

Submission — Inquiry into the Victorian On-Demand Workforce

July 2019

ISG Management Pty Ltd t/a Tandem Management (ISGM)

When the Inquiry first requested submissions, the Tandem group decided not to participate as we do not regard ourselves as part of the labour-hire industry. The Communication Worker's Union Victoria (CWU), however, has since made a submission to the Inquiry which is now published on the Inquiry's website. The submission contains a number of claims that are not only inaccurate and misleading but are damaging to the reputation of ISGM (a subsidiary of the Tandem group) and the Tandem group. The CWU is currently involved in a Federal Court class action against ISGM which is being led by Shine Lawyers. The class action is backed by litigation funder Litigation Lending Services Limited and is supported by the new Australian Communications Workers Alliance and the CWU.

ISGM is vigorously defending the class action in the Federal Court and rejects the inaccurate and misleading claims put forward in the CWU submission.

This submission is provided in response to the CWU submission and the claims made.

An Australian success story

ISGM, and the Tandem group of entities, is an Australian success story. The Tandem group is a leading field services delivery business, providing end-to-end management of field-based workforces, including managing systems, processes, people, compliance and safety. The group specialises in delivering network connections and beyond-the-gate trade services to millions of Australians on behalf of Australia's leading telco, insurance, retail and home entertainment brands.

The group has access to a national subcontractor workforce of over 5,200 workers engaged by over 2,600 subcontracting companies, who provide network services (including connection, installation and maintenance) as well as monitoring, assurance and repair services for clients' end-customers.

Subcontractors all own their businesses and we're passionate about supporting them to succeed and be profitable.

A short history

The Tandem group (as it is today) was founded in 2010 on the conviction that the traditional contractor model for field delivery services was delivering sub-optimal results for all involved. In the context of subcontractor engagement, we focus on HSE (and other) compliance, speedy payment terms and respectful interactions. In turn, this translates into exceptional client and customer outcomes.

Since winning its first contracts with nbn™ (December 2010), Telstra (December 2011) and Foxtel (November 2014), the Tandem group has expanded the scope of these contracts with additional volumes and has been awarded new contracts.

ISGM has a national subcontractor workforce that is engaged, skilled and professional, and is incentivised to generate additional revenue for their businesses. We have many success stories of subcontractors who have embraced the model and are now running profitable businesses. These subcontractors are genuine independent contractors: they have their

own companies, vehicles and equipment; pay their own tax and insurance; determine when they work and how hard; are free to delegate work and to work for others; and can (and in many cases do) employ or engage workers.

Class action

As mentioned at the outset, ISGM is currently subject to a class action in the Federal Court. The class action is being led by Shine Lawyers and is backed by litigation funder Litigation Lending Services Limited. The new Australian Communications Workers Alliance and the CWU are involved in the class action.

In the preface to its submission to this Inquiry, the CWU goes into detail about the impact of “sham contracting” on Telstra field staff and other workforces.

The CWU argues that after having “some limited success” in representing workers employed under sham arrangements in unfair dismissal cases, it decided this was the “imperfect way” to test the question of employee v contractor.

The opportunity to test this issue “once and for all”, says the CWU, came with the class action that was lodged in the Federal Court late in 2018 by Shine Lawyers.

The CWU claims the Shine class action is the “largest action in Australia to date” and that more than 4,000 subcontractors could be eligible to join. However, in its submission, the union reveals that the actual number who have “registered their interest” totals only “several hundred”.

The only former ISGM subcontractor that ISGM knows is party to the claim is **(Redacted Text)** who was the sole director and worker of **(Redacted Text)** who supplied services to Telstra on behalf of ISGM intermittently from July 2014 to November 2016.

Our defence

On 23 April 2019, ISGM filed its defence and a cross claim against **(Redacted Text)**. In our defence we deny that **(Redacted Text)** was an employee of ISGM and maintain that the only legal relationship that existed was between ISGM and **(Redacted Text)**.

We say ISGM entered into a contract with **(Redacted Text)**, a propriety limited company, to provide installation and maintenance services as an independent contractor. **(Redacted Text)**, as the sole director and a worker of **(Redacted Text)**, performed those services on behalf of **(Redacted Text)**. **(Redacted Text)** agreed to supply services to ISGM, and in the context of supplying those services:

- Nominated when **(Redacted Text)** was available to receive Tickets of Work
- Rejected Tickets of Work
- Was paid based on completion of Tickets of Work
- Provided the tools, vehicles and consumables required to supply services
- Could supply services to others

ISGM made weekly payments to **(Redacted Text)**. **(Redacted Text)** paid GST and maintained its own business arrangements such as providing insurance.

ISGM did not have a contractual relationship with **(Redacted Text)** personally. **(Redacted Text)** carried out the work as a representative of **(Redacted Text)**.

Cross claim

The cross claim filed by ISGM is a contingent claim that only becomes relevant if there is a finding of employment. The purpose of the cross claim is to argue any amount that ISGM is liable for should take account of the payments already made to a subcontracting company, especially in circumstances where the subcontracting company has earned more than an employee would have under award rates.

Declassing application

We have also filed a “declassing application” as we do not believe this case should proceed as a class action due to, among other things, the differing profile of subcontracting companies and the way they run their businesses. In the alternative, we are arguing that the class action should operate on an “opt in” basis and class members should actively opt in to participate. This is on the basis that participation could have negative tax and other impacts on a class member depending upon individual circumstances. This application is due to be heard in August.

Claims of sham contracting

In response to claims by the CWU that we “misrepresented the true nature of a contractor’s employment arrangements, leading them to financial and personal hardship”, and that they were employees of ISGM, we say this was not the case.

ISGM totally denies it has ever been engaged in sham contracting. We believe the agreements with our subcontractors are not only legal, but fair and reasonable and detail the responsibilities of both parties in a commercial, transparent and clear manner.

Our subcontractors run businesses and are responsible for complying with all of the taxation, regulatory and insurance obligations that are required by law.

Payment to the subcontractor is made every seven days, which is an unusually short period of time, designed to assist with business cash flow. We believe that the vast majority of our subcontractors are running successful small businesses.

The CWU claims much of the profit that ISGM has derived from its operations has “been gained through the exploitation of its so-called subcontracting workforce” and says the telecommunications workers employed under these arrangements were in fact employees of ISGM. As we have stated previously, we deny this allegation.

It is also important to note that when ISGM commenced operating in 2010, the subcontractor model for Telstra field work was already firmly established. Entities such as Visionstream Pty Ltd, Skilled Group Ltd, Service Stream Ltd, Silcar Pty Ltd and/or BSA Ltd had been providing services to Telstra through this model since 1994. In fact, ISGM’s first cohort of around 1,100 subcontracting companies that entered into agreements with ISGM when it commenced the contract with Telstra in 2011, were already working as independent contractors for these other entities.

Branding and work practices

The CWU seeks to further entrench the notion of our subcontractors being employees by stating that we exercised total control and direction over their work, “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, key performance indicators and rates per ticket of work”.

Where subcontractors indicate their availability to work, we naturally have the expectation that they will perform the tickets of work allocated to them on those days. If there is work available, we will advise subcontractors where that work is located. These are normal business practices which are reflected in the contractual obligations between ISGM and its subcontracting companies.

Outside of the work that subcontractors agree to perform, they have the freedom to work for who they want, when they want and to refuse tickets of work offered to them.

In respect of uniforms, subcontractors are required to wear branded uniforms when working for some clients for safety and reassurance to customers that the person attending their home is doing so on behalf of their service provider. Subcontractors also are provided with branded ID cards, a letter of introduction and emergency safety card.

Optional removable vehicle branding is also available. Subcontractor vehicles can, and often do, have the subcontractor's own business branding.

Subcontractors are required to remove branded uniforms when completing work outside of the tickets of work allocated by ISGM and when working for other companies, demonstrating that our requirements in this regard only go as far as necessary to meet the public safety/confidence objective.

Fair Work Ombudsman

The CWU takes issue with the fact that our subcontractor model has been reviewed by relevant regulators and no adverse findings have been made. It refers to an investigation in 2014/15 by the Fair Work Ombudsman (FWO) as a "cursory inquiry" and says that the FWO, like all regulators, is not keen to prosecute a financially well off and well-connected company. We object strongly to this unfounded claim which reflects unfairly on the FWO and the Tandem Group.

We refer the Inquiry to the FWO's own submission to this committee. It states: "The FWO's approach to resolving issues arising in the on-demand workforce is necessarily consistent with our approach to any dispute requiring our intervention, namely to apply and enforce Australian workplace law as it stands."

Our understanding is that the FWO inquiry into our subcontractor model, which was robust and lengthy, was conducted on that basis and the FWO found that we were not in breach of Australian workplace law. We believe the agreements with our subcontractors are not only legal, but fair and reasonable. The agreements detail the responsibilities of both parties in a commercial, transparent and clear manner.

Agreements with subcontractors

The CWU raises the issue of the agreements we have with our subcontractors and states "these conditions are contractually imposed."

We certainly do have agreements that impose contractual obligations on all parties, including ISGM. Our clients often schedule field work in advance and our subcontractors provide their availability to us in advance. For us to be able to manage these arrangements for the benefit of all, including the end-users – the customers – we obviously have agreements in place with contractual obligations.

Subcontractor earnings

The CWU makes a broad-brush assessment of the earnings of installation and maintenance technicians who provide services to ISGM, alleging that the "average contractor is lucky to take home \$34,000".

The figures used by the CWU are deeply misleading, particularly the proposition that average earnings would be \$60,000 per annum for a subcontracting company that provides services for 40 weeks per year.

As part of material recently filed for our declassing/opt-in application, we examined the average, median and range of earnings of subcontracting companies which provided services for at least 220 days per year. The 220-day threshold was used as this would equate to one technician working 44 five-day weeks per year (having subtracted four weeks for annual leave, two weeks for personal/carer's leave and two weeks for public holidays). Our analysis showed that in the 2017/18 financial year, the average earnings of subcontracting companies which provided services for at least 220 days per year was \$149,167, and the median was \$120,737. Even isolating companies to those with only one technician providing services, the average for the same period was \$113,718, the median was \$111,068 and the range was up to \$319,960.

While the exact earnings of the representatives of subcontracting companies would depend on how the companies structured and ran their businesses, on any view, the notion that the 'average' subcontractor takes home \$34,000 is clearly misconceived and misleading.

Personal loans

The CWU claims that "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."

As they are independent businesses, our subcontractors are required to be incorporated and they are responsible for complying with all taxation, regulatory and insurance obligations required by law. Obviously there is an expense in setting up a business and buying tools and a suitable vehicle. However, there is also choice in how this is done with many subcontracting companies buying these items second hand or in discounted packaged deals. It is entirely the choice of an individual whether or not they choose to start their own business and provide subcontracting services in the first place. We do encourage subcontractors to seek their own financial and legal advice and they are required to warrant that they have had the opportunity to do so when entering an agreement with us.

Conclusion

Thousands of subcontractors continue to work with ISGM today. They are operating their own small businesses profitably and are delivering great customer outcomes for our clients.

We are very proud of the ethical and professional manner in which we have operated our business from the outset and the opportunities provided to continually support small business owners in Australia.