



**Submission of the
Construction Forestry Mining and Energy Union**

**to the
Standing Committee on Employment, Workplace
Relations and Workforce Participation**

**Inquiry into Independent Contractors and Labour Hire
Arrangements**

March 2005

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- Appendix 16:** ATO's written response to questions posed by the CFMEU during the Royal Commission headed "Response to CFMEU Questions", 2002.
- Appendix 17:** ATO's Submission to the Royal Commission, June 2002.
- Appendix 18:** "*The New Business Tax System: Stage 2 Response*", Media Release of Treasurer Peter Costello, No 74, 11 November 1999.
- Appendix 19:** Newspaper clippings headed; "*Irish link in major Oz cash laundering scam*", "*Sydney link to \$11m crime cash*", "*Corkman to face extradition hearing*", "*Crime authorities crack down on budding bodgie*", "*Foreign workers preferred*" and "*Jobs racket claimed*".
- Appendix 20:** Letter from the CFMEU to the Minister for Immigration and Multicultural Affairs, 18 May 1999, with attachments.

1. INTRODUCTION

- 1.1 Both illegitimate independent subcontracting and labour hire arrangements constitute precarious forms of employment. Workers engaged under such schemes often have little job security and often receive inferior remuneration.
- 1.2 Bogus “independent” subcontracting is widespread within the building and construction industry. By classifying their workers as subcontractors, employers usually save on administration costs and avoid award entitlements. The workers involved usually pay a lower rate of taxation than like workers who are treated as employees. In our view, most of these workers are not truly “independent” and should instead be classified as employees at law. The result of these sham arrangements is threefold;
- workers involved generally receive lower overall remuneration (ie entitlements such as annual leave, personal leave, superannuation, compensation cover etc are not paid),
 - employers who comply with the law by only engaging employees or genuinely independent subcontractors are undercut by unscrupulous operators, and,
 - the Australian community suffers diminishing levels of public services as the Government loses billions of dollars in unpaid taxes each year.
- 1.3 Labour hire arrangements also have unfortunate consequences. In the Union’s experience, many less reputable labour hire firms are guilty of unlawful or inappropriate activity including;
- engaging workers on sham subcontracting arrangements,
 - underpaying workers,
 - engaging illegal migrant labour, and,
 - underpaying workers compensation premiums.
- Labour hire operations are also less likely to properly train their workers. This has adverse consequences for occupational health and safety and long term skill formation
- 1.4 The CFMEU’s view is that the Federal Government should take immediate steps to crack down on illegitimate subcontracting and unscrupulous labour hire operations in the building and construction industry.

2. REFERRAL TO PREVIOUS SUBMISSIONS etc.

2.1 The CFMEU has been actively involved in the debates surrounding so-called "independent" subcontracting and labour hire arrangements for many years.

2.2 We refer the Committee to the following attached documents concerning subcontracting and request they be considered as part of the Union's submissions to this Inquiry;

- **Appendix 1:** The CFMEU's submission to the Royal Commission into the Building and Construction Industry ("the Royal Commission") regarding "Working Arrangements, Tax Evasion etc", 18 July 2002. Attached to that submission are the following;

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.

- **Appendix 2:** Speech of John Sutton, National Secretary of the CFMEU (Construction & General Division) to the Australian Taxation Office ("ATO") Building and Construction Industry Forum, 28 November 2003.
- **Appendix 3:** "For Fairness and Services: Restoring the Integrity of the Taxation System", jointly compiled by the CFMEU and ACOSS, August 2004.

- **Appendix 4:** The CFMEU's submission to the Senate Economics Committee, May 2000 (headed "Executive Summary").
- **Appendix 5:** Hansard Extract of evidence given by John Sutton (National Secretary, CFMEU Construction & General Division), Raoul Wainwright (National Legal/Research Officer, CFMEU Construction & General Division) and Ralph Willis to the Senate Economics Legislation Committee, 23 May 2000.
- **Appendix 6:** The CFMEU's submission to the Review of Business Taxation, June 1999.
- **Appendix 7:** Hansard Extract of evidence given by John Sutton (National Secretary, CFMEU Construction & General Division), Raoul Wainwright (National Legal/Research Officer, CFMEU Construction & General Division) and Dan Murphy (Director, Fugen Holdings) to the Senate Select Committee on a New Tax System, 5 March 1999.
- **Appendix 8:** The CFMEU's submission to the Senate Select Committee on a New Tax System, January 1999.
- **Appendix 9:** The CFMEU's submission to the Inquiry into the Structure and Distributive Effects of the Australian Taxation System.

2.3 We refer the Committee to the following attached documents concerning labour hire. In particular, the Union supports the submissions and recommendations contained in **Appendix 12** and requests that the Committee adopt this document as part of our submissions to this Inquiry. The Union also supports the recommendations and findings in **Appendices 11, 13 and 14.**

- **Appendix 10:** "Union Experience of Labour Hire in the Industry", document prepared by the CFMEU for the ATO's "Cash Economy and Tax Evasion Subcommittee", July 2004.
- **Appendix 11:** Final Report of the NSW Government Labour Hire Task Force, 2001.
- **Appendix 12:** Submission of the Labor Council of NSW (in conjunction with the CFMEU Construction & General Division, NSW Branch) to the NSW Government Labour Hire Task Force, 14 September 2000.
- **Appendix 13:** Submission of the Australian Council of Trade Unions ("ACTU") to the NSW Government Labour Hire Task Force, September 2000.
- **Appendix 14:** Submission of the ACTU to the Inquiry into Labour Hire Employment in Victoria, December 2003.

3. ADDITIONAL POINTS ON "INDEPENDENT" SUBCONTRACTING

Case Study

On 22 February 2005 a worker named Mr McDonald gave the following evidence to the Tasmanian Industrial Commission (T No 11934 of 2005);

MR McDONALD: Well, I was hired at the Ferntree Tavern - while I was having a beer - by Mark Coxan, and then he told me to come down on a Tuesday, down to the North West Bay Ships, and just to have a look around the boat. And then I got a phone call on Thursday morning - on the Monday morning - to say come in on Thursday, and bring an ABN number.

So I went in on the Thursday and started, and then my first job for the first month was grinding on the boat with a nine-inch grinder. And I didn't have a clue how to use the grinder, I was just given it and told to start grinding. And then from then on I was mixing bog. So I was a farer, putting bog on the side of the boat.

...

MR McDONALD: And so I did that over the full 12 months, and that was pretty much what I did. And in some cases there I was working 72 hours a week, with - I would start at seven in the morning and go through until two in the morning, and then have to be there at seven the next day. And for me, that is not contracting, because I had no choice in it. If I didn't do it, I was given the sack. So that is pretty much what I did down there.

...

THE COMMISSIONER: Yes. You were asked to bring an ABN. Do you know about ABN?

MR McDONALD: I didn't at the time. I was told I had to ring Dean up and he has told me to go to the Taxation Office and just ask about an ABN number. And so I went in there and then they said that it would take a week to go through. So then, for the first week and a half I was working, I didn't actually have an ABN number.

THE COMMISSIONER: Okay. So you were paid up - just given a cheque to say, "Here's your money" - - -

MR McDONALD: No. I give him my bank details and it went straight into my bank.

THE COMMISSIONER: Okay. So it went straight into your bank. So they didn't take off tax, they didn't take off anything?

MR McDONALD: Nothing.

THE COMMISSIONER: They just said - - -

MR McDONALD: They made us pay our own tax.

THE COMMISSIONER: Okay.

Situations such as this where workers must obtain an ABN in order to work are not unusual in the construction industry.

3.1 The Union's position on so-called "independent" subcontracting is well documented in the Appendices listed at 2.2 above. We request that all these documents be considered part of the Union's submissions to this Inquiry. In particular, **Appendix 1** addresses the dimensions of the issue, its international context, the different kinds of subcontractor arrangements and the effect of such schemes on workers, employers, the industry and society as a whole. At pages 12 to 15 the submission also makes a number of suggestions on how to address the problem. We request that the Committee pay careful attention to this submission and adopt the suggestions contained therein.

3.2 The Union also makes the following additional points;

Latest Data and Estimates

3.3 The latest data on the number of "own account workers" (a term used by the Australian Bureau of Statistics ("ABS") to describe such contracting arrangements) indicates that there are 217,900 such workers in the construction industry as at November 2004. By comparison there are 566,000 employees and 53,800 employers. (see ABS 6105.0 Jan 2005)

3.4 On 11 February 2005, Mr Ron Silberberg, the Managing Director of the Housing Industry Association, estimated that there were more than 350,000 contractors in the residential construction industry alone (see **Appendix 15**). This estimate confirms the Union's contention that such arrangements are rife in our industry. In our long experience we know that most of these workers are not genuine subcontractors.

ABN Applications Need to be Scrutinised

- 3.5 The speech of Mr John Sutton, National Secretary of the CFMEU Construction & General Division, at **Appendix 2** contains suggestions similar to those in **Appendix 1** (see pages 11 to 14). However Mr Sutton also emphasises the need for the distribution of ABNs to be policed (see page 13). He refers to the ATO's written response (which was submitted to the Royal Commission: see Barcode 006.0500.0085.0092 at **Appendix 16**) to questions asked by the CFMEU in 2002. In that response the ATO states that the procedure by which individuals obtain ABNs is "based on self-assessment". Once an application is lodged, all the ATO will then verify is;
- first, that the person does not already have an ABN, and,
 - second, the identity of the person.

In other words, the ATO makes no attempt to ensure an applicant is a genuine business and not an employee.

- 3.6 This system has led to a proliferation of ABNs and thus allowed sham subcontracting to thrive in our industry. At pages 3 and 4 of **Appendix 2** Mr Sutton refers the ATO's main submission to the Royal Commission (see Barcode 065.0313.0974.0021 at **Appendix 17**) dated June 2002 which states;

"Currently there are 3,624,742 active ABNs and the building and construction industry accounts for 482,295 (13%) of the total."

These figures were current as at 3 January 2002 which was just a year and a half after the new tax system commenced. At that time, there were also around 480,000 blue collar workers in the industry. Over 3 years has past since those figures were compiled. One can extrapolate from there that the number of ABNs in the industry today would be at least 650,000. If correct, this would be more than the number of blue collar workers. In other words, these figures suggest that the number of businesses in our *labour intensive* industry is greater than the number of workers. Clearly this is a farcical situation.

The Still Unknown Effect of Personal Services Legislation

- 3.7 The CFMEU is still waiting to see data from the ATO on the full effect of the Alienation of Personal Services Income Legislation. While this legislation came into effect generally in 1999, it did not begin operating in the construction industry until 1 July 2002. This delay

was due to a two year amnesty for our industry. On 11 November 1999 upon introducing the legislation Treasurer Peter Costello issued a Press Release (see **Appendix 18**) which stated;

"I am announcing today the second stage of the Government's response to the recommendations of the Ralph Review of Business Taxation. These measures, along with those already announced, will provide Australia with a modern, competitive and fair business tax system. These measures overall raise additional revenue and will balance off tax reductions previously announced in stage one.

Integrity measures

The Government will adopt measures recommended by the Review to contribute to the fairness and equity of the tax system. These include:

...

- Restricting the ability of individuals to reduce tax by diverting the income they earn from their personal services to an entity (a company, trust or partnership). Known as the 'alienation of personal services income', this undermines the income tax base and raises significant equity issues. The proposed approach will treat the income of an entity that is earned through the provision of personal services as the income of that individual for tax purposes.

...

Fiscal impact of the measures

The revenue raised by the measures announced today is such that the overall impact of business tax reform will be revenue neutral. The revenue impact of the measures is attached and, compared with the previous figuring on business tax reform, incorporates additional revenue from the integrity measure affecting tax shelters (Attachment O)."

Attachment O referred to in the quotation (also attached at **Appendix 18**) indicates that the Government predicted the following fiscal gains from the alienation legislation;

1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005
\$0	\$380m	\$480m	\$495m	\$515m	\$530m

- 3.8 The CFMEU does not believe the legislation has had the effect claimed by the Government in the construction industry. On the contrary, because the legislation was a watered down version of the recommendations of the Review of Business Taxation, the CFMEU believes the spread of sham subcontracting in the construction industry will have actually worsened.
- 3.9 Unfortunately, the ATO has still failed to make available the data needed to settle this question. In 2003 the Royal Commission recommended that such data be made available (see Recommendation 126). The Government responded in their "*Table of the Government's Response to the 212 Recommendations of the Royal Commission into the Building and Construction Industry*" as follows;

"The Government will undertake a review after the relevant tax returns for the income year ended 30 June 2004 have been lodged (i.e. after 2 full years of operation)."

The industry is still waiting for the results.

Skills Shortages and Safety

- 3.10 The Union's experience is that individual subcontractors and the entities who engage them are far less likely to provide appropriate skills and/or safety training. Skills shortages and occupational health and safety are two major issues in the construction industry. Illegitimate subcontracting exacerbates these problems.

4. ADDITIONAL POINTS ON LABOUR HIRE

Case Study

On 6 January 2005 a worker named Tom Watt was killed on a building site in Victoria. He was engaged as a so-called "independent" subcontractor by labour hire firm, Troubleshooters.

He died after falling through a penetration in the floor which was not guarded by hand rails or scaffold. Before Christmas Mr Watt had complained that the conditions on the site were unsafe.

Mr Watt's family did not receive funeral or death and disability benefits from various industry funds because he was technically classed as a subcontractor.

- 4.1 The Union supports the submissions and recommendations contained in **Appendix 12** and requests that the Committee adopt this document as part of our submissions to this Inquiry. In particular the Union draws the Committee's attention to the CFMEU's submission attached at Annexure A to that document.
- 4.2 The Union also supports the recommendations and findings in **Appendix 11** and we urge the Committee to adopt similar recommendations. Further, we support the submissions and recommendations of the ACTU at **Appendices 13** and **14**.
- 4.3 Whilst **Appendices 11, 12** and **13** deal specifically with the labour hire industries in New South Wales (and whilst **Appendix 14** deals with Victoria), their content is equally applicable to the Australian context.
- 4.4 The Union makes the following additional points regarding labour hire.

The Latest Data

- 4.5 We refer the Committee to the data set out by the ACTU at pages 1 to 2 of **Appendix 14** and pages 2 to 4 of **Appendix 13**.
- 4.6 A Staff Working Paper released by the Productivity Commission in February 2005 titled "*The Growth of Labour Hire Employment in Australia*" stated the following at page XII;
- Labour hire employees numbered around 270 000 in 2002, equivalent to about 2.9 per cent of all employed persons.
 - Labour hire employment grew strongly between 1990 and 2002. In workplaces with 20 or more employees:
 - the number of labour hire workers grew from 33 000 in 1990 to 190 000 in 2002, an increase of 15.7 per cent a year; and
 - the proportion of labour hire workers among all employees grew almost fivefold, from 0.8 per cent in 1990 to 3.9 per cent in 2002.
- 4.7 To the best of the CFMEU's knowledge, no construction industry specific data is available. We urge the Committee to recommend that the ABS regularly compile industry specific data on labour hire.

The Effect of Labour Hire

- 4.8 The Union's experience in the construction industry is that workers engaged by labour hire firms mostly receive only sporadic work. They

are often casual employees or engaged under sham subcontract arrangements. Hence job security is minimal and workers have problems planning their futures. Banks and lending institutions for instance, are less likely to give loans or mortgages to workers without permanent employment. Whilst some workers may enjoy the flexibility of such arrangements, our experience is that the overwhelming majority of workers want permanent work with regular income.

4.9 Labour hire operations in the construction industry also appear to be a breeding ground for unlawful or inappropriate activity. Builders who use labour hire receive the benefits of labour without the administrative and legal responsibilities which come with traditional employment relationships. Indeed, the physical absence of the labour hire firm from a builder's work site often means they are largely free from scrutiny. Such circumstances are fertile ground for questionable employment practices such as sham subcontracting, the use of illegal migrant labour and underpayment of workers compensation premiums. Attached at **Appendix 19** are the following newspaper articles detailing some notorious labour hire scams;

- "Irish link in major Oz cash laundering scam"
- "Sydney link to \$11m crime cash"
- "Corkman to face extradition hearing"
- "Crime authorities crack down on budding bodgie"
- "Foreign workers preferred"
- "Jobs racket claimed"

4.10 Also attached at **Appendix 20** is a letter written by the CFMEU to the Minister for Immigration and Multicultural Affairs on 18 May 1999 with details of a large labour hire company found engaging at least 35 workers with expired working visas.

4.11 Finally, the Union's experience is that labour hire operations are less likely to provide workers with proper skills and/or safety training. Construction is a dangerous industry which also suffers from chronic skills shortages. We urge the Committee to address these problems.

5. THE TERMS OF REFERENCE

5.1 The Terms of Reference require this Inquiry to report on;

- A. the status and range of independent contracting and labour hire arrangements

- B. ways independent contracting can be pursued consistently across state and federal jurisdictions;
 - C. the role of labour hire arrangements in the modern Australian economy; and
 - D. strategies to ensure independent contract arrangements are legitimate.
- 5.2 Terms A, C and D are adequately addressed in this submission and the other documents referred to at 2.2 and 2.3 above.
- 5.3 Regarding Term B, the CFMEU supports a consistent national approach to the problem of sham independent subcontracting. Any attempt however to streamline subcontracting across state and federal jurisdictions must be accompanied by serious measures designed to ensure all subcontractors are genuine businesses. Failure to implement such measures will exacerbate the problem as rogue employers and some workers take advantage of such streamlining to further exploit the system. Ultimately, with these arrangements spreading to all industries, our economy's tax base will shrink and governments will find themselves with less revenue to provide the public services society requires.

6. CONCLUSION

- 6.1 The CFMEU urges the Federal Government to seriously address the massive problems of illegitimate subcontracting and unscrupulous labour hire operations. We further urge the Government to adopt the recommendations set out and referred to in this submission. These measures will benefit workers, honest employers, the building industry and society as a whole.