

07 February 2017



Labour Hire Regulation
Executive Director Industrial Relations
Office of Industrial Relations
GPO Box 69
Brisbane QLD 4001

E: labourhirereg@justice.qld.gov.au

Dear Director,

Re: REGULATION OF THE LABOUR HIRE INDUSTRY 2016

We appreciate the opportunity to respond to the Regulation of the Labour Hire Industry Issues Paper (Issues Paper). Master Builders strongly supports lawful and ethical practices in employment and contracting.

Introduction

This submission canvases the recent history of reviews and reports in the matter of labour hire practices. It is our belief that the present review covers much of the same ground as earlier inquiries- being the alleged problem of labour hire contracting. Those earlier reviews have not found a universal and permanent failure of the practice of labour hire. The reviews have led to measured intervention and a range of protections for employees and workers are noted.

The Queensland Building and Construction Commission (QBCC) already regulates the building and construction industry. Workers and businesses including labour hire firms must be licenced by QBCC to contract to the industry. An additional licence system to the QBCC will be confusing and add costs to business. The government must exclude all QBCC licenced building and construction labour hire firms from any new licencing that may follow this inquiry.

Notwithstanding, we encourage the government to turn its attention to non-regulatory responses, and develop its communications and services towards the critical industries and workers.

This submission does not cover labour hire agents that do not directly engage employees and as such do not perform building work regulated by the QBCC.

We address the 11 questions put by the Issues Paper in the annexure.

Labour hire in the building and construction industry

Contracting is an essential practice in this industry. Labour hire is far less so, but it still has a legitimate role alongside 'direct hire' contracting. In their correct formulation (as with all employers), labour hire does not equate to sham contracting or otherwise breach of workplace laws.

Master Builders represents more than 8,500 members in building and trade contracting including a relatively small number of labour hire firms. We do not represent nor have members engaged in the employment agency industry.

Employees engaged by labour hire business working in the building and construction industry represent about 7% of the labour hire interests.¹ This is much less than manufacturing (17%) and mining (13.7%).

The number of labour hire workers to all workers in the building and construction industry is 1.8% and trending down over the past 3 years. Table 11 of the Office of Industrial Relations (OIR) submission to the Parliamentary enquiry shows the all industries result to be steady at 2.2%.²

Our members who are engaged in labour hire confirm this downward trend. The larger established firms believe the labour hire business model has plateaued as a ‘one stop shop’ labour service to the industry. Some members have already diversified to specialist subcontracting service businesses rather than just supplying workers.

The benefits of labour hire arrangements in the building and construction industry are obvious. Overall, it allows the contractors to conveniently access a supply of labour to meet peaks and troughs in demand. All parties to the labour hire relationship have legitimate economic reasons for electing to use that mode of service provision, namely flexibility and accessibility to the market.

QBCC licencing of labour hire

The QBCC is the State’s building and construction industry regulator. All labour hire entities in the building construction sector are subject to regulation by the QBCC, directly and indirectly. To do business in Queensland, all labour hire firms with interests in supplying its labour and skills to the building and contraction industry must hold relevant licences with the QBCC.

Most labour hire firms in this sector supply multiple trades, therefore the business must hold a builders licence, whether or not its trades workers are separately licenced. Clients of the labour hire firms will usually require evidence that the persons who are performing the work are QBCC licenced, to ensure quality and warranty of work.

The QBCC licencing regime is robust and administered by an independent regulator. As such, additional licencing of labour hire in the construction industry is superfluous and will add costs and administration to these employers, whilst not providing any benefit to the industry.

The following table summarises the correlation of the matters raised in the Issues Paper, and the existing licencing requirements.

¹ Queensland Parliament, *FINANCE AND ADMINISTRATION COMMITTEE, INQUIRY INTO THE PRACTICES OF THE LABOUR HIRE IN QUEENSLAND*, Submission from The Office of Industrial Relations, Queensland Treasury at page 3

² *Ibib*

Topics in Issues Paper	Current QBCC requirements for Labour Hire firms operating in the building and construction industry.
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Licencing	<p>An individual or company who wants to carry out building work valued at over \$3,300 (including labour and materials) must hold the appropriate QBCC licence.</p> <p>The QBCC licences builders and contractors in classes of work with a defined scope of work describing the work able to be performed under that class. For example, a builder must ensure all trade contractors on a building site are licensed.</p>
Fit & Proper Person Test	<p>The QBCC consider</p> <ul style="list-style-type: none"> • honesty and integrity in commercial and other dealings; • any failure to carry out commercial or statutory obligations and the reasons behind the failure; • any Tier 1 defective work; • any failure to pay an infringement notice for an offence under the QBCC Act; • any other relevant factor (e.g. criminal history).
Licensing Fees	The QBCC licensing fees for a Builder or Trade Contractor range from \$602.30 to \$1,320.55
Bond	The QBCC financial requirements in general require a bond no less than 4% of assets. For example, a 'Maximum Revenue' of \$600,000 requires Net Tangible Assets of \$36,000 and a Maximum Revenue of \$4,000,000 requires Net Tangible Assets of \$210,000.
Annual Compliance Reports	The QBCC require Builders and Contractors with a business revenue over \$600,000 to submit a report from an accountant annually.
Training	Trade contractors must complete an approved managerial qualification (BSBSMB401).

Past inquiries

The labour hire contracting industry has been the subject of a number of state and national inquiries in the past 7 years.

Queensland Inquiry - FAC 2015

Our concerns then are no less so now. For example, we note numerous submissions to this inquiry conflated labour hire arrangements as sham contracting. We strongly oppose any proposition that labour hire is sham contracting. The definition of sham contracting in section 357 of the *Fair Work Act 2009*, is clear: it is where an employer deliberately misrepresents the employment relationship as a contract for services. For example, an employer insisting a person contract as an ABN worker, where all the features of the relationship are, in law, an employment contract of service.

On balance, there were areas of the FAC 2015 background papers that we should highlight. It identified many positive signs of labour hire compliance with laws. For example, the OIR submission stated that labour hire employees' wages are commensurate with 'direct' employees, that the WorkCover compliance is satisfactory, and labour hire employees are as equally protected by the WHS laws as are other forms of employment.

According to the OIR submission, the State government and its agencies such as WorkCover and the Office of State Revenue have '*quite sophisticated data-matching techniques*' and '*liaises with the Australian tax office*' that enable the government to '*compile quite a good picture of companies*'. The Department goes further to clarify '*What I am saying is that they have good intelligence to monitor the performance of these companies*'.³

The final report to FAC acknowledged the additional requirements of labour hire businesses operating in the building and construction industry. It said:

The Queensland Building and Construction Commission Act 1991 (Qld) and the Queensland Building and Construction Commission Regulation 2003 (Qld) require all persons carrying out building work to be appropriately licensed. This requirement can apply to labour hire businesses when they carry out building work.

*The Queensland Building and Construction Commission (QBCC) provides a licensing information statement, which discusses the licensing requirements relating to labour hire businesses. A labour hire business that fails to comply with these requirements may not be entitled to payment, and may be prosecuted by the QBCC.*⁴

ABCC Sham Contracting/Labour Hire in the Building and Construction Industry Inquiry and Report 2011

³ Queensland Parliament, *FINANCE AND ADMINISTRATION COMMITTEE, INQUIRY INTO THE PRACTICES OF THE LABOUR HIRE IN QUEENSLAND*, Report No. 25, June 2016 at page 19.

⁴ Queensland Parliament, *FINANCE AND ADMINISTRATION COMMITTEE, INQUIRY INTO THE PRACTICES OF THE LABOUR HIRE IN QUEENSLAND*, Report No. 25, June 2016 at page 31.

The ABC Commissioner was satisfied that the vast majority of contracting that occurs in the building and construction industry is legitimate and that this legitimacy extends to the majority of labour hire arrangements that are used.⁵

There was no clear empirical or anecdotal link drawn between sham contracting and the use of labour hire arrangements.

In addition, the ABCC noted that the introduction of the Modern Award system and in particular, the application of the awards to labour hire employers has removed the ability of employers to use labour hire firms to avoid award responsiveness and undercut employee entitlements.

Award Modernisation under the Fair Work Commission

During the course of the award modernisation process from 2009, the then Australian Industrial Relations Commission determined that it would not make a separate award for the labour hire industry. Instead, it extended coverage of each relevant modern award to deal with agencies supplying labour. Labour hire employees are paid according to the modern award in place at the establishment of the client or host business.

For example, the *Building and Construction General On-Site Award 2010* cover all employers in the industries of civil construction, engineering construction, and building construction. It applies equally to employees properly engaged as labour hire workers as it does to employees of builders and trade contractors.

This award allows employers and employees to contract as either daily hire, casual or weekly full time. The wages include special allowances to compensate for the nature of employment—such as ‘follow the job’ allowances. Casual employees receive 25% more than other forms of engagement.

Commonwealth Parliamentary Committee Recommendations

The Issues Paper confirms labour hire regulation is under consideration from a number of jurisdictions, including the Commonwealth Parliament. In March 2016, following a parliamentary committee investigation into abuses of the Seasonal Worker Program, a joint Parliamentary Committee proposed to establish a national licensing regime for labour hire.

The recommendation received wide support within the joint committee constituted by five Coalition MPs, four Labor MPs and a Greens Senator.⁶

The recommendations include:

- Requiring a business to use a licensed labour-hire contractor to procure labour;
- Keeping a public register of all labour-hire contractors;
- Requiring labour hire owners to demonstrate compliance with all workplace employment, tax, and superannuation laws.

⁵ Office of the Australian Building and Construction Commissioner, *Sham Contracting Inquiry Report*, Australian Government, 2011

⁶ Commonwealth Parliament, Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, Australian Government, March 2016,

The report concluded by recommending a comprehensive review by December 2017. In light of this federal proposal, it would be premature for the Queensland government to introduce a new regulatory scheme prior to the federal review later this year.

Productivity Commission's inquiry into the Workplace Relations Framework 2015

Any review of labour hire practices should take into account and acknowledge the extensive consultation and reports of the Productivity Commission, which identify labour hire as a legitimate commercial service. The Productivity Commission's report includes Recommendation 25.2:

That the Australian government amend the Fair Work Act 2009 so that enterprise agreement terms that restrict the engagement of independent contractors and labour hire workers, casual employees or regulate the terms of their engagement, should constitute unlawful terms.

The Commission regards the limitations on labour hire and casual employment as a restrictive practice, or anti-productivity practice. Master Builders has formally endorsed this recommendation.

Royal Commission into Trade Unions (TURC) 2014/15

The TURC report has enhanced the above recommendations in the Productivity Commission Report. TURC acknowledged the views expressed in the report that anti-competitive conduct in enterprise bargaining should be dealt with in the *Fair Work Act*. The TURC report goes one step further (to overcome unintended issues in common law) and recommended the *Competition and Consumer Act 2010* be amended to make explicit that an enterprise agreement under the Fair Work Act is a contract, arrangement or understanding for the purposes of the *Competition and Consumer Act 2010*.

This part of TURC report underlines the rights of labour hire employers and their clients to lawfully trade and recognises the productivity benefits this brings to industry.

A crowded field of regulation

In a conservative estimate, we note below some federal and Queensland laws, which currently regulate labour hire employers in the building and construction industry.

Anti-Discrimination Act 1991

Bankruptcy Act 1966

Building and Construction Industry Payments Act 2004

Building and Construction Industry (Improving Productivity) Act 2016

Competition and Consumer Act 2010

Corporations Act 2001

Fair Work (Building Industry) Act 2012

Fair Work Act 2009,

Further Education and Training Act 2014

Holidays Act 1983

Industrial Relations Act 1996

Payroll Tax Act 1971

Queensland Building and Construction Commission Act 1991
Subcontractors' Charges Act 1974
Superannuation Guarantee Charge Act 1992
Taxation laws, including reportable payments
Trusts Act 1973
Work Health and Safety Act 2011
Workers' Compensation and Rehabilitation Act 2003

Regulators

Key federal and state authorities enforce the above legislation. The QBCC, as identified earlier in this submission, already licences labour hire in the building and construction industry. Labour hire is also accountable to a field of other powerful regulators. For example, the Australian Tax Office, the Australian Security and Investment Commission, the Fair Work Ombudsman, the Office of State Revenue, and the Australian Building and Construction Commission.

We propose the Minister seek advice from the Office of Industrial Relations which regulators are inadequate for the purposes of supporting the interests of the labour hire employers, their employees, the community and how they may be improved.

Conclusion

The labour hire industry has been the subject of a number of national and state inquiries over recent years. None of these inquiries has sought to stifle the model of labour hire contracting. It remains a legitimate mode of employment and contracting.

It is therefore very important the Minister exercise caution in contemplating additional regulation of labour hire businesses, or indeed any business that operates lawfully. It is very likely that an additional licencing regime will be confusing and add costs to business.

If the government accepts that there is a culture of abuse of workers in other industries, and current regulation and enforcement is inadequate, the government response must be responsible and proportionate to those industries where there is a problem. Instead of introducing another layer of regulation or licencing, the government must be satisfied that there are no existing regulatory schemes, which it can use to improve compliance.

For example, the government should favour a services model. This may be through help lines, dedicated investigators, and legal assistance and so on. Existing federal and state government legislation and agencies already throw a very wide net, and it would be complementary if the government used its community services to educate and support vulnerable persons or groups.

On the facts, there is no case to justify a second licence for labour hire in the building and construction industry. If the Minister concludes a form of intervention is necessary, we urge that it should not extend to the building and construction industry.

Any inquiries on this submission should be made to Corlia Roos, Director, Construction Policy Master Builders at corlia.roos@mbqld.com.au.

Yours sincerely



Grant Galvin

Chief Executive Officer

