workers) as were 54% of all independent contractors in all industries combined (518,000 workers)

Table 1 Independent contractors, selected characteristics, November 2008

Characteristic	Construction	All industries	Construction	All Industries
	000	000	%	%
Did not have authority over own work	113.9	369.8	36.5	38.2
Not usually able to work on more than one active contract	69.7	260.5	22.3	26.9
0 employees	233.0	761.5	74.7	78.7
1-9 employees	71.3	184.5	22.9	19.1
<i>Subtotal, 0-9 employees</i>	<i>304.3</i>	<i>946.1</i>	<i>97.5</i>	<i>97.8</i>
Had only one contract	159.1	517.9	51.0	53.6
Was not able to (sub)contract own work	66.5	338.3	21.3	35.0
Did not have any say on hours worked	40.3	153.1	12.9	15.8
Total	312.0	967.1	100.0	100.0

Source ABS FOES, November 2008, Cat 6359.0, published and unpublished data.

Table 2 Independent contractors in construction, industry and occupation, November 2008

	No - '000	%
Industry		
Construction services	243.1	78.0
Building construction	56.3	18.1
Heavy and civil engineering co	7.8	2.5
Construction nfd	2.3	0.7
Remaining Industries	2.3	0.7
Total	311.8	100.0
	No - '000	%
Occupation		
Technicians and trades workers	188.2	60.3
Other occupations	55.7	17.9
Labourers	50.2	16.1
Machinery operators and driver	17.9	5.7
Total	312.0	100.0

Source ABS FOES, November 2008, Cat 6359.0, published and unpublished data.

Table 3 Independent contractors by occupation, November 2008

	Construction 000	All industries 000	Construction share %
Technicians and trades workers	188.2	275.3	68.4
Other occupations	55.7	488.2	11.4
Labourers	50.2	115.0	43.7
Machinery operators and drivers	17.9	88.6	20.2
Total	312.0	967.1	32.3

Source ABS FOES, November 2008, Cat 6359.0, published and unpublished data.

3.3 Improved equity in tax transfer system

The elimination of bogus contracting will boost both horizontal and vertical equity. If workers earning equivalent remuneration pay the same tax, that will enhance horizontal equity. Vertical equity as well will be improved, if fewer people on higher incomes are evading and paying less tax than those on lower incomes.

4 Problems with operation of the rules

4.1 ABNs too easy to obtain

The ease of obtaining ABNs is an important issue for the Review because it determines the size of the population potentially able to use – and abuse - the APSI business rules. The provision of ABNs is governed by the *New Tax System (Australian Business Tax Number) Act 1999 (ABN Act)*. The ABN Act is within the Board's present Review as its criteria for evaluation of the APSI legislation include the extent to which it "is consistent with other tax legislation."

The CFMEU has made many submissions arguing that ABNs were too easy to obtain under the ABN Act and ATO policy; and that this ease of access contributes to failure of the APSI to achieve its policy intent. The most recent of these submissions was the CFMEU October 2008 submission to the Henry Review. The CFMEU's key points were that:

- The ATO is required to issue an ABN based on defective tests to establish that ABN applicants are in fact operating a business.
- Certain categories of workers were eligible for ABNs when they should clearly not be, notably apprentices, workers doing general labouring work and 457 visa workers.
- The penalties for making false declarations in order to obtain an ABNs were inadequate, for both individuals and their advisers.

Test for ABN: the "operating a business" test

Under the Act, any person can apply for an ABN and the Commissioner of Taxation must issue an ABN if satisfied as to the identity of the applicant and that the applicant is carrying on an enterprise. "Enterprise" is defined in the Act as an activity, or series of activities, done in the form of a business. A "business" is any profession, trade, employment, vocation or calling, but does not include occupation as an employee.

ANAO report 2002-03

The Australian National Audit Office (ANAO) examined ABNs and the Australian Business Register (ABR) in a 2002-03 report²⁰ and found serious shortcomings in the system. The report stated that "the ATO has identified an increasing propensity in job advertisements for employers to require applicants to have an ABN. The effects of this trend are being reflected by several indicators including:

- A perceived leakage of employees out of the PAYG system, as employees become 'contractors' instead of staff;

²⁰ Australian National Audit Office (ANAO), *Administration of Australian Business Number Registrations, Australian Taxation Office, The Auditor-General Audit Report No.59 2002-03, Performance Audit.*

3 August 2009

- Analysis of ABR data that shows a significant increase in the proportion of new ABN registrations coming from individuals. In September 2000, individuals comprised 36 per cent of ABN registrants; by October 2002 they comprised 42 per cent.
- Data quality testing of ABR data by the ATO has identified registrants that appear to be employees rather than businesses.²¹

The ANAO obtained a copy of the ABR data base as at 28 September 2002 and tested the data. This included attempting to identify potential employees in the data specifically excluded by the legislation from having an ABN.

The ANAO reviewed the entire ABR data base “to determine the numbers of registrants that described themselves as either ‘labourers’ or ‘apprentices’”. The ANAO found 10,243 ABN holders had so described themselves:

- 8,889 persons described as some type of labourer or giving labouring as their main activity.
- A further 1,149 described themselves as contract labourers.
- 205 persons stated they were some type of apprentice, of whom 118 described themselves as apprentice jockeys or similar.²²

The ANAO provided examples of what it termed some of ‘the more problematic descriptions provided by applicants’ for these ABNs :

- ‘Casual labourer currently unemployed registered with the CES.’
- ‘I wish to seek employment as a labourer and have been told I need an ABN.’
- ‘I am in Year 10 at school and work casually as a labourer on weekends.’
- ‘Working for wages as an apprentice carpenter.’

As the ANAO report commented:

- Those persons “describing themselves as employees appear by their own admission to be ineligible for an ABN” and at the very least would require further investigation.
- Similarly the labourers appeared to be employees (not carrying on a business) and apprentices seemed incapable of undertaking a business until they finished their apprenticeships.

The ANAO recommended (Recommendation 3) that, to enhance current registration procedures for issuing ABNs, the ATO:

- Extend up-front checking procedures to detect...the more obvious categories of apparently ineligible applicants.
- Review current registration procedures and ABR business rules to determine whether these are sufficient to meet the (ABR) legislative requirements. And
- If appropriate, provide advice to government on any necessary amendments to the legislation.

The ATO’s response, as recorded in the 2003 ANAO report, was:

²¹ Ibid, p61-62.

²² Ibid, p63.

Agreed in principle. A review of the ABN registration is planned, it will focus on actively seeking opportunities to enhance the registration process.²³

In a 2007 follow-up audit, the ANAO found that the ATO had partially implemented this recommendation, but that complete implementation would not occur until a number of tools were integrated into the ABN application process to be delivered in Phase 2 of the Eligibility Tool project.²⁴

Comment on ANAO reports

1. The ANAO's figure of 10,243 will understate the total number of ABNs issued to persons working as labourers or apprentices in 2003. This is because the ANAO investigation was limited to ABN registrants who had self-described as labourers or apprentices. It therefore excluded persons working in these occupations but who had registered for ABNs using alternative descriptions of their so-called "business" activities. ABS data suggests the total number of labourers with ABNs could have been up to 10 times the figures uncovered by the ANAO. An ABS survey in November 2004 recorded 119,200 labourers working as owner managers of incorporated and unincorporated 'enterprises' at the time, in all industries.²⁵
2. The number of persons in 2009 still holding ABNs that have been wrongly issued to them is not known, but is likely to be substantial. This is despite ATO advice in 2009 that "400,000 inappropriate ABNs" had been cancelled following an examination of the ABN system (advice to the 22 March 2009 meeting of the Building and Construction Industry Forum). The detailed criteria for cancellation and the number from the construction industry are not known.
3. The propensity for employers to state in job advertisements that applicants were required to have an ABN – noted by the ANAO and ATO in 2003 – remains very widespread in 2009. A CFMEU examination in July 2009 of job vacancy advertisements specifying that the worker "must have an ABN" or containing similar requirements clearly indicates that this practice is commonplace. Attachment 1 summarises the results of this search of job advertisements, and includes examples as requested in the Board's terms of reference.

Some of the more noteworthy examples of July 2009 job ads in Attachment 1 are the following:

- A Google Australia-wide search for 'labourer must have ABN' yielded about 120,000 results (Note – not all listings are current vacancies).
- A Google Australia-wide search for 'form worker must have ABN' yielded about 122,000 results.
- A Google Australia-wide search for 'concreter must have ABN' yielded 46,500 results, while similar searches for each of plumber, carpenter, scaffolder, plasterer, tiler 'must have ABN' yielded each between 6,700 and 23,000 results.
- A search of job ads in the weekend Sydney papers *The Sydney Morning Herald* and *The Daily Telegraph* on 25-27 July 2009 located numerous examples of ads stipulating an ABN was

²³ Ibid, p65.

²⁴ Australian National Audit Office (ANAO), *Administration of Australian Business Number Registrations, Follow-up Audit*, Australian Taxation Office The Auditor-General Audit Report No.15 2007-08, Performance Audit, p42.

²⁵ ABS, *Forms of Employment Survey*, November 2004. Cat. 6359.0. The survey was not conducted in 2003.

3 August 2009

required, even where an hourly rate was quoted; or “ability to take direction” was an attribute required of “self-employed with an ABN” invited to apply; or “ABN or Pty Ltd only”.

The profusion of such advertisements in 2009 is simply not consistent with ATO claims that compliance with the alienation measure is “satisfactory”, as claimed by the Deputy Commissioner in his 2005 evidence to the Parliamentary inquiry, cited earlier.

Rather, these advertisements themselves raise serious questions about the effectiveness of ATO compliance activity in relation to bogus contracting. It is clear from the sheer number – and brazenness - of these job ads requiring workers to have ABNs that there is little concern about the ATO investigating the *bona fides* of the so-called contracting arrangements being advertised.

Exclusion of certain categories from ABN eligibility

In March 2009, after repeated representations by the CFMEU²⁶, the ATO online application for an ABN excluded ‘apprentice, trade assistant or labourer’ from being eligible to register online for an ABN.

At the online screen listing ‘description of your business activity’, the ABN applicant is required to select the option that best relates to the business activity they are engaged in. If they nominate ‘apprentice, trade assistant or labourer’ the registration will be refused, with the following explanation provided:

ATO ABN Entitlement Tool Report — Apprentice, trade assistant or labourer “You are not entitled to an ABN”

Apprentices, trades assistants and labourers are required to work under the direction, control and supervision of their employer to learn their trade. By their very nature, they are considered employees for Commonwealth taxation and superannuation purposes. As a result you are not entitled to an ABN.

The CFMEU welcomes this move restricting ABNs for new ABN applicants, but has several outstanding concerns.

- While the online ABN registration route excludes these three categories from registering for an ABN, those choosing to register via hard copy forms do not appear to encounter the same advice. In July 2009 the ATO was sending out ABN registration forms to Sole Traders wanting to register for an ABN that did not mention the three categories no longer eligible.
- The issue of removing/cancelling the ABNs of persons who were Apprentices, trade assistants or labourers, and who were issued ABNs *between July 2000 and March 2009* needs to be addressed. The apprentices group may be less of a problem because many will have become tradespersons with the passage of time.
- Some categories of temporary residents (in terms of immigration status, not tax status) such as backpackers, working holiday makers and subclass 457 visa-holders (in construction and elsewhere) are known to register for ABNs and take part in bogus contracting. Some do so willingly (eg backpackers) while others are compelled by their employers. These groups are

²⁶ See Appendix 2, extract from CFMEU submission to Cole Inquiry.

currently all eligible for ABNs, but there are grounds for restricting eligibility where the risk of involvement in bogus contracting is high.

Penalties for making false declarations

Section 8K of the Taxation (Administration) Act 1953 (Cth) provides a range of penalties for multiple offences under s 8C which includes giving incorrect information in respect to an ABN application. The maximum penalty for a first offence is \$2,200; for second and subsequent offences the maximum penalty is a fine of \$4,400.

The ATO website warns that:

Penalties for applying for an ABN if you are not entitled

If you apply for an ABN and are not entitled to be registered you may be committing an offence under section 8K of the Taxation Administration Act 1953 by making a false or misleading statement regarding the operation of an enterprise. Persons found guilty of making misleading statements may be prosecuted

But according to a search made on 14 July 2009, the total number of prosecutions under Section 8K since its inception is only 19 and none involve ABN offences.

By contrast "Sham contracting" is now unlawful under the *Fair Work Act 2009* and may attract higher penalties. The *Fair Work Act 2009* creates several classes of offences by employers including misrepresentation of genuine employment, Re-engagement, and False and Misleading Statement. These offences carry penalties for employers including monetary penalties of (maximum) \$6,000 for an individual and \$33,000 for a body corporate.

4.2 PSI tests

The legislative tests set out for determining whether an entity is a personal services business are deficient.

- The test for determining whether income is to be treated as personal services income for income tax purposes is inappropriate and defective. Currently the test is whether the contractors are operating in a "business-like manner" but does not examine whether contractors are operating in "an employee-like manner", as recommended by the 1999 Ralph Review.
- The requirement that the contractor needs to satisfy only *one* of the multiple tests set out in the legislation to qualify as a business is not sufficiently demanding.
- The tests suffer from a number of other significant flaws:
 - The unrelated clients test fails to catch a high proportion of the building industry contractors who change employers at least once a year, and having more than one employer per year does not change the nature of employee-like work.
 - The employment test does not exclude associates, thus allowing income splitting.
 - The business premises test is so open-ended as to allow contractors to erect artificial "premises" which would satisfy the test.

5 Improving the rules

The CFMEU submits that the following changes are needed to improve the rules and better achieve the policy intent of this legislation.

The CFMEU submits that changes are needed to improve the rules and better achieve the policy intent of this legislation. There are two options that could be pursued to address the problems identified in section 4.

One option is to keep the current system and to improve its integrity; the following sections 5.2-5.6 address the CFMEU's proposals in this respect. A second option is our preferred position and would require a complete overhaul of the current legislation and rules as outlined in the next section.

5.1 Construction Industry Worker Deeming Proposal

Given the failure of the APSI rules to reign in the rampant misuse of the ABN system in the construction industry and the consequent incidence of false self employment, the CFMEU proposes that an entirely new approach be taken in this industry. The presumption inherent in the ABN/APSI scheme has been to regard applicants as operating in a business-like manner unless proven otherwise. It is this flawed assumption that has allowed 115,000 labourers, 43% in construction, to be counted as independent contractors as was shown in Section 3 of this submission.

The brazenness with which '*labourers with ABNs*' are called for in newspaper classified adverts reflects a culture of lawlessness that existed under the old PPS system and has continued virtually unhindered in the ironically named *New Business Tax System*.

The historic revenue tragedy of PPS is being repeated as the ABN farce. It is time to acknowledge the shortcomings of these schemes in the construction industry and draw a line under their failure. The most effective means of redressing the situation is to change this flawed assumption and to deem all workers in the construction industry as employees.

There are two precedents for this proposal. One is in operation generally in Queensland under their *Workers' Compensation and Rehabilitation Act 2003 (Qld Act)*, the other is a proposal of HM Treasury in Britain specific to the construction industry. Both of these use a three step test to examine whether an individual is genuinely operating in a business-like manner.

The *Qld Act* at *Schedule 2, section 11, Part 1 (1)* defines persons working in Queensland as workers even if the person works "*under a contract, or at piecework rates, for labour only or substantially for labour only*", regardless of the legal form of a contract.

To not be classified as a worker the person performing the work must meet the test set out in *Schedule 2, section 11, Part 1 (2a)* as follows;

the person performing the work—

(i) is paid to achieve a specified result or outcome;

and

(ii) has to supply the plant and equipment or tools of trade needed to perform the work;

and

(iii) is, or would be, liable for the cost of rectifying any defect in the work performed; or

(b) a personal services business determination is in effect for the person performing the work under the Income Tax Assessment Act 1997 (Cwlth), section 87-60.

In July this year HM Treasury issued a consultation paper "False self-employment in construction: taxation of workers"²⁷ on the issue of false self-employment in the construction industry. The paper quotes results from the European Labour Force Survey that showed 34% of workers in the construction industry are self employed, in respect to this finding HM Treasury state (par 2.5);

Even given the range and variety of skills used by the industry, there is no obvious reason why the proportion of self-employed workers in the construction industry should be so high.

It is noteworthy that this figure is very close to current Australian figure of 32%. Of this 34% HM Treasury estimate that one third of these operating as sole traders are in fact working under employment terms. In terms of numbers this represents 300,000 subcontractors. These estimates are derived by looking at the number of contractors with no claims for deductions for the cost of plant, equipment nor materials.

HM Treasury estimates that 350 million pounds per year is the cost to revenue. In Australian dollar terms this equates to \$700 million. If the same proportions hold for the Australian construction industry and information gleaned from the ATO would suggest this is the case, then the cost to revenue here would be in the order of \$230 million. However the CFMEU believes that this figure would lie at the lower end of the range of estimates for revenue losses due to false self-employment. HM Treasury review previous compliance measures and conclude as follows (pars 4.7-8;)

While some of these measures have had a positive effect, this has tended to be temporary or confined to a small number of cases. There has been no significant lasting effect on levels of false self-employment within the industry. Measures designed to encourage voluntary compliance have in some cases resulted in workers and engagers seeking other ways to disguise employment, which is evidenced by the growing use of intermediary structures. The only option currently available to tackle this problem is for HMRC to carry out an increasing number of compliance reviews.

The Government has concluded that deploying a significantly higher level of compliance activity for this industry compared to others, with the additional cost of resources that would be involved, is not a viable long-term solution. In any case, further compliance activity by itself may not be sufficiently effective, given the increasing use of intermediaries. Instead the Government believes that legislation to deem income received by workers in the construction industry to be employment income is the best way to tackle this problem.

This conclusion we submit should carry heavy weight with this Review. The scheme they go on to propose should be considered favourably in the Australian context.

HM Treasury proposes that deeming criteria are used to determine the nature of the income. These criteria are to be objective, simple and easy for the payer to apply. They propose three criteria that

²⁷ HM Treasury Consultations & legislation website, http://www.hm-treasury.gov.uk/d/consult_falseselfemploymentconstruction_200709.pdf

within the context of the construction industry would show the worker to genuinely be in receipt of self-employment income (par 5.11);

- *Provision of plant and equipment – that a person provides the plant and equipment required for the job they have been engaged to carry out. This will exclude the tools of the trade which it is normal and traditional in the industry for individuals to provide for themselves to do their job;*
- *Provision of all materials – that a person provides all materials required to complete a job; or*
- *Provision of other workers – that a person provides other workers to carry out operations under the contract and is responsible for paying them.*

The proposal calls for a worker to meet one or more of these criteria in order not to be deemed in receipt of employment income. HM Treasury views each of these criteria as representing a significant element of a contract for services. An illustrative example of how these criteria would apply is presented (par 5.16);

ABC Ltd – how ‘deeming’ would work

ABC Ltd is a business, which undertakes development of sites across the country for private housing. It secures most of the required building services locally at the different locations, rather than having a permanent workforce. For the current project, it is building six houses on a small site.

The company enters into various contracts to have work carried out on the site, as follows:

Carrying out groundwork

Mr B supplies his own services and those of three other men for the groundwork. The payments made to Mr B will not be deemed to be employment income, as he meets criterion 3. However, if he does not already employ the three people working for him, he will need to treat them as being deemed to be in receipt of employment income if they meet none of the criteria.

Building the walls

Four people are engaged by ABC Ltd for bricklaying. ABC Ltd sources all the bricks and the bricklayers bring only their tools of the trade. They will be deemed to be in receipt of employment income, because they meet none of the criteria.

Installing the glazing

Mr C supplies and fits the glazing with the assistance of his employee. Mr C will not be deemed to be in receipt of employment income, as he meets criteria 2 and 3.

Fixing the roofing

Four people are engaged for installing the roofing sourced by ABC Ltd. They do not bring any equipment with them. They will be deemed to be in receipt of employment income, because they meet none of the criteria.

HM Treasury concludes that labour and product market efficiency will increase with the removal of two distortions to competition. First, between firms in the construction those who use false self-employment and those who do not, second, between the construction industry as a whole and other industries where false self employment is not widespread. Thus leveling the playing field and allowing a more efficient allocation of labour within the economy.

Consideration is given to avoidance measures that would be used to circumvent the proposal through the use of various intermediary structures. HM Treasury concludes that the proposed legislation would need to contain specific provisions to counter such arrangements.

As the consultation period concludes on October 12 this year the CFMEU respectfully suggests that the Review allow for further submissions arising from this process.

These two models represent what the CFMEU would argue is best practice and transparency in a currently very opaque situation.

5.2 ABNs

There needs to be a systematic attack on the “no ABN, no start” culture in the construction industry and elsewhere.

1. The issuing of ABNs should be further constrained. First, certain categories of workers should be specified by regulation as not eligible to obtain an ABN, specifically apprentices and trainees, trades assistants, and workers doing general labouring work. As from March 2009, some of these are no longer eligible for ABNs via online applications (apprentices, trades assistants and labourers) but that is by way of ATO policy, not regulation.
2. Second, tighter eligibility criteria should be considered for issuing ABNs to temporary visa holders (eg 457 visa workers, Working Holiday Makers, overseas students) with a higher risk of tax avoidance/evasion or workplace exploitation. The ATO/DIAC should prepare a report for their Ministers and the BCI Forum (as appropriate), based on ATO/DIAC data matching of temporary visa holders and the ABN register, identifying the numbers and characteristics (including occupation) of temporary visa holders who have been issued ABNs. That report could also advise on options for restricting eligibility of ABNs to temporary visa holders.
3. Third, all applicants for ABNs should be required to demonstrate through tangible evidence based on more stringent tests that they are in fact operating a business. This should include testing whether applicants are operating in an *employee-like* manner, based on the criteria set out in the 1999 Ralph Review. These include having regard to the level of control exercised by the service requirer in relation to matters such as time of work, actual hours of work required, and where the services are to be performed.
4. While the March 2009 changes to ABN eligibility rules will (if properly enforced) prevent ABNs being issued to apprentices, trades assistants and labourers from that date, all ABNs already issued to these classes of workers between 2000-09 and still current should be cancelled. This will require a search of the Australian Business Register (ABR) like that performed by the ANAO in September 2002.
5. The penalties for making false (or misleading) declarations in order to obtain an ABN should be substantially increased for both individuals and their advisers. Currently the maximum penalty is

\$4,400 and should be raised in line with the monetary penalties for employers engaging in sham contracting arrangements under the *Fair Work Act 2009* - (maximum) \$6,000 for an individual and \$33,000 for a body corporate.

6. There should also be additional harsh penalties for tax agents who facilitate serious instances of bogus contracting, over and above the financial penalties mentioned above. Such a penalty could take the form of cancellation of a tax agent's licence where there is involvement in systematic multiple accounts of assisting bogus contracting.
7. Penalties should be introduced for employers who insist on contractor only employment where the person engaged is really in an employee-like situation.
8. The ATO implement in full the ANAO's recommendations in its 2003 report on restoring integrity to the ABN registration system, detailed earlier in this submission.

5.3 PSI tests

The legislative tests set out for determining whether an entity is a personal services business are deficient.

- The test for determining whether income is to be treated as personal services income for income tax purposes should be changed. Currently it is whether the contractors are operating in a "business-like manner". It should be changed to include whether contractors are operating in "an employee-like manner", as recommended by the 1999 Ralph Review.
- The criteria suggested in the Ralph Review – for operating in "an employee-like manner" – are more appropriate and comprehensive than the distinct, separate and inappropriate tests now enshrined in legislation. The Ralph Review criteria should be adopted.
- The requirement that the contractor needs to satisfy only *one* of the multiple tests set out in the legislation to qualify as a business is not sufficiently demanding.
- The tests suffer from a number of significant flaws:
 - The unrelated clients test fails to catch a high proportion of the building industry workers who change employers at least once a year, and having more than one employer per year does not change the nature of employee-like work.
 - The employment test should exclude associates, thus preventing income splitting.
 - The business premises test needs to be tightened so would-be contractors may not erect artificial "premises" to satisfy the test.

5.4 Compliance monitoring

Contrary to the ATO's publicly stated position that compliance is satisfactory, the available evidence does not support that view. It is generally recognised that non-compliance will increase, not decrease, in times of rising unemployment when power shifts further to the service requirer.

The ATO should be directed to undertake enhanced compliance activity on the alienation measure, commensurate with the scale of the problem and increased risk associated with current and projected labour market conditions; and be properly resourced to undertake such activity.

5.5 ATO publication of data

The ATO be directed to undertake and publish:

- analysis investigating whether the legislation in relation to the alienation of personal services income introduced as part of the New Business Tax System has raised the revenue estimated at the time and is more effective than the system it replaced.
- regular data and analysis of its compliance activity in relation to the alienation measure.

5.6 Building and construction industry forum

The Building and Construction Industry Forum was established by the ATO, pursuant to a recommendation of the Cole Commission. The Forum's terms of reference as currently drafted are very broad. The CFMEU believes the effectiveness of the Forum would be enhanced by placing greater and particular emphasis on the issue of dependent contractors and on improving tax compliance.

- The terms of reference for the Building and Construction Industry Forum should be amended to increase the focus on dependent contracting arrangements and on improving tax compliance.
- The Building and Construction Industry Forum should be chaired and led by a senior member of the ATO.

Attachment 1 Job ads stipulating ABN required

This Attachment sets out:

1. Job ads stipulating an ABN is required, or similar – from *The Sydney Morning Herald* and *The Daily Telegraph* on the weekend of 25-27 July 2009.
2. Results of 28 July 2009 Google searches Australia-wide for 'labourer must have ABN', and similarly for the following building and construction occupations: plumber, tiler, plasterer, form worker, concreter, concrete worker, carpenter, scaffolder, insulation installer.
3. Examples of the job ads found via the Google search in 2 above.

1. Newspaper adverts:

Sydney Morning Herald:

Insulation: Installers wanted for contract work Northern Beaches/ North Shore. Exp preferred but not essential. Own transport and ABN. Email insulateit@optusnet.com.au

Antenna installers: Experienced. Must be Incorporated. Ph Bill 0402477977

Carpenter: With experience. Prefer ABN number. Please call Charlie 0418217758

Carpenters: Required for immediate start on various projects in the CBD. E.g. installation skirting doors, robes, etc. Own transport required and all relevant licences and insurances. Please contact Matt on 0404832728.

Carpenter/Window Installer: Experienced licensed, own company, vehicle & insurance. 97010341

Cleaners: Evening work from 6.30pm, 3 nights per week, 2.5 hours work per night each in Campbelltown and Maroubra Junction. Must have ABN and experience. Fax resumes to Adam on 03 9338 8397 or email info@cleaningaddiction.com.au

Brushhands: Immediate start. Must have insurance. Green card and own transport. John 0408477944

Plumbing: Subcontractor Maintenance. Extensive experience. Home unit repairs, roof leaks, clear blocked drains etc. Must be Co. own insurances, truck, tools 2-3 days a week. \$50

3 August 2009

hourly rate (GST incl.) based in inner west. Please forward your CV, email address: pppccc1@bigpond.com Please include contact details.

Subcontractors: With current insurances/licences, tools and reliable work vehicles required for Department of Housing work in Northern Suburbs. Plasterers, Painters, Carpenters, Labourers, Floor Covering Installers, Cleaners & General Maintenance workers. Successful applicants must be organised and be able to carry out high quality work to deadlines. DOH experience desirable. Email details to admin@dpsconstructions.com.au

Welder/Boilermaker: Required for Sydney work. You need to possess: Trade qualification with experience in Mig and Tig Aluminium Welding. Good command of English. Flexible attitude, ability to multitask, ability to take direction and work independently, ability to work to deadlines. Experience with marine repairs desirable. We offer a competitive hourly rate and lots of variety. Self employed with an ABN should also apply. Immediate start for the right applicant. Email your resume to thomson_marine_services@yahoo.com.au or fax to 0245728525.

Daily Telegraph:

Plumbers: Two plumbers, one first year apprentice required. Must be tradies, reliable, own tools and transport. Sydney area. Wages or sub-contract. Residential/commercial work. Ph Terry 0420941115.

Roof Plumbers/Metal Roofers: At least 5 years experience. Applications welcome from Pty Ltd companies or individual applicants wanting full time employment. Ph 0410431475.

Metal Roofers: Commercial/industrial, hard work, long hours, weekends, ABN or Pty Ltd only. Standard rates, tools, vehicle essential, hardcore workers, immediate start. Ph 0412206588

2. Google Search Results, Australia-wide, 28 July 2009

About 37,300 results for 'plumber must have ABN'

About 120,000 results for 'labourer must have ABN'

About 6,700 results for 'tiler must have ABN'

3 August 2009

About 12,500 results for 'plasterer must have ABN'

About 122,000 results for 'form worker must have ABN'

About 46,500 results for 'concreter must have ABN'

About 9,300 results for 'concrete worker must have ABN'

About 23,200 results for 'carpenter must have ABN'

About 6,190 results for 'scaffolder must have ABN'

About 4,940 results for 'insulation installer must have ABN'

3. Examples of job ads located via Google:

Plumbers:

"PLUMBERS required. New houses, bush work and civil. Must have ABN, insurance, tools and vehicle. Must be reliable, good rates offered. Phone 0402 363 404"

<http://jobview.careerone.com.au/GetJob.aspx?JobID=82280055>

We are currently looking for a qualified Maintenance Plumber to join our busy team of staff in a full time subcontracting position. To successfully secure this opportunity, we require that you must be a qualified plumber, have an ABN, must have a driver's license and a vehicle, and are reliable and hardworking.

<http://ninemsn.seek.com.au/job/maintenance-b-plumber-b-full-time-subcontractor-covering-most-areas-of-sa/adelaide/15705025/81/1/>

Tiler:

Looking for an experienced roof tiler to work tomorrow (Wednesday 29th) with a possibility of more days next week. Must have ABN, red card and own transport. Must be an Australian citizen and English as first language. Please email resume to: shelteredroofing@hotmail.com

<http://melbourne.gumtree.com.au/c-Jobs-construction-trade-engineer-EXPERIENCED-ROOF-TILER-W0QQAdIdZ145065834>

Local company requires 2 tiler's, must be experience and or qualified tiler. Must have excellent knowledge with all aspects of tiling and have own ABN number.

<http://jobsearch.gov.au/findajob/job.aspx?LocationCode=3&SpecOcc=4417&CurrId=198797505&Ref=findajob/searchresults.aspx>

Looking for someone to work under instruction, to complete overload of work! - Doing Residential Wall and Floor Tiling covering Penrith to Sydney Area. Experienced /Licensed Tilers only! Subcontractors only - Must have own ABN Tools and Travel Vehicle/ Insurances.

3 August 2009

Position may become permanent! Award Rates Apply!

<http://sydneyexchange.com.au/adreply2.php?g=533066>

Plasterer:

PLASTERERS 30 plus hours per week. Must have ABN, Red Card, drivers licence and own transport. Reliable and trustworthy essential, experience an advantage.

<http://jobview.careerone.com.au/GetJob.aspx?JobID=82385736>

Gyprock plasterer required casual work call now. You must have induction card ABN and tools transport call joe on 0416055383 now

<http://sydney.gumtree.com.au/c-Jobs-construction-trade-engineer-gyprock-plasterer-required-casual-work-call-now-W0QQAdIdZ130654482>

An excellent opportunity to learn the plastering trade. No experience needed, will train the right applicant. Own transport to work required. Long term opportunity for the right person. Green Card and ABN required. You are not required to have your own insurance.

<http://jobsearch.gov.au/findajob/job.aspx?CurrId=199938194>

Form worker

international formwork in urgent need of form workers and labourers for immediate start must have green card, abn and ppe, good rates of pay

<http://sydney.gumtree.com.au/c-Jobs-construction-trade-engineer-workers-needed-in-cbd-W0QQAdIdZ140564488>

Concreter

CONCRETE LABOURER Domestic concrete work. In and around East subs. Driveways, exposed aggregate, crossovers and coloured concrete. ABN and drivers licence required.

<http://jobview.careerone.com.au/GetJob.aspx?JobID=82461428>

CONCRETER Experienced and proven ability to lead a pour crew for House Slabs. ABN and own Transport. N/W and West Subs.

<http://jobview.careerone.com.au/GetJob.aspx?JobID=82341390>

CASUAL CONCRETTERS wanted. Fully qualified with own transport, red card and ABN number, for footpath and crossing. Contact Carl on 0409 041 505 between 7am and 4pm Monday to Friday.

<http://jobview.careerone.com.au/GetJob.aspx?JobID=82273560>

3 August 2009

Carpenter

CALL JOE IF YOU ARE READY FOR WORK ON 0416055383 MUST HAVE GREEN CARD AND CAR ABN
CALL NOW 0416055383

<http://sydney.gumtree.com.au/c-Jobs-construction-trade-engineer-Carpenter-labourer-REQUIRED-CALL-JOE-MUST-HAVE-A-CAR-ABN-W0QQAdIdZ117899748>

2ND FIX Carpenter/Joiner. Experience in hanging doors and installing skirting. Own tools, insurance and ABN required. Call Stephen on 0418 453 860.

<http://jobview.careerone.com.au/GetJob.aspx?JobID=82284794&fn=553&q=carpenter+abn&sort=rv.dt&cy=AU&vw=b&vw=b&AVSDM=2009-07-19+20%3a33%3a00&pg=1&seq=1>

Labourer

Bricklayers/Labourers Wanted. Must have green card, abn, own transport. Liverpool area.
Start ASAP. 0411 333 532

http://mycareer.com.au/consumer/find/job/view.aspx?s_rid=recommendation-jobs&s=705&jobid=7112759

Scaffolder

SCAFFOLDING labourer required. Must have experience and ABN. Phone Simon 0427 740 004.

<http://jobview.careerone.com.au/GetJob.aspx?JobID=82334631&fn=544&fn=4&q=scaffolding+abn&sort=rv.dt&cy=AU&vw=b&vw=b&AVSDM=2009-07-18+21%3a27%3a00&pg=1&seq=43>

Illegitimate Subcontracting in the Construction Industry

The illegitimate use of sub-contracting arrangements, including sham sub-contracting, is widespread and growing in the Australian construction industry. The same problem is exhibited to one extent or another in the building and construction industry across the globe.

The root cause of this phenomenon is cost and responsibility shifting from larger employers to smaller employers. In turn many smaller employers seek to shift cost and responsibility onto their workers whom in many instances will then be described as independent contractors (whether accurate in law or not).

Wherever this phenomenon in the construction industry goes unchecked by regulators (government and/or trade unions) the industry deteriorates in a variety of ways until some remedial steps are taken.

Typical remedial steps have included: deeming certain workers to be employees for the purpose of industrial legislation; promoting collective bargaining amongst quasi-contractors or dependent contractors; legislation providing minimum standards and outlawing unfair contracts; taxation department initiatives to gather lost taxation payment, eg PPS introduction in 1983, 80:20 Rule legislation in 2000; union campaigns to educate and empower such workers.

Many employers, with the backing of employer organisations, use and abuse the individual subcontract system in order to avoid legal obligations and responsibilities. Bogus subcontracting in the construction industry exploits workers, undercuts honest employers, hurts the industry and depletes the public purse. With the problem at its worst point historically in Australia today, there is a drastic need for the industry and government to come to grips with the problem.

DIMENSIONS OF THE ISSUE

No-one can precisely describe the number of sub-contractors in the Australian construction industry. The industry is dynamic, with building sites opening and closing every day and with building workers constantly moving between employers they can and

do work sometimes under the description of “employee” and other times under the description of “sub-contractor”. The terminology itself varies with “sub-contractor”, “subbie”, “contractor”, “self-employed”, “independent contractor”, “own account worker”, “contract for services worker”, amongst some of the labels used to describe this non-employee.

The best estimates of the number of non-employees in the Australian construction industry in recent times would reveal a figure ranging between 180,000 – 220,000 persons. The quarterly Australian Bureau of Statistics figures for May 2002 reveals that there are 201,800 own account workers in the Australian construction industry¹. With the blue collar workforce in construction at around 450,000 one can see that these non-employees make up nearly half the manual workforce.

The extent of independent subcontracting and its abuse in the construction industry was highlighted in a recent Productivity Commission paper (see **Appendix 1**). It reported that 25% of all self-employed subcontractors in Australian are engaged in the construction industry (more than any other industry)². Further, 12% of all “dependent subcontractors” (that is, those subcontractors who should be classed as employees) in Australia work in the construction industry. The same paper found that both the construction and ‘property and business services’ industries have the highest proportion of sham subcontracting in Australia.

The number of individual subcontractors in the construction industry is also reflected in Chapter 5 of the Australian Taxation Office’s submission to the Royal Commission into the Building and Construction Industry. There the number of Australian Business Numbers given to individuals in the construction industry as at 3 January 2002 is listed as 170,718. The number of Australian Business Numbers given to partnerships in the construction industry as at the same date is 77,573. If you consider the fact that many labour only subcontractors are set up as partnerships with family members who have little or no role in work performed, the ATO’s figures reflect an overwhelming use of individual subcontracting in the construction industry.

¹ Australian Bureau of Statistics – Spreadsheet 6291.0.40.001 Labour Force (SE) Self Employed - Australia – Quarterly TABLE 9C. Labour Force - Own Account Workers - Australia - Industry Division (ANZSIC range in brackets) (a)(b)

² Productivity Commission Staff Research Paper by Waite M. & Will L., “*Self-Employed Contractors in Australia: Incidence and Characteristics*”, 2001, p.48. This paper is attached at **Appendix 1**.

The spread of subcontracting arrangements is also on the rise across industry generally. This is a point which is supported by the Productivity Commission paper which estimates that the share of self-employed contractors in total employment rose by 15% between 1978 and 1998. Indeed the increase has been greater in industries such as the construction industry where such working arrangements are common.³ See also the paper by John Buchanan attached at **Appendix 16** which shall be outlined in greater detail later.

To describe these workers as non-employees needs qualification in the sense that a large number of these workers would in the union's judgement, be determined to be employees at law if their circumstances were to come under the scrutiny of a court of law. In our view, one that we've held for many years, the great bulk of these workers are in fact employees at law. Perhaps 25% of those described above as non-employees would in truth be under a contract for services as opposed to a contract of service.

Our view of the correct dimensions of this issue was given credence when during the debate surrounding the implementation of the new 80:20 taxation rules the HIA announced that more than 100,000 workers would seek special rulings to be exempted from the new rules⁴ (see **Appendix 2**). This told us that the HIA believed that this was the ballpark figure for workers who spent 80% plus of their working time working with one employer. This is one key indicator of employee status. It, of course, is not definitive but it is indicative.

INTERNATIONAL CONTEXT

It is important to recognise that the use of sham subcontracting in the construction industry is a global phenomenon. The detrimental effects of such arrangements to workers, employers, the industry and society in general have been experienced around the world.

Attached to this paper are the following documents which help detail the nature of individual subcontracting, both genuine and otherwise, in the construction industry internationally.

³ *ibid.* p.27 (see **Appendix 1**).

⁴ Newspaper clipping "Plea for leniency on contractors" Paul Cleary. This clipping is attached at **Appendix 2**.

- **Appendix 3** – Saboia J., “Contract Labour in the Brazilian Construction Industry” at p.16 in “*Contract Labour: Looking at Issues – nine Country Cases*” No.106 & 107 Labour Education 1997/1-2, International Labour Office, Geneva.
- **Appendix 4** – Patel B.B., “Contract Labour in India in manufacturing, construction, plantations and forestry” at p.38 in “*Contract Labour: Looking at Issues – nine Country Cases*” No.106 & 107 Labour Education 1997/1-2, International Labour Office, Geneva.
- **Appendix 5** – Lee Kiong Hock & Sivananthrian A., “Contract Labour in Malaysian Plantation, Construction and Sawmilling Industries” at p.45 in “*Contract Labour: Looking at Issues – nine Country Cases*” No.106 & 107 Labour Education 1997/1-2, International Labour Office, Geneva.
- **Appendix 6** – Birch, J., “Contract Labour in the British Construction Industry”, at p.69 in “*Contract Labour: Looking at Issues – Nine Country Cases*” No.106 & 107 Labour Education 1997/1-2, International Labour Office, Geneva.
- **Appendix 7** – “*Contract Labour – Why Do We Need an ILO Convention?*” Prepared by the International Federation of Building and Wood Workers for the International Labour Organisation 86th Conference, 2-18 June 1998, Geneva, Switzerland.
- **Appendix 8** – “*Working Document on the Problem of Contract Labour*” UITBB, 12th Conference of the Building TUI, Vigo, Spain, 27-29 November 1997.
- **Appendix 9** – “*The construction industry in the twenty-first century: Its image, employment prospects and skill requirements*” International Labour Organisation, Geneva 2001.

DIFFERENT SUB-CONTRACTOR ARRANGEMENTS

In the union’s view there are in the order of 50,000 legitimate sub-contractors in the Australian building and construction industry. Most of these are in the housing industry and typically such a sub-contractor would contract for labour and materials. Most would contract for the delivery of result rather than being paid by the hour. Many would be in a partnership and some would be incorporated.

Many of the sub-contractors in the housing industry would work exclusively in that segment of construction, perhaps moving at times into the lower end of the commercial

market, being town houses and apartments. Many of the sub-contractors in the housing sector have long-term relationships with specialist house-building construction companies. Many such house-building construction companies will only engage labour under sub-contract arrangements. Some engage hundreds of sub-contractors on their books. It is only a few years ago that major NSW house-building firm Masterton had 800 dedicated sub-contractors working for them.

In commercial construction naturally there are many sub-contractors who run genuine businesses where they contract for the provision of labour and/or materials, usually to carry out a task or result that they have contracted to perform for a building company. Typically such firms will employ workers to perform the result they've contracted for. However it is here where a large number of illegitimate or sham sub-contractors come into play with very large numbers of workers being employed illegally.

Typically many sub-contractor employers will engage their workforce on all-in payment arrangements with the individual workers expected to have ABN's as though they were fully-fledged sub-contractors themselves.

The most typical arrangement is for the sub-contractor employer to pay a fixed hourly rate which is to incorporate all conditions of employment. In some instances the all-in worker will have Superannuation payments and/or Redundancy and/or Long Service Leave paid in addition. In some instances the employer will cover these workers for Workers Compensation. In a smaller number of instances the employer may pay some conditions of employment. In other instances the employer may have some of his/her workforce on all-in payments and others on employee wages and all conditions of the award and statutes.

If a sub-contractor employer is bound by an EBA he/she are more likely to be paying wages and conditions but not all employers who've signed an EBA would be exempt from using all-in payments.

One could, without being precise, further describe this phenomenon in both geographic and occupational terms in the industry thus:

Geographic (graded according to frequency)

Northern Territory	-	almost universal
Tasmania	-	very high occurrence
Western Australia)	-	high tendency – probably 70%
Queensland)	-	plus of the workforce
NSW and ACT	-	serious concentrations
Victoria	-	common occurrence

Occupational (graded according to frequency)

Finishing trades (painters, plasterers, fit-out carpenters)	-	very high concentration
Earthmovers, tilelayers, roof Tilers, roofing carpenters etc	-	high concentration
Bricklayers, steelfixers	-	very common (probably 70% plus)
Scaffolders, formwork carpenters	-	common
Concretors	-	frequent
General labourers, apprentices	-	not unusual
Crane crews	-	not usual

Other relevant aspects are that this phenomenon is almost universal in country areas and very frequent in the regions. It is also the predominant form of employment on small apartment construction in the suburbs.

There is an inverse relationship between the strength of the union movement in our industry and the use of sham subcontract arrangements. Where unions are strongest the occurrence of all-in payments tends to be least. This is not unique to Australia. The same pattern can be observed internationally.

CONSEQUENCES OF ALL-IN PAYMENTS FOR WORKERS

All-in payments casualises the building and construction industry.

Headway was made in the 1970's and 1980's to decasualise the construction industry. Her Honour Justice Elizabeth Evatt conducted an Inquiry in 1975 into the Decasualisation of the Construction Industry. Yet today we face this corrosive force which drags

Australia's construction workforce back to the bad old days when workers had minimal rights and conditions.

While it is true that a minority of workers in construction (particularly some young workers, some temporary workers like students and backpackers and some who are only moving through the industry while they look for a career elsewhere) prefer a casual rate of pay in substitution for longer term conditions, the majority of construction workers prefer both a good wage and good conditions.

Certainly workers with families and mortgages etc, strongly prefer regular employment with decent conditions that provide for holidays, sick leave, RDO's (time off with family), together with a regular flow of income that obtains through periods of down time such as inclement weather, sickness, injury etc.

A profoundly undemocratic situation currently exists in various parts of the industry where many construction workers cannot follow their vocation or calling if they want the reasonable right to work on wages and conditions. For plasterers, painters, bricklayers etc, to want to work on wages and conditions in various cities and towns in this country is simply impossible. One only has to pick up the newspapers and look in the Job Ads section and see that for various building workers classifications it is simply not possible to find a job that provides holiday pay, sick leave, RDO's etc. For the workers concerned to insist on wages and conditions from prospective employers would be a one-way ticket to permanent unemployment.

Added to this is the fact that workers on fraudulent subcontract arrangements miss out on the specific entitlements and conditions prescribed for employees under statute and common law. The argument is encapsulated in the Productivity Commission's report at **Appendix 1** which paraphrases authors such as Creighton, Stewart and Collins who make the following important points⁵;

1. "some workers do not know the true value of the employment benefits foregone, and that only employers therefore gain from the contracting arrangements", and,
2. "workers offered contractual employment cannot negotiate more attractive terms and conditions"

⁵ Productivity Commission, *op. cit.* p.8 (see **Appendix 1**).

Later, in conclusion, the report states;

“there are concerns that employers can avoid obligations in areas like payroll tax, superannuation, unfair dismissal and workers’ compensation if they hire workers as contractors. This phenomenon is seen as detrimental to worker welfare, and an indication that labour law is failing to protect a group of workers that, because they are essentially working in employee-employer relationship, should be covered by that law.”⁶

Even if the so-called “all-in” rate paid to a subcontractor equates dollar for dollar with the wages of an employee, the worker will still miss out on important protections afforded to employees, fought for by unions and legislated by governments down the decades.

Take for example unfair dismissal laws. The use of bogus subcontracting means that a worker must run the risk of a jurisdictional argument before claiming unfair dismissal in both state and federal arenas. In many cases the onus is upon the worker to prove they are an employee. Meanwhile, the employer normally will have greater resources to defend such cases. Indeed, workers who are actually employees may be deterred from pursuing unfair dismissal rights because of the mere fact that their employer has labelled them as a “subcontractor”.

Bogus subcontracting also jeopardises workers compensation entitlements. In some jurisdictions, labour only subcontractors are not covered for workers compensation purposes. Sham subcontracting places at risk the workers compensation rights of workers who are most vulnerable – the injured. Seriously incapacitated workers who are denied access to workers compensation on the basis that they are viewed as “subcontractors” will be left to resort to a restrictive welfare system if they choose not to challenge their claim. Indeed, it is true to say that many so-called subcontractors will accept the decision of an insurance company as final, even though they may well be “employees” at law.

The “Workers Compensation and OHS Council Compliance Working Party” which forms part of the “Compliance Improvement Branch” of the New South Wales WorkCover Authority recently stated in a report (see **Appendix 10**) dated 8 May 2001 that;

“a lack of clarity in the deemed workers provisions has contributed to non-insurance and underinsurance. Some employers are genuinely unaware that the contractor they engage is deemed to be a worker, however, others seek to exploit any uncertainty in the deemed workers provisions to minimise their premiums. An employer’s failure to obtain insurance may not be discovered until after

⁶ *ibid.* p.55 (see **Appendix 1**)

a claim is lodged. Disputes concerning whether someone is a worker or deemed worker within the meaning of the legislation, delay injury management and payment of claims.”⁷

The fact is that forcing subcontractor arrangements on workers has the neat effect of subverting most, if not all, employee entitlements that has been enacted by a democratically elected Parliament, decided upon by a court or commission or fought for by trade unions.

So-called “independent” subcontractors can also run into problems which are normally associated with larger businesses. See for example **Appendix 11** detailing submissions made by the CFMEU in April 1996 regarding the impact of the Trade Practices Act 1974 (Cth) on such workers. Clearly, workers who are forced into subcontract arrangements are placed into highly vulnerable situations, the extent of which is often not immediately obvious.

Whilst it is true that workers can, in many cases, challenge their alleged “independent subcontractor” status (such as in unfair dismissal proceedings), it must be remembered that this requires positive action by the worker with its associated time and costs. Many workers will lose their “employee” entitlements in such cases simply because they cannot afford to make such challenges or because they are unaware of their right to do so.

The union can see no good public policy or industry policy reason why this unacceptable state of affairs should be allowed to continue. Certainly if the only consideration in our society was the maximum cost efficiency of employers the notion of having a perfectly flexible workforce that is only paid when workers are at the workplace, would be just fine. Happily Australia is a country where we profess to adhere to civilised values, and rights for ordinary workers are seen as a feature of our democracy. Building workers in Australia should be able to access these civilised values.

CONSEQUENCES OF ALL-IN PAYMENTS FOR EMPLOYERS

An employer who engages his/her workers on all-in payments will almost always have a cheaper cost structure regards labour than a comparable employer who engages his/her workforce on wages and conditions. Attached at **Appendix 12** is an article published in

⁷ Workers Compensation and OHS Council Compliance Working Party which forms part of the “Compliance Improvement Branch” of the New South Wales WorkCover Authority Report, 8 May 2001, p.2 (see **Appendix 10**).

the Australian Financial Review on 14 February 1995 titled “Huge financial penalties if contractors deemed employees”. This article provides a useful example of how a company can save on costs such as payroll tax, workers compensation, superannuation and PAYE assessment by engaging sham subcontractors.

Typically the employer engaging his/her workers on the all-in rate will pay a higher hourly rate than an award or an EBA (though not always) which provides some element of compensation for lost conditions of employment. This employer will also make substantial savings regards on-costs with those savings including Superannuation, Workers Compensation costs, payroll tax costs, FBT and administrative costs. We will explain later how the manipulation of taxation arrangements, particularly the non-deduction of (PAYG(W)) tax allows this employer to operate at a significantly lower cost structure than employers who do deduct (PAYG(W)) tax from their employees working on wages and conditions.

Bona-fide sub-contract employers who employ their workforce on wages and conditions are adversely affected in their capacity to be competitive in various parts of the industry. These bona-fide employers continually complain about their inability to win work in various parts of the construction market where competitors using the all-in payments system have a cost competitive advantage in the order of 30% to 40%. For an example of this kind of evidence see at **Appendix 13** an extract from the Hansard of the Senate Inquiry into a New Tax System dated 5 March 1999.

Building companies tendering for work to sub-contract firms will in most instances (with the exception of major or high profile projects) pay little or no regard to whether the tendering sub-contractors provide conditions for their workers. In some instances prominent building companies will vet the tendering sub-contractors for Workers Compensation, public liability policies and sometimes other details.

Yet the more common situation is where a builder or head contractor will award a tender to a sub-contractor whose price is so low that the party letting the contract knows (or with a minimum of thought would realise) that the successful sub-contractor could not possibly afford to pay their workers all legal entitlements and obligations.

CONSEQUENCES OF ALL-IN PAYMENTS FOR THE HEALTH OF THE INDUSTRY

A number of attempts have been made over the years to analyse and document the damage that the all-in/quasi-contractor method of employment has done to the construction industry. The unions in Britain have, of course, been fighting against the same scourge for many decades and have produced material that has many parallels with our own situation (See **Appendix 14** Dr Mark Harvey, UCATT & The Institute of Employment Rights, "Undermining Construction – The Corrosive Effects of False Self-Employment" November 2001). Though they call this method of engagement by a different name ("the lump") the consequences for the industry are much the same whether we talk of Britain, Australia, New Zealand, Germany or a host of other countries.

Where this method of employment takes a grip in the industry the following consequences flow:

- bona-fide firms lose work to those who can price jobs at a much lower cost.
- both employers of this labour and the workers themselves enter a twilight world where they know they are engaged in illegal practices and seek to avoid regulatory authorities be they inland revenue (tax office), trade unions or any other regulatory body.
- safety inevitably suffers since the workers engaged this way are only paid for productive work, not periods of downtime where safety must be rectified, or inclement weather, or sickness and injury, or union meetings or non-work periods of any kind.
- training and apprenticeships suffer because in the cost-cutting environment that accompanies employers practicing illegal employment practices such as contractors are rarely able or willing to incur the costs of properly training young workers.
- payments to funds that exist for the betterment of the industry or the workforce such as Superannuation, Long Service Leave, Redundancy and Training Funds suffer through diminished contributions.

- the broader public good suffers through much diminished taxation collections be they direct taxes like PAYG(W) and payroll tax or others like FBT.
- the opportunity cost of superior and safer technology, better materials, better management systems and the smarter organisation of work comes into play because with labour costs being considerably less than they would otherwise be the incentive for innovation is much reduced.

Additionally, the flow on effects of sham subcontracting arrangements have more broadly detrimental social consequences. These can include;

- where the arrangement provides for lower monetary benefits to the worker, society will suffer the well documented effects of economic insecurity and poverty,
- where the arrangement provides for no superannuation to the worker, the financial burden of looking after that worker in retirement will fall upon the tax payer,
- where the arrangement provides for no workers compensation cover, society will need to care for injured workers who are forced to live on the welfare system. In addition, the pool of funds within the workers compensation system is lessened, causing strain on the system and effectively lower payouts for injured workers,
- lower tax revenue for governments which means less public expenditure on social goods such as health care and infrastructure. In addition, PAYE taxpayers are put in a position of having to bear a greater tax burden.

In short, it is the union's view that re-branding employees as subcontractors creates a legal fiction with an unacceptably high social cost.

WHAT SHOULD BE DONE ABOUT THE PROBLEM

The problem should be tackled in a concerted, comprehensive Whole-of-Government manner.

The single biggest driver and critical issue that sustains this method of employment is tax evasion.

We have shown above how the tax avoided helps to make the offending employer more competitive and the forgone tax deductions from the workers makes their take-home pay much more acceptable than it would have otherwise been (had they had to pay proper employee tax).

A serious attempt by the taxation authorities backed with political will, would not only net hundreds (probably billions) of dollars of extra revenue, it would force tens of thousands of small and medium sized employers to go legitimate or get out of the industry.

In some of the crackdowns that have occurred in Britain over the decades they describe this transition process as “the workers going back on the books”.

In terms of what steps the taxation authorities might take, the Ralph Report was and remains a good starting point.

The 80:20 principle outlined in the Ralph Report stood an excellent chance of having a dramatic impact. This of course was prior to the politics of the day coming to the fore. Described shortly, the Treasurer Peter Costello driven by revenue loss considerations was serious about implementing the Ralph proposal but the Minister for Workplace Relations (who was also Minister for Small Business), Peter Reith, who was at that point engaged in a internecine political arm wrestle with Costello, managed to win party-room support to have the Treasurer’s proposals substantially watered down. The resulting qualifications and complexities that were attached to the 80:20 rule render it almost irrelevant, in our submission. The lack of courage exhibited by the ATO, who are still costing the revenue to be recouped by the emasculated 80:20 rule as the same as the originally intended version, hasn’t helped to restore integrity to the problem eloquently described by John Ralph.

Apart from the original 80:20 rule put forward in the Ralph Report, a series of other steps should be taken, which working together and mutually reinforcing each other, would substantially cure the problem.

These steps include:

- unfair contracts legislation similar to that in the Queensland Act introduced into the Federal Act and all State Acts.

- the Industrial Relations Acts explicitly permitting both collective bargaining and access to the industrial tribunals for dependent contractors (as described)
- the trade practices legislation explicitly permitting collective bargaining for dependent contractors (as described).
- deeming provisions in the industrial legislation providing that certain classes of workers (whether employees at law or not) are to receive certain prescribed minimum standards (as they do in some jurisdictions for Workers Compensation purposes presently).

As to the proposition of there being one uniform definition of employee across Federal and State jurisdictions, we see some merit in introducing definitions (they don't presently exist in a codified way in the various industrial relations acts) provided it was really achievable to have all jurisdictions adopt one definition. We qualify this view by suggesting that the bar would have to be set pretty high, since a weak definition that employers could drive proverbial trucks through would be of no benefit in addressing the problem being dealt with in this paper.

We could also envisage the possibility of there being a different definition of employee for the building and construction industry from other industries, since the problem of employers and workers seeking to circumvent the existing law is more acute in our industry than in most others.

The exact substance of the definition could incorporate the existing common law principles "control test", "organisation test", etc., as well as picking up newer ideas like the 80:20 rule. In addition to this, courts should be directed to have regard to the bargaining power of the parties. A lack of bargaining power on the part of the worker is indicative of a lack of "independence". An "independent subcontractor" with limited or non-existent bargaining power makes a mockery of the entire concept. A useful way to gauge this factor would be to see whether the employer engages other "subcontractors" and if so, whether the terms of each engagement are identical. As well, courts could have regard to whether such subcontractors are working alongside employees. If so, it may indicate that those subcontractors are not genuine.

One shouldn't underestimate the political difficulties involved in achieving one common definition to be legislated for in all Australian jurisdictions.

Another cautionary, though not intended to be negative, note is that past history has shown that each and every time judges or legislators have shifted the boundaries on the contract of service/contract for services issue, employers and their representatives have set to work to devise ways and means of again excluding workers from the protections afforded to employees.

Knowing this to be an inevitable reaction of employers means that the response to this problem must be many sided and couldn't just simply rely on a step such as introducing a common definition of employee.

Another proposition that does bear some consideration is the idea of making the contracting for labour alone specifically illegal in the building industry.

It is hard to see public good or industry good that is served by low or semi-skilled manual workers being permitted to operate as self-employed workers. In fact even under the present legal regime it is improbable that such arrangements for those employees could be anything other than a sham. We already see many examples of apprentices and basic general labourers being described by their true employer as self-employed. Such workers are very often unaware of their rights and wide open to the exploitation that accompanies the loose description of them as 'self-employed' or various other descriptions of a non-employee. Indeed the essence of the apprenticeship concept is that there is supervision and control by an employer. The concept of an independent subcontractor apprentice is absolute nonsense but its existence is symptomatic of the problem.

Arguably, at the high skill end of the industry, most particularly in the case of white collar professionals (Architects, Engineers, Estimators etc) where such persons typically contract to deliver a result, usually free from any direction and control, there is no compelling case for regulation.

In terms of the middle ground, our best suggestion is that the line be drawn at manual or blue collar workers.

THE EFFECT OF SHAM INDIVIDUAL SUBCONTRACTING ON TAX REVENUE

“Will we be run out of business as a legitimate tax paying company in this industry? If this week I wanted to change our company to PPS, I could save \$3.74 million on our turnover. That is some 15 to 20 per cent. We are surviving at the moment because the major builders need us on jobs and we have manpower and we have a good name. I want to be able to sleep at night knowing that we do pay our legitimate taxes, everyone is covered for workers compensation, and we do pay our fair way in this country.”

This quote forms part of the submissions made by Mr Daniel Murphy, Director of a Sydney bricklaying company called Fugen Holdings, to the Senate Inquiry into A New Tax System on 5 March 1999 (see **Appendix 13**).

The union has high hopes that the Royal Commission into the Building and Construction Industry will address this issue with the seriousness it deserves. Moreover, the Federal Treasurer, Peter Costello, has recently written to the union, responding to our concerns about the epidemic of tax evasion in the industry, noting that “the Royal Commission has taken up the issue of tax avoidance and evasion in the industry” (see **Appendix 15**).

Earlier this paper outlined the widespread use and misuse of bogus self-employed labour in the construction industry. Workers engaged under sham subcontracting arrangements generally should be treated as employees for purposes of the income tax system. Forcing workers into bogus subcontracting has the effect of creating large numbers of tax evaders. Weak legislation has the effect of generating a positive incentive for tax evasion.

By engaging workers as “independent” subcontractors, employers create for themselves a comparatively low cost structure vis a vis their peers who engage workers as employees. Firstly, while all-in rates vary from market to market, they rarely reflect the full value of what the worker should be receiving under industrial awards and legislation. Secondly, employers who use bogus subcontract arrangements avoid other obligations such as payroll tax, FBT, workers compensation premiums and superannuation (although workers compensation and superannuation is occasionally paid on behalf of the worker). Employers using these arrangements also save on administrative costs such as the hiring of payroll staff and book keeping.

Meanwhile, the workers who are engaged by such employers find themselves accepting the situation for at least one of the following two reasons; 1. the alternative is unemployment, and/or 2. the worker gets an advantage through less taxation. If workers

received in their hand the same level of remuneration under subcontract arrangements as do employees, there would be an absolute uproar from those workers. It is the tax savings which workers receive from this contrived arrangement that keeps them from complaining about loss of employee entitlements.

It is the interaction of cost savings for employers and tax savings for workers within a weak regulatory regime that allows sham subcontracting to flourish. The result is a taxation black hole - billions of dollars in public revenue lost due to a shameful set of arrangements in the construction industry which shouldn't exist.

The leading paper on this subject was written by John Buchanan and is attached at **Appendix 16**⁸. That paper found that by switching to become an 'independent' subcontractor, employees can have their tax bills more than halved. The savings come mostly from the business related deductions subcontractors can claim. Normal employees however cannot make the same deductions. This is on top of a lower overall tax rate applied to subcontractors, particularly those who incorporate with the company tax rate now being significantly lower than marginal tax rates for medium to high wage employees.

Buchanan's paper demonstrated this tax saving using a table comparing the taxes typically paid by PAYE and PPS workers in the construction industry who earn \$52,000 per year. The table is as follows⁹;

⁸ Buchanan J., "The Growth of Contractors in the Construction Industry: Implications for Tax Revenue", in Buchanan J. ed. *Taxation & the Labour Market*, Australian Centre for Industrial Relations Research and Training, December 1998, at p. 13 (see **Appendix 16**).

⁹ *Ibid.* p.23 (see **Appendix 16**).

**Comparison of taxes typically paid by PAYE and PPS Contractors in the
Construction Industry, example for worker with gross annual income of \$52,000**

Tax Return Profile of Joe Average Salaried Worker		Tax Return Profile of Joe Average – Sole Trader	
Wages as per Group Certificate	\$52,000	Gross Income	\$52,000
Less Allowable Deductions	(750.00)	Less Allowable <i>Deductions</i>	
		Materials & Job Costs	5,000
		Motor vehicle expenses	6,000
		Salary to Spouse	6,000
		Sundry Expenses	1,700
		Telephone	1,500
			\$20,200
Taxable Income	\$51,250	Taxable Income	\$31,800
<i>Income Tax Payable</i>	\$14,689.50	<i>Income Tax Payable</i>	\$6,834.00
<i>Medicare Levy</i>	\$871.25	<i>Medicare Levy</i>	\$540.59
	-----		-----
	\$15,560.75		\$7,374.59
<i>Less Spouse Rebate</i>	(\$1,452)	<i>Less Spouse Rebate</i>	-
<i>Net tax payable</i>	\$14,108.75	<i>Net tax payable</i>	\$7,374.59
Employer Superannuation Contribution of 2,600 taxed at 15%	\$390	Employer Superannuation Contributions	
<u>Government Revenue Summary</u>		<u>Government Revenue Summary</u>	
Net Income Tax Paid	\$14,108.75	Net Income Tax Paid	\$7,374.59
Tax on Superannuation Contributions	\$390.00	Tax on Superannuation Contributions	-
Total Revenue	\$14,498.75	Total Revenue	\$7,374.59
Average Rate of Tax	28%	Average Rate of Tax	14%

Note: This table was prepared by a senior accountant with extensive experience in providing advice in the construction industry. The examples represent a typical situation gleaned from years of providing such advice and observing practice in the industry.

It is apparent from this material that workers on subcontract arrangements effectively halve their tax liabilities. Using various data Buchanan is then able to demonstrate that subcontractors pay on average \$6,217.22 less tax per year than their employee counterparts.¹⁰ Using further analysis Buchanan shows that around \$2.2 billion would have been contributed to the public purse in 1996/97 had subcontractors paid the same tax as PAYE workers in the construction industry.¹¹

Buchanan's paper also analyses the United Kingdom experience which was far worse than Australia's at the time. With little changed today, it is clear that Australian governments must do something to prevent our construction industry sliding into the UK's situation before it's too late.

UNION VOICE

The CFMEU has been an active lobbyist on the misuse of subcontract labour at a policy level. On 13 September 1995, National Legal Officer for the CFMEU Construction & General Division, Mr Tom Roberts, went into print on this issue in the Australian Financial Review. Attached at **Appendix 17** is a copy of the article titled "PPS feeds the black hole". Mr Roberts also reported to the CFMEU Construction & General Division, Divisional Conference in October 1997 on the issue. Attached at **Appendix 18** is a copy of that report. A similar report was made at the Divisional Conference in 1995 (see **Appendix 19**).

In January 1999 the CFMEU Construction & General Division made a Submission to The Senate Select Committee on a New Tax System (see **Appendix 20**). This submission made the following recommendations;

- the establishment of set criteria to determine whether a worker is a subcontractor,
- lifting the rate of tax deducted from payments to subcontractors,
- restricting access to exemptions and variations from the rate of tax,
- increasing penalties for abusing the tax system.

The union then began a campaign to lobby politicians and senior public servants on the issue. Attached at **Appendix 21** are the following letters;

¹⁰ *ibid.* p.34 (see **Appendix 16**).

- letter from CFMEU Construction & General Division to Senator Malcolm Colston dated 1 February 1999,
- letter from CFMEU Construction & General Division to Senator Andrew Murray dated 14 April 1999,
- letter from CFMEU Construction & General Division to Senator Harradine dated 6 May 1999,
- letter from CFMEU Construction & General Division to Senator Andrew Murray dated 4 June 1999,
- joint letter from CFMEU Construction & General Division, the Australian Manufacturing Workers Union, the Liquor Hospitality and Miscellaneous Workers Union and the Transport Workers Union, to The Hon. Kim Beazley dated 22 June 1999,
- letter from CFMEU Construction & General Division to the Commissioner of Taxation dated 19 November 1999,
- letter from CFMEU Construction & General Division to The Hon. Peter Costello dated 26 November 1999,
- letter from CFMEU Construction & General Division to Senator Andrew Murray dated 14 June 2000,
- letter from CFMEU Construction & General Division to The Hon Simon Crean dated 19 June 2000,

On 23 May 2000 John Sutton, National Secretary of the Construction & General Division of the CFMEU, Raoul Wainwright, National Legal/Research Officer of the Construction & General Division of the CFMEU and Mr Ralph Willis, consultant to the CFMEU, presented submissions regarding this issue to a Senate Committee (see Hansard attached at **Appendix 22**).

The union also made a Submission to the Review of Business Taxation in June 1999 (see **Appendix 23** – note: **Appendices B and C** of that Submission are attached elsewhere in this paper). On 18 June 1999 the Business Review Weekly reported “Union revives ‘subbie’ tax battle” (see **Appendix 24**).

¹¹ *ibid.* (see **Appendix 16**).

Our letters to Senator Andrew Murray dated 14 June 2000 and The Hon Simon Crean dated 19 June 2000 neatly summarise the CFMEU Construction & General Division's view of the now enacted New Business Tax System (Alienation of Personal Service Income) Act 2000. In essence the legislation would not and, as time is proving, has not addressed the problem. It has only exacerbated it. The recommendations proposed by the CFMEU in those letters would go a long way to rectifying the problem.

As to the question of reporting users of sham subcontract labour to regulatory authorities, this is not as simple as it might seem. On a day to day level, countless workers have approached the CFMEU over many years claiming they have been forced into subcontract arrangements. These issues are dealt with on a case by case basis and are sometimes resolved in the workplace, sometimes in the courtroom. On those occasions the Union has taken the complaints of workers in this regard to various tribunals for resolution (the industrial relations commissions and local courts etc.), it has invariably encountered delays, complexities and costs which prevent the expeditious resolution of the issue. On many occasions the Union and its branches have reported unscrupulous employers to the proper authorities for various breaches of legislation and the like. There are numerous stumbling blocks however when it comes to reporting the bogus use of subcontract labour. They include;

- reporting the use of subcontracting scams doesn't seem to generate great interest on the part of bureaucrats or politicians.
- reporting employers who have forced their workers to become subcontractors generally require such workers speaking out in each instance. Yet workers who are forced into such arrangements often accept them for fear of unemployment. Speaking out often does not seem an option to these workers.
- it must also be recognised that, as we have said previously, some workers enjoy the benefits of lower tax despite the loss of employee entitlements.
- judging whether labour only subcontractors are bogus involves a journey into a quagmire of legal obscurities. Often courts themselves cannot decide whether a worker is a subcontractor or not.

In our experience, reporting the use of fake subcontractors all too often falls on deaf ears. Generally, the most effective way we have found to correct such inappropriate practices is for workers themselves to take action on the site with the support of their union.

SUMMARY

By caving into pressure from business lobby groups like the Housing Industry Association, the Federal Government has provided a safe haven for inappropriate and illegal practice. Fraudulent subcontracting has been allowed to flourish under the Federal Government's laws. Until the incentive for employers and workers to engage in sham subcontracting is removed, the problem will only get worse. At the moment the only parties who gain from the practice are tax evaders and unscrupulous employers. The ones who suffer are honest taxpayers, honest employers, workers, the industry and society in general. Fundamentally the cancer of sham subcontracting undermines the rule of law. As Buchanan states

"as matters stand we appear to be witnessing the realisation of John Stuart Mills dictum: under conditions of competition standards are set by the morally least reputable agent"¹²

Regulators need to bring this situation under control as a matter of urgency. The Royal Commission into the Building Industry is well placed to sink its teeth into this problem. We urge it to do so.

¹² *ibid.* p.40, (see **Appendix 16**).

LIST OF APPENDICES

1. Productivity Commission Staff Research Paper by Waite M. & Will L., "*Self-Employed Contractors in Australia: Incidence and Characteristics*", 2001.
2. Newspaper clipping "*Plea for leniency on contractors*" Paul Cleary.
3. Saboia J., "Contract Labour in the Brazilian Construction Industry" at p.16 in "*Contract Labour: Looking at Issues – nine Country Cases*" No.106 & 107 Labour Education 1997/1-2, International Labour Office, Geneva.
4. Patel B.B., "Contract Labour in India in manufacturing, construction, plantations and forestry" at p.38 in "*Contract Labour: Looking at Issues – nine Country Cases*" No.106 & 107 Labour Education 1997/1-2, International Labour Office, Geneva.
5. Lee Kiong Hock & Sivananthrian A., "Contract Labour in Malaysian Plantation, Construction and Sawmilling Industries" at p.45 in "*Contract Labour: Looking at Issues – nine Country Cases*" No.106 & 107 Labour Education 1997/1-2, International Labour Office, Geneva.
6. Birch, J., "Contract Labour in the British Construction Industry", at p.69 in "*Contract Labour: Looking at Issues – Nine Country Cases*" No.106 & 107 Labour Education 1997/1-2, International Labour Office, Geneva.
7. International Federation of Building and Wood Workers, "*Contract Labour – Why Do We Need an ILO Convention?*" prepared for the International Labour Organisation 86th Conference, 2-18 June 1998, Geneva, Switzerland.
8. UITBB, "*Working Document on the Problem of Contract Labour*", 12th Conference of the Building TUI, Vigo, Spain, 27-29 November 1997.
9. International Labour Organisation, "*The construction industry in the twenty-first century: Its image, employment prospects and skill requirements*", Geneva 2001.
10. Workers Compensation and OHS Council Compliance Working Party - Compliance Improvement Branch of the New South Wales WorkCover Authority - Report, 8 May 2001.
11. CFMEU, "*Problems for Independent Subcontractors in the Construction Industry*", April 1996.
12. Australian Financial Review, "Huge financial penalties if contractors deemed employees", 14 February 1995.
13. Hansard of the Senate Inquiry into a New Tax System dated 5 March 1999.
14. Harvey M., "Undermining Construction – The Corrosive Effects of False Self-Employment" UCATT & The Institute of Employment Rights, November 2001.
15. Letter from the Federal Treasurer, Peter Costello, to CFMEU Construction & General Division NSW Branch dated 8 July 2002.
16. Buchanan J., "The Growth of Contractors in the Construction Industry: Implications for Tax Revenue", in Buchanan J. ed. *Taxation & the Labour Market*, Australian Centre for Industrial Relations Research and Training, December 1998.
17. Roberts T., "PPS feeds the black hole", Australian Financial Review 13 September 1995.
18. Roberts T., "Tax Rorting and Sub-contracting in the Construction Industry", Report to the CFMEU Construction & General Division, Divisional Conference, October 1997 on the issue.
19. Roberts T., "Taxation & Award Avoidance", Report to the CFMEU Construction & General Division, Divisional Conference, 1995.

20. CFMEU Construction & General Division Submission to The Senate Select Committee on a New Tax System January 1999.
21. The following correspondence ;
- letter from CFMEU Construction & General Division to Senator Malcolm Colston dated 1 February 1999,
 - letter from CFMEU Construction & General Division to Senator Andrew Murray dated 14 April 1999,
 - letter from CFMEU Construction & General Division to Senator Harradine dated 6 May 1999,
 - letter from CFMEU Construction & General Division to Senator Andrew Murray dated 4 June 1999,
 - joint letter from CFMEU Construction & General Division, the Australian Manufacturing Workers Union, the Liquor Hospitality and Miscellaneous Workers Union and the Transport Workers Union, to The Hon. Kim Beazley dated 22 June 1999,
 - letter from CFMEU Construction & General Division to the Commissioner of Taxation dated 19 November 1999,
 - letter from CFMEU Construction & General Division to The Hon. Peter Costello dated 26 November 1999,
 - letter from CFMEU Construction & General Division to Senator Andrew Murray dated 14 June 2000,
 - letter from CFMEU Construction & General Division to The Hon Simon Crean dated 19 June 2000,
22. Hansard of Senate Committee dated 23 May 2000.
23. CFMEU Construction & General Division Submission to the Review of Business Taxation, June 1999.
24. Business Review Weekly, "Union revives 'subbie' tax battle" 18 June 1999.