

## **SUBMISSION ON INQUIRY INTO INDEPENDENT CONTRACTORS AND LABOUR HIRE ARRANGEMENTS**

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### **A Background**

(1) The Building Service Contractors Association of Australia ("BSCAA") was established in 1964 and represents the interests of some 700 contractors throughout Australia. Our members are predominantly contract cleaners so we are, by choice, an "industry specific" association. Other areas covered by our membership base include security, grounds maintenance and facilities management.

(2) By whatever significant measure, be it number of employees or gross turnover, we estimate that our membership accounts for in excess of 75% of the building services industry. The sector has a turnover of approximately \$2.5 billion and employs around 150,000 people. Our members hold contracts in all segments of the market including commercial, retail, education, mining, defence and manufacturing.

### **B Industry characteristics**

(3) The building services industry is a service industry with few capital barriers to entry. Accordingly, it has traditionally attracted a relatively high number of entrants, many of whom enter and exit the industry in a relatively short space of time.

(4) More often than not our client base views cleaning as a straight "cost", rather than an "investment" in terms of maintenance. As a result, there is constant pressure from building owners and managers to achieve reductions. This is unfortunately a reality in the majority of our market place.

(5) Even with industry margins already at a low levels, often clients still choose to re-tender jobs in an endeavour to cut costs even further and this re-tendering inevitably leads to contracts changing hands for very little money.

(6) The nature of the industry may therefore be characterised as one in which contracts regularly change hands, often with very small price differentials.

### **C Labour hire arrangements**

(7) The use of labour hire and recruitment companies are not considered a primary source of employee engagement by BSCAA members. There is a view that these entities do not have a thorough enough grasp on the intricacies of the building services industry. There is also a view that when building service contractors (BSC's) effectively buy staff at an hourly rate, the margin at the end of the day (in an industry of historically low margins) makes the practice uncompetitive.

### **D Independent contractors**

(8) Contracting out of services is an increasing trend in our industry sector.

(9) There are a number of reasons for this trend, including the inflexibilities in both state and federal awards and the raft of penalty and shift provisions contained within these instruments, which render contractors uncompetitive. State industrial laws, such as in Western Australia and now emerging elsewhere, exacerbate the position. A major reason for the push to Independent Contracting is the ever increasing burden of labour on-costs which are a part of any employer-employee relationship. The addition of Superannuation, Payroll Tax, Workers Compensation, Stamp Duty etc can add up to 30% to the direct labour cost of any engagement. Independent Contracting allows these on-costs to be rolled into one single fee at a much more attractive 'hourly rate'. In a labour market where recruitment at cleaners' award rates is becoming increasingly more difficult, the opportunity to engage a higher quality resource at a higher premium is a market reality.

(10) The climate for trading, utilising the traditional award system, is now becoming extremely difficult in all areas apart from central business district high profile sites, which continue to come under the union's sphere of influence and where the award system continues to prevail.

(11) Australian Workplace Agreements (AWA's) have started to emerge in the BSC sector (more predominantly in Western Australia due to the nature of state industrial laws) and they do offer greater flexibility than the award system. To this extent that these instruments offer wide workplace flexibility, but benchmark the remuneration value of the Agreement against the Award remuneration rate, they have been welcomed by significant section of the marketplace. The introduction of AWA's has been vehemently resisted by the union movement as they generally exclude the union as a party to the Agreement. Despite the commercial and operational advantages of AWA's their introduction into most Capital City CBD's has been resisted by the Union.

(13) The flexibility of sub contracting, by way of contrast, has undoubted appeal and hence the growing trend.

(14) There is a significant concern in our industry sector, however, and that is the growth in "illegal subcontracting" and "cash in hand payments". Dubious and / or straight illegal subcontracting is clearly in evidence and on the rise in New South Wales. Of more recent times illegal subcontracting and cash in hand payments have emerged in the tourism industry in Queensland.

(15) There is also evidence in most states of contractors converting employees into sub contracting arrangements to avoid paying award wages and statutory on-costs and this practice represents another form of illegal subcontracting.

(16) BSCAA is universally opposed to subcontracting practices that that are essentially a re-engagement of labour, that do not meet statutory criteria in terms of "the contractor test" and are therefore primarily designed to avoid paying either award wages and / or statutory on-costs. The challenge for our particular industry sector where labour costs are such a significant part of any contract is to determine with government how illegal-subcontracting practices can be restricted.

(17) Much of the commentary about independent contracting centres on the definition of an employee as opposed to a legitimate contractor. Contractors operating in a genuine capacity should support the proposed Independent Contractors Act. Rather than pivoting on the "source of income 80/20 rule" the new legislation focuses on a new results test.

(18) The new results test rulings, setting out 11 common law style tests that should be taken into consideration is realistic, with the further stipulation that two of the common law tests must be passed, being the ability for rectification and the stipulation that in most situations contractors must supply their own equipment.

(19) The lack of a uniform definition of an "employee" across different jurisdictions remains confusing for industry. State Labour Governments on the one hand are endeavouring to widen their respective interpretations to restrict contracting. The Australian Taxation Office definition is undoubtedly related to revenue considerations. State Tax Offices also have payroll tax considerations and State WorkCover Authorities have yet another focus.

(20) A common core definition of an employee (and hence, by default, an independent contractor) would be a sensible outcome for business in Australia.

(21) Irrespective of the feasibility of achieving definitional agreement across all states, territories and the Commonwealth, the key issue for our industry sector is compliance and as far as possible, the eradication of illegal subcontracting. In this regard there would appear to be least two alternatives. Either some form of registration managed by a government agency or a continuation of the existing self-assessment process, but followed up with a far more rigorous compliance mechanism.

(22) AWA's presently undergo a form of scrutiny, registration and subsequent renewal or otherwise every three years. To this extent, the present Federal Government through the Office of the Employment Advocate has been engaged in a form of regulation of agreements between employers and employees. The question arises as to whether it has an appetite to become involved in the registration of independent contractor arrangements?

(23) Franchising is another example of where the Federal Government has been prepared to establish an industry framework. There is now comprehensive legislation in place for registration and regulation of franchises.

(24) Such a framework would protect the tax base for the Federal Government and at the same time provide a method to protect the independent contractor's from 'under-award' contracts by ensuring that the 'contract value' included all of the traditional on-costs and production costs. The industry would welcome the opportunity to present a draft template, which would accommodate these twin objectives

(25) The Australian Taxation Office has approached our Association of recent times seeking support for initiatives that might restrict illegal practices, cash in hand payments etc in our industry sector. The Department clearly believes that such practices are increasing, hence its decision to target building services. BSCAA supports this initiative so long as it is directed at the "cowboy" element within our industry and does not lead to increased paperwork, administration and cost.

## E Summary

(26) Independent contracting is growing throughout Australia for most of the right reasons and our Association supports the Federal Government's push towards deregulation of the labour market.

(27) Unfortunately, in the building services sector with low capital barriers to entry combined with the often held view by owners and managers that building services does not "add value" to the balance sheet, the downward pressure on costs is very significant. This pressure has been a major contributing factor to the growth in subcontracting and illegal subcontracting.

(28) Federal Government examination of some form of independent contractor registration makes considerable sense and follows the proactive steps it has taken with AWA's and franchising. Registration would bring compliance and transparency from the government and principal's perspective, whilst delivering flexibility and true resourcing levels to service delivery providers.

(29) BSCAA supports a unified approach to the definition of self-employed contractors across government agencies, both state and federal.

(30) BSCAA supports increased Federal Government resources being directed at the detection and prosecution of illegal subcontracting practices.

(31) BSCAA supports, in combination with (28) (29) and (30) above, community and client education programs aimed at exposing the risks of engaging in, or contracting out, illegal subcontractors.

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