Sham Arrangements and the use of Labour Hire in the Building and Construction Industry

Discussion Paper
December 2010

Submission by:
National Electrical and Communications Association

About NECA

The National Electrical and Communications Association (NECA) is the national voice of the electrotechnology contracting industry. NECA is the only association that represents the interests of electrical and communications contractors Australia-wide, from employers and business people to technicians.

NECA's services are tailored to the unique needs of contractors working in the electrotechnology industry. We save members time and money by providing timely information, advice and practical tools to make business easier, safer and more cost-effective. More than 5,000 members across Australia now recognise and enjoy the benefits of membership of NECA. Our members combined employ a total of 200,000 Australians

With offices in every state, NECA employs specialists in industrial relations, occupational health and safety, management, education and training, human resources and technology who are on-hand to offer advice on a range of topics and provide representation and support in industrial relations matters. NECA has representatives on many Standards Australia technical committees and is also a registered organisation in federal and state industrial jurisdictions.

The Association actively represents the needs and entitlements of contractors at all levels of government and industry, ensuring members' needs are heard. We regularly provide our national member base with up-to-date industry-relevant information including current training, occupational health and safety, industrial and legislative requirements.

NECA employs more than 2,000 apprentices in joint Group Training Companies. NECA's interests in this area are represented through:

- 370 Degrees Group (Victoria)
- NECA Group Training (New South Wales, Queensland & ACT)
- PEER VEET (South Australia)
- Electrical Group Training (Western Australia)

NECA actively works on behalf of members with a range of government departments, industry associations and peak bodies, with a view to ensuring that the needs of members are heard and acted upon.

Our senior level personnel work across a range of issues such as, for example, occupational health and safety and industrial relations legislation, education, training and upskilling, technology and environmental sustainability, providing input, comment and strategic direction on behalf of our members. Members of NECA have the benefit of the Association's national lobbying expertise and networks, and can rest assured that the future of the industry is well-protected.

Currently, NECA is represented on or closely involved with :

- EE-Oz Training Standards
- Australian Chamber of Commerce and Industry (ACCI), General Council
- Australian Chamber of Commerce and Industry (ACCI), Workplace Relations Committee
- Australian Chamber of Commerce and Industry (ACCI), OH&S Committee
- NESS Superannuation Fund
- International Forum of Electrical Contractors (IFEC)
- European Association of Electrical Contractors (AIE)

- TRAA Central Trades Committee
- Copper Development Centre Residential Energy Management Forum
- National ICT Industry Alliance
- Australian Cabler Registration Service (ACRS)
- Standards Australia
- Australian Refrigeration Council (ARC)
- Federation of Asia and Pacific Electrical Contractors Association (FAPECA)
- Ministerial Council on Energy, Energy Technical and Safety Leaders Group
- Interim Advisory Committee of the Ministerial Council for Federal Financial Relations (on new national licensing system for electrical, and refrigeration and air conditioning occupations)
- Australian Government Stakeholder Reference Panel on the National Broadband Network
- Australian Communications and Media Authority (ACMA) Registrars Coordinating Committee

NECA's Response

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

Sham contracting, as defined in the discussion paper, is not beneficial for the industry nor for the individuals and employers affected by it. NECA strongly opposes sham contracting because of the harmful effects it can have on employees, employers and the industry as a whole. The impacts of sham contracting in the building and construction industry can be far reaching and can lead to economy wide effects if left unchecked.

It is well established that sham arrangements result in deficiencies in superannuation contributions, workplace health and safety support and a deprival of basic employment conditions.

The flow on effects from non-payment or underpayment of superannuation will eventually lead to lower savings for individuals upon retirement, a greater burden on welfare and aged care which could result in an increase in taxation to compensate.
A level of basic employment conditions (the NES) is in place to ensure that individuals are provided with a certain degree of certainty when they undertake work for another.

In considering these harmful effects, it is our submission that the vast majority of subcontracting arrangements in this and associated industries involve true independent contractors and legitimate labour hire arrangements.

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?

The provisions of the Fair Work Act that deal with sham contracting clearly set out the suite of clearly defined sham arrangements that the discussion paper highlights. Notably, these sections inherit the general ambiguity that flows from the definition of employee and

contractor, or lack thereof. These provisions do adequately cover each stated example of sham contracting.

We submit that changes to the Fair Work Act would be ineffective in addressing any instances of sham contracting. Where there is strong and clear evidence of sham contracting, the ABCC should focus its efforts on those cases, rather than a broad, industry wide overhaul.

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 and employee and an independent contractor?

The distinction between employee and contractor is not a straight-forward one. Although there is no statutory definition of an independent contractor in Australia, its ordinary meaning based on the common law, if properly used and applied, does provide for a clear and definite classification.

We submit that any attempt to create a strict definition will actually lead to greater confusion, greater exploitation and less compliance because those parties who intend to subvert the system will have a much clearer method for doing so.

4. Do you support the creation of a third category of worker that lies between and 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?

We submit that there is no need to create a third category of employee or contractor. If an individual is deemed to be an independent contractor, then they should be treated as such.

As stated in questions 2 and 3, NECA does not support the additional regulation or investigation into this, an overstated dilemma. Intentional offenders of these provisions, which is a minute percentage, will always find a way to achieve their purpose, no matter the regulation. The creation of another category will lead to more definitions and more regulation, which in turn grants these select few further and easier means of evading the system.

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

As stated in Question 4, this category should not exist. If a third category did exist, it would require a new classification, entitlements and protections. We submit that this would not alleviate any concerns about sham contracting and would in fact create further confusion and ambiguity.

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

Labour-hire companies are effectively still businesses with the same motivation and methodology as any other. As such, they are already subject to the same industrial instruments and legislative framework that any other business is. There should be neither additional nor fewer obligations imposed upon them.

The construction industry does rely on labour hire arrangements to provide for flexibility, mobility and specialisation in their labour requirements, forecasting budgets based on fixed prices and certainty of service.

In saying that, the current provisions in the Fair Work Act and Independent Contractors Act address all circumstances of sham arrangements. Labour-hire arrangements, either on-hire employees or contractors, are already covered and regulated by these provisions.

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

We submit that if a legitimate on-hire contractor arrangement is being used, then those contractors are already regulated adequately.

With the concerns of protecting employee's rights and entitlements in mind, we submit that the majority of labour-hire arrangements involve "on-hire employees" and not phoenix companies, nor for that matter "on-hire contractors." This way, employee or contractor rights remain protected because each individual has an avenue for addressing their employment-related concerns.

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?

No, there is no need for a Code of Practice for Labour-hire arrangements as they are already regulated appropriately.

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

As stated in question 4, no further concepts or definitions should be created.

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

The issue of company regulation is one for ASIC and their jurisdiction should not be blended or distorted by the ABCC attempting to regulate for this kind of behaviour in this particular industry.

The issue of phoenix companies is a much broader one than just with respect to labour-hire arrangements. The building and construction industry of late has seen numerous companies, reputable and otherwise, place themselves or be forced into liquidation due to non-payment of creditors.

NECA submits that labour-hire arrangements would represent only a small portion, if any, of the fraudulent companies engaging in this kind of business.

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

A targeted education campaign directed at industry sectors which have high levels of contracting would be an effective method for the distribution of this information.

Furthermore, the definitions, obligations and conditions for legitimate contracting are being continually driven by industry associations and peak bodies such as NECA.

When one considers the industry as a whole, it is in the benefit of employers and employees to comply with the current legislation to achieve the countless mutual benefits that can be obtained by subcontracting and labour-hiring.

General Comments

The Importance of Contracting in the Building and Construction Industry

It is well established that contractors in the building and construction industry play an important role and cannot be replaced through recruitment and employment.

Subcontracting allows for the efficient allocation of a specialist and mobile workforce. Given the nature of the building and construction industry being defined by particular projects, the ability to move your workforce, is a crucial requirement. Given that each stage of a project defines the labour requirements at that time coupled with the current skills shortage in many of these associated industries, flexibility and mobility of one's workforce is almost a defined requirement.

Being a physically demanding industry, for the most part, subcontracting allows individuals the freedom to work when they choose and how frequently they choose. Given that contractors are in control of their own financial position, they wear some risk in the completion of their work and their income is tied to their output. It is for this reason that contractors are often more productive because their productivity is directly correlated with their remuneration.

In the absence of such an opportunity, many building and construction workers would likely have to maintain a broad set of skills and training to enable them to address each and every specific concern that arises during a project. An inability of an employer to move their workforce as they need them would impose such a significant burden that it would no longer be a profitable business to run. Keeping in mind, the Fair Work Act and many awards already impose strict requirements on providing employees with work and pay, any further imposition on their only alternative would stifle the industry.

It can also be said that employees' remuneration is correlated to hours of work rather than output of work. On that basis, it is not in an employee's best interest to work to the greatest of their ability and complete their work in the most effective and productive way possible.

Inequality of Bargaining Power

We submit that any allegations of employees being forced into contractor or labour-hire arrangements are completely baseless. We have not come across and would strongly advise against any situation where an employer has refused to employ a person for the purpose of avoiding employment-related entitlements including unionisation.

Unions cite instances where employees have reported that they were forced to work as contractors rather than as employees because they did not have bargaining power. Furthermore, unions claim that as contractors, workers do not have the bargaining power that employees in a union could bring. We dispute that this situation exists at all and a statement that 'countless workers have approached them over many years' is grossly misleading. Without specific details and time frames, these claims lack persuasion and should not be given any weight by the ABCC. They are a mere attempt by unions to bolster their positions.

It is not necessarily the case that employers are pushing for contracting arrangements. If anything, it is the individuals concerned who push employers for contracting arrangements to enable themselves to enjoy the vast array of benefits described in the discussion paper. Employers are often in a position of weakness where individuals, who believe the benefits of contracting outweigh those of being employed, are therefore actively seeking and intending to be contractors.

Conclusion

It is our firm position that the effects of sham contracting are detrimental to the industry as a whole and should not be tolerated. However, we maintain that the vast majority of contractors are true independent contractors or legitimate labour-hire arrangements.

We submit that an industry-wide overhaul of the magnitude proposed would in fact be targeting a small minority and would detract from the significant benefits obtained as a result of legitimate subcontracting and labour-hire arrangements.