

7 March 2011

The Commissioner
Australian Building and Construction Commission
Level 11, 255 Elizabeth Street
SYDNEY NSW 2000

Re: Sham Contracting Inquiry

Thank you for your invitation to make a submission to the ABCC Inquiry. The 11 questions provided a useful way into making commentary on the issues.

1. What do you see as the major impacts of sham contracting in the building and construction industry?

The main impact relates to inequities with respect to loss of benefits and entitlements of individuals who are engaged on contracts for services when their substantive employment arrangements clearly mean they should be engaged as employees.

In addition, there is a loss of opportunity for those persons because they would not be as free to seek work with other employers in the same way that genuinely independent contractors are at liberty to do.

2. To what extent do you think the provisions of the *Fair Work Act 2009* (FW Act) work to reduce sham contracting in the building and construction industry? How could existing provisions in the FW Act be improved?

Sections 357-9 of the *Fair Work Act 2009* set out clearly the provisions relating to misrepresentation of a contract of employment as a contract for services under which the individual performs work as an independent contractor. The sections also set out clear provisions relating to dismissal of an employee with a view to engage the individual as an independent contractor and misrepresentation to engage as an independent contractor a person previously employed for work that is effectively the same as the work for which the individual was employed.

Our position is that employers should not be able to package permanent full time or part time roles into labour hire firms or other similar arrangement other than as a standard employee arrangements.

3. Is there a better approach to identifying the difference between an employee and an independent contractor than the current common law test? If so, what is the best approach to identifying the difference between an employee and an independent contractor?

The key question relates to the genuine 'independence' of contractors as distinct from an arrangement in which the contractors would be 'dependent' in the sense that they would be working for one employer only in an ongoing employee capacity but without the entitlements of an employee.

Genuine independence is a key differentiator and would also prevent employees or unions being readily able to pressure employers into transforming genuine contract roles into employment roles in cases where that doesn't reflect the underlying nature of the work or the individual's personal preference.

4. Do you support the creation of a third category of worker that lies between an employee and an independent contractor? If so, what attributes would you ascribe to a third category of worker that sits between an employee and an independent contractor?

Adding a hybrid category is unlikely to add clarity, effectiveness or efficiency in our view. The two primary categories of work in this industry – employee and contractor – are well accepted and generally understood and the challenge is to sharpen the attributes and distinction of each, and not to add a blur ball into the middle.

5. Should economically dependent contractors be treated differently to independent contractors? How?

If a contractor is economically dependent because the contractor works effectively full time for one employer and over a considerable period of time eg more than one year, that contractor should be considered as an employee and not as a contractor who is genuinely 'independent'.

6. Is there currently an appropriate level of regulation of on-hire employee arrangements in the building and construction industry?

According to a research article (see link below) in AHRI's *Asia Pacific Journal of Human Resources* Australian construction workers are loyal to both the labour-hire agency employing them and the host employer, though their commitment to the agency is stronger.

The study distinguishes:

- *Affective commitment* - emotional attachment that leads employees to remain with an organisation because they want to

- *Normative commitment* - an employee's felt sense of obligation, or staying with an employer because they feel they ought to
- *Continuance commitment* - an employee's tendency to remain with an employer because they feel they need to

The authors conclude that 'affective and 'normative' dimensions are stronger for the employing agency than for the host firm.

http://www.ahri.com.au/MMSDocuments/comms/apjhr/apjhr_2010/apjhr_december_2010.pdf

7. Is there currently an appropriate level of regulation of on-hire contractor arrangements in the building and construction industry?

AHRI published an article in its *Asia Pacific Journal of Human Resources*. Despite the Fair Work Act 2009 imposing responsibilities on the common law employer – the agency - Dr Underhill says they only limited practical application to the host (see link below to AHRI's *Asia Pacific Journal of Human Resources*).

Dr Underhill argues compliance is compromised by the structure of the Australian temporary agency industry. "Barriers to entry are low; capital requirements are minimal; and business licensing regulations, which might otherwise deter new entrants, do not exist".

"All the rights and obligations in relation to agency workers (with the exception of OHS regulation) fall upon the agency employer ... As long as compliance rests upon employers who can easily evade their obligations, a culture of non-compliance will also be pervasive".

http://www.ahri.com.au/MMSDocuments/comms/apjhr/apjhr_2010/apjhr_december_2010.pdf

8. Do you support the development of a Code of Practice for Labour Hire in the building and construction industry? If yes, what should be the elements of this Code of Practice?

We make no comment on this question.

9. What role, if any, do you see for the concept of "joint employment" in the building and construction industry?

See answer to question 6.

10. What approaches do you support to address the issue of phoenix companies in the building and construction industry?

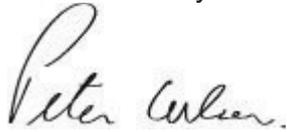
Company directors of a failed enterprise should not be able to continue trading in another company shell that is set up as a labour hire entity without assets so that the directors can readily and fraudulently evade their obligations with respect to employee entitlements.

11. How could the ABCC better inform workers and industry participants regarding their rights and obligations in relation to sham contracting?

The ABCC could use public circulation of information by media release and other standard means but also email, intranets and social media tools so that employees who are not on line in their normal course of work can become acquainted with their rights and obligations with respect to sham contracting. Confidential surveys of practice would also assist.

We look forward to seeing the outcomes of the Inquiry.

Yours sincerely

A handwritten signature in black ink that reads "Peter Wilson". The signature is written in a cursive style with a large initial "P".

Peter S Wilson AM
National President