

# Insecure employment in the Telecommunications & Digital Economy.

CWU Victoria welcomes the opportunity to make this submission to the Victorian Government Inquiry into the Victorian on-demand workforce and insecure work.

## **Sham contracts**

A sham contract is when an employer deliberately disguises an employment relationship as an independent contracting arrangement, instead of engaging the worker as an employee as they should be. This is usually done to avoid paying employee entitlements such as superannuation, workers' compensation, leave, and certain taxes; but predominantly it is used to drive down wages and conditions in the industry.

In other cases, employees are pressured to become independent contractors where they are threatened with being dismissed or are misled about the effect of changing their working arrangements.

Because of the very nature of technology, it is easy to offshore jobs and in fact import cheap labour on wages and conditions of the originating country. This is already happening through companies such as Wipro Limited, which is an Indian multinational corporation that provides information technology, consulting and business process services. It is headquartered in Bengaluru, India and has approximately 180'000 employees worldwide and are utilised by many multinational companies such as Telstra. The Fair Work Act 2009 protects genuine employees from 'sham' independent contracting arrangements and outlines employers' obligations when establishing an employment relationship. Sham contracting arrangements are illegal. However, that has not so far prevented employers from circumventing the law with highly legalistic contracts beyond the interpretation of the worker and any suburban solicitor they may (however it is unlikely) go to.

## **The impacts of sham arrangements**

The most common reason for a business to engage a contractor instead of hiring an employee is the desire to avoid paying employee entitlements, including tax and superannuation obligations. If these issues are handled incorrectly, however, the consequential payments and penalties could have a far greater impact on the business; however, with many multinational highly profitable corporations any penalty is treated merely as a cost of doing business and are easily absorbed. The gains of cheap compliant labour are too lucrative to give up easily.

## **Penalties of sham contracting**

The risks of sham contracting can be costly on smaller businesses, with penalties including:

1. Civil penalties under the Fair Work Act 2009 (Cth) of up to:
  - a) \$54,000 (per contravention of the Fair Work Act) for an employer; and
  - b) \$10,800 for an individual (Director, HR Manager or other Senior Personnel);
2. Payments to the employee for unpaid wages and other entitlements (annual leave etc.); and
3. Tax and superannuation payment obligations.

### **Superannuation guarantee contributions**

An employer's payment of superannuation contributions will differ depending on whether the worker is classified as an employee or an independent contractor. As of 1 July 2015, an employer is required to make superannuation guarantee contributions to an employee's superannuation fund equivalent to 9.5% of the employee's annual pay. The impacts of non-payment of this entitlement through misclassification is immeasurable. Most sham contracting arrangements by their very nature are designed to deny workers of their statutory entitlements and improvements to those entitlements through bargaining.

Who picks up the tab for the superannuation shortfall at the time of retirement? Of course, it is the community.

CWU response to sham arrangements in the digital economy

Privatisation and competition policy have been catastrophic to the industry with over 53'000 job losses from Telstra from 1998 to 2018<sup>1</sup> we would argue that most of these jobs were not in fact redundant<sup>2</sup> the employer had in fact a cheaper way to get the work done by non-unionised compliant workers; in many instances offshore. This is not unique to the telecommunications industry, no industry is immune, and the methods are common such as offshoring call centre work to low wage countries, sham arrangements in the field work cohort such as the traditional 'Telstra Liney or Tech'. Many hundreds of the Telstra field workers found themselves doing the same work as so called 'subcontractors' after being made redundant by Telstra. These jobs were never in fact redundant, Telstra still needed the work to be done on the network. It is an utterly ridiculous notion that no construction, maintenance and repair work would never need to be done again, ever, by anybody, on something as complex as a telecommunications network. Through the profit motive of privatisation Telstra just needed it done far cheaper and the easiest way to achieve this is through driving down labour costs utilising very favourable legislation.

### **The rise of employment law class actions**

The CWU Victoria has had to adapt to the aggressive tactics of employers in the digital economy. Having had some limited success in representing workers employed under sham arrangements at unfair dismissal cases, it was the imperfect way to test the question of employee v contractor as the employer never wanted to have the question adjudicated. The CWU began to explore the idea of a class action of subcontractors in 2012 but there had never been a significant test of the sham arrangements provisions.

In late 2018 the CWU Victoria in conjunction with class action law firm Shine Lawyers lodged an application in the Federal Court to finally test once and for all the question of employee v contractor in the telecommunications industry; the respondent in the case is

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<sup>1</sup> <https://www.afr.com/business/telecommunications/telstra-cuts-53000-staff-over-two-decades-20180620-h11m2k>

<sup>2</sup> Redundancy meaning the employer no longer requires that work to be done by anyone.

workforce management company, ISG Management (now known as Tandem). This company is long overdue to have its contracting practices examined and they ought not be surprised to find themselves front and centre of the 'largest class action lawsuit in Australia to date. More than 4,000 workers could be eligible to join in the class action, many of them redundant Telstra workers who previously enjoyed secure, well paid employment. Given the complexity of these cases it is not possible for workers themselves or often union to fund the cases that will no doubt be vigorously defended so in this matter a litigation funder having assessed the case and sought funding from Litigation Lending Services, the central allegation in the case is that ISG Management "misrepresented the true nature of a contractor's employment arrangements, leading them to financial and personal hardship." The financial & personal hardship cannot be understated in this matter. A broad-brush approach to sizing up the financial loss for a worker who was once employed in Telstra at the level of a CFW 4 is to compare the wages level of **\$83'710.00<sup>3</sup> plus 9.5% superannuation contribution before tax for a total of \$91'662.45 with a liability to the ATO of \$21'411.94.<sup>4</sup>**

Contrast this against ISGM managed installation and maintenance telecommunications subcontractors for Telstra, NBN Co and Foxtel, workers performing the same work that in many instances that they did if they were ex Telstra. A typical ISGM/Tandem 'contractor' who is relatively experienced can complete on average four tickets of work per day @ \$75.00 per ticket of work. If the worker is taking sick leave, annual leave, long service leaves or personal leave then their average availability for the year would be 40 weeks approximately. The average earnings under this arrangement would be \$60'000.00 per annum, **BUT**, now deduct expenses, the costs that would normally be borne by the employer. Superannuation, vehicle costs, workers compensation insurance, public liability insurance, tools, required training costs, accounting and other professional costs, telephony and internet costs etc; conservatively costed at \$26'000.00. The average contractor is lucky to take home \$34'000.00<sup>5</sup> \$583.04 take home pay each week with \$3002.00 per annum liability to the ATO!

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<sup>3</sup> Telstra EBA 2015-2018 CFW 4 per annum salary as at 1 October 2017

<sup>4</sup> <https://www.atopayg.com/calculator.html>

<sup>5</sup> CWU Excel spreadsheet Contractor v Employee Earnings.

This represents a difference of \$18'409.91 this is a loss to the coffers of the ATO and is the tip of the iceberg. In the telecommunications sector alone there is an estimated 30'000 workers employed under subcontracting arrangements at any given time. Based on these very conservative estimates in only one industry the loss of revenue to taxation is approximately \$552 million per annum. The reality is there are hundreds of thousands of workers across many industries working as sub-contractors, the requirement to procure an ABN to gain an apprenticeship or other work and be classified as a subcontractor is rife. If we assumed just 300'000 people worked in this way the loss to taxation could be conservatively estimated at \$5.5 billion dollars.

### **Who benefits?**

In the ISGM/Tandem matter currently before the courts, the company is expected to record \$1 billion in sales in 2019. Whilst it is difficult to put a price on this far private companies, Tandem is valued at approximately at about \$250 million on a market capitalisation basis, or north of \$200 million on an enterprise value basis.<sup>6</sup>

The company, in 2017 advised potential investors that it expected \$649.6 million total revenue in the 2018 financial year on a proforma basis and \$41.4 million operating EBITDA, up from \$611.1 million and \$28.3 million respectively. It can certainly be said that much of this profit has been gained through the exploitation of its so-called subcontracting workforce those telecommunications workers who were purportedly employed under sub-contracting arrangements, we say they were employees of ISGM and the matter before the Federal Court will examine that model and come to a conclusion once and for all.

Tandem for its part says it will vigorously defend them the claim and, in its defence, they say they believe that their subcontractor model provides flexibility, choice and

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<sup>6</sup> <https://www.afr.com/street-talk/morgans-pitches-tandem-corp-20-to-fund-managers-20180205-h0tnvt>

competitive returns for Australian small businesses, the several hundred contractors who have registered their interest in the class action will no doubt say different.

The company claims that its arrangements have previously been reviewed by relevant regulators with no adverse findings made. This a reference to cursory inquiries by the Fair Work Ombudsman in 2012. Like all regulators they are not at all keen to utilise limited resources prosecuting a financially well off and well-connected company. The issue of poor regulatory oversight in all sectors is worthy of a Royal Commission on its own.

Tandem has consistently stated that its contractors are free to provide services to others, have the right to delegate work, have the right to refuse to perform work for Tandem, provide their own equipment and insurance and are paid per job. These conditions are contractually imposed on 'subcontractors' and the operation of the contract will be subject of evidence if the matter proceeds to trial. The CWU Victoria knows well the consequences for 'subbies' who make themselves unavailable for work for any reason.

Further claims that many contractors engage other workers; usually in a 'sub sub contracting' relationship bears further scrutiny. It is a further exploitative model in the vein of Australia Post parcel contracting which led to the most egregious treatment of migrant workers on student visas<sup>7</sup> who were treated as bonded labour in a gravely exploitative relationship. Worse still the work was being performed for a Federal Government owned corporation with a seeming impunity. Concerns raised by the CWU in Victoria were dismissed out of hand by Australia Post. This is even though the exploited workers themselves had approached the union to disclose their stories and the details of their exploitation. Despite this these companies hold on with a tenuous grip that the relationship "has all the hallmarks of an independent contractor relationship." Extraordinary.

The facts of the matter in both Australia Post and telecommunications subcontracting is that these workers, who have little business experience, must set up their own companies to receive work from ISGM and Australia Post, and in many cases had to take out large personal loans to pay for tools, permits and a vehicle to conduct the work.

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<sup>7</sup> <https://www.theage.com.au/national/victoria/three-men-jailed-for-rorting-2-million-in-education-subsidies-20181001-p5075y.html>

The employer exercises total control and direction over the employment of these workers including where they worked, the jobs they worked on, the clothes they wore to work, the branding on their vehicles, the methods of work they were required to follow, sets key performance indicators and rates per ticket of work or parcel delivery. As such that they are employees rather than independent contractors, in the view of the CWU.

The reality is that there are very few jobs that can resist being made insecure in the ways described. The insecurity though does not end with those workers, the cost to the community has not yet been measured in any meaningful way because of the way these workers are classified. There is an immediate need to assess the number of workers classified as subcontractors in all industries and the accumulated losses to public revenue and the losses being sustained by these workers.

Submission by the Communication Workers Union Victoria – T&S Branch  
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