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INQUIRY INTO THE PRACTICES OF THE LABOUR HIRE INDUSTRY IN QUEENSLAND

Submission from Master Electricians Australia



Background

Master Electricians Australia (MEA) is a dynamic and modern trade association representing electrical contractors. A driving force in the electrical industry and a major factor in the continued success and security of electrical contractors, MEA is recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. The organisation's website is: www.masterelectricians.com.au.

As an employer body for the electrical industry we are keenly interested in ensuring the integrity of the labour hire industry and include below our responses to the terms of reference.

Issues for consideration

The extent, nature and consequence of labour hire employment in industries and/or regions, including within industry supply chains and the responsibilities of entities involved.

In the electrical contracting industry, labour hire employment is used predominantly when peak demand for work necessitates it.

Phoenixing, under-capitalisation and undercutting of conditions by labour hire companies ("companies") and their impact on the labour market and business

➤ *Phoenixing*

MEA is not aware of phoenixing being a notable issue for labour hire companies operating in the electrical industry.

➤ *Under-capitalisation*

Similarly, MEA is not aware of under-capitalisation being a notable issue for labour hire in the construction industry as employees are predominantly engaged on a casual or fixed term basis.

➤ *Under cutting of conditions*

The electrical industry in general is not award reliant with the vast majority of both labour hire and permanent employees being paid \$8 to \$21 an hour in excess of the modern award rate. Our members would find it difficult to recruit and maintain a workforce of either labour hire or permanent employees if undercutting the modern award and/or the conditions as set out in it. Many electrical contractors are keenly aware that good talent within the industry is highly mobile and that their skills are very transferable and in demand. Nonetheless, with the decrease in work currently available, it is clear to those in the industry that employers paying at the higher end of the spectrum have contributed to the down turn in work, as opposed to those paying closer to the middle of the spectrum. We would argue that this is not under cutting conditions, but rather the usual market forces operating in a high supply, low demand market economy.

➤ *Impact on labour market*

- Over the last three years all electrical contractors have had to drastically reduce the size of their workforces due to a reduction in projects work and opportunities that have returned to a pre mining boom norm. Labour hire presents an opportunity for employment in areas of the sector that have sporadic labour demands but where these demands are short lived. We would say our members are engaging in smaller projects that have a far shorter duration.
- Some industrial relations academics and employee organisations have suggested that the high casualisation of these workforces can lead to underemployment and precarious employment. However, this is nothing new in the construction mining and infrastructure industries in which electrical contractors work. The *2016 Major Projects Report*¹ indicates that Queensland major project work fell 25% in 2014/15, a further 50% drop in major project work forecast over 2015/16 with the bottom expected in 2016/17. This equates to a 75% reduction over two years. The reality is that with the work not available, employers simply cannot retain permanent workforces.
- In periods of low demand, labour hire arrangements present realistic employment opportunities for employees with the required skills and an opportunity for employers to tender for smaller projects with smaller peaks but very little certainty of ongoing employment.
- In terms of the Construction Industry there are portable long service leave scheme and redundancy trust schemes that allow for the industry participants to have longevity in the industry.

The social and economic impacts, including on regional communities, of replacing permanent employees, apprentices and trainees with labour hire workers;

In looking at this question it would need to be established from where the labour hiring employees were being sourced. The Queensland Government has already undertaken a review of Fly In Fly Out (FIFO) workers and have made recommendations and are considering introducing legislation on this topic. Given the nature of Apprentices and Trainees it is unlikely given the difference in circumstances of training wages and outcomes of these arrangements that employers would make a direct change to labour hire of trade assistants or mature workers in these circumstances, however Group Training providers, are discussed later in this section.

Typically, labour hire workers in the electrical industry are required to assist with peak demand on projects or works greater than the standard capacity of the business. Accordingly, it is unlikely that these companies are replacing permanent employees given that the work is temporary in nature.

In the absence of labour hire, a company needs to engage workers directly, most often as casuals, to meet the demands of the project. However, the recruitment process of assessment, selection and engagement with a number of applicants can be very time consuming. Alternatively, companies can build relationships with labour hire companies to reduce the excessive red tape and process involved in recruitment. This allows the employer to engage

¹ http://www.gmca.com.au/files/documents/QMCA_MPR2016a_20160216_final_LR.pdf

with well qualified and experienced electricians and then make an assessment based on team and organisational fit. The result is an improvement in efficiency and productivity which allows a business to make a positive contribution to the growth of local economies and communities.

Group training providers, namely organisations that labour hire apprentices to businesses, such as Electrogrouop for the electrical industry, offer an opportunity for apprentices to achieve their trade requirements of obtaining a variety of electrical experience to satisfy the issuing of a trade certificate and ultimately a licence. Most electrical contractors are small employers and as such are not able to commit to long term training contracts. Group training offers the opportunity for employees and apprentices to obtain a breadth of experience that is required in their trade years. The vast majority of electrical contractors are not able to offer this breadth of work and as such other employers are utilised to do this. For the most part, group training has proven itself to be a very necessary component of the training and experience for apprentices and the engagement of a particular type of labour for business.

Labour hire can therefore make a positive impact on communities, including those in regional areas, by offering employment opportunities for workers who may otherwise need to look elsewhere. It also enables companies to continue to operate in regional areas, contributing to economic growth.

Allegations that labour hire and sham contracting are being used to avoid workplace laws and other statutory obligations, such as:

- ***Underpayment of wages and entitlements, including superannuation; and***
- ***Avoidance of payroll tax and Workcover premiums;***

Underpayment of wages and entitlements

➤ *Labour hire*

MEA is not aware of labour hire being used in the electrical industry to avoid obligations in relation to wages and entitlements as previously identified in the under cutting of conditions section of our submission.

➤ *Sham contracting*

Companies operating in the construction industry, both large and small, have participants engaged as subcontractors. Legitimate subcontracting is an essential feature of the industry, particularly for electrical contractors where a large proportion of businesses fall into the 0 – 3 employee size category, with the majority operating as sole traders, without the resources to engage permanent employees.

There are protections in place through workplace laws to ensure contracting cannot be used to avoid superannuation obligations. Changes to the superannuation guarantee since 2009 require businesses engaging subcontractors to pay the super where there was an invoice provided with a labour component for 50 per cent or more of the total invoice. The super is payable on the labour component.

There is also legislation in place that seeks to prevent sham contracting arrangements, such as the *Independent Contractors Act 2006*. Judicial bodies throughout Australia are empowered to enforce such legislation, with cases regularly going to the FWC and other courts challenging the arrangements of businesses. See [Turner v Australia Post \[2016\]](#)

[FWC 801 \(2 March 2016\)](#) as an example of a case of a genuine contracting arrangement considered by the Fair Work Commission.

Avoidance of payroll tax and Workcover premiums

➤ *Labour hire*

MEA is not aware of labour hire being used in the electrical industry to avoid obligations in relation to payroll tax and Workcover premiums. Labour hire companies have the same obligations as any other employer.

➤ *Sham Contracting*

Workcover have opted for the 'ATO decision tool' for determining whether someone is a subcontractor and as such sought to ensure that there is appropriate cover for those people deemed employees. This is a practical mechanism that protects workers from being subject to sham contracting arrangements.

Both Workcover Queensland and the Office of State Revenue have enforcement powers and audit schedules that all employers are subject to and these should be utilised and enforced.

The effectiveness of enforcing current industrial relations laws and instruments, occupational health and safety laws and workers' compensation laws in the labour hire industry

➤ *Industrial relations laws and instruments*

The Fair Work Commission, through the Modern Awards, clearly and concisely enforce the obligations of labour hire companies. As an example, in the *Electrical, Electronic and Communications Contracting Award 2010* the following extracts show that labour hire, regardless of its form, is clearly covered by the relevant award:

4.6 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

[New 4.7 inserted by [PR994523](#) from 01Jan10]

4.7 This award covers employers which provide group training services for apprentices and/or trainees engaged in the industry and/or parts of industry set out at clause 4.1 and those apprentices and/or trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.

Companies operating in the construction industry, both large and small, have participants engaged as a subcontractors. Legitimate subcontracting is an essential feature of the industry, particularly for electrical contractors where a large proportion of businesses fall into the 0 – 3 employee size category, with the majority operating as sole traders, without the resources to engage permanent employees.

As labour hire workers are not deemed to be employees of the particular electrical contractor, they are covered by industrial awards and agreements like the modern awards

or enterprise agreements of labour hire companies. Given our previous evidence of hourly rates that electrical contractors must pay, it would be difficult for a labour hire company to pay less than the modern award or the industry rate as they would not have the applicants for the employers to choose from.

➤ *Occupational health and safety laws*

As a Person Conducting a Business or Undertaking (PCBU) in their own right, a subcontractor must have their own safety systems and standards in place for all workers on site. Contractors have advised that labour hire companies in this space are inducting their labour hire employees and also regularly checking to ensure that the hiring company has a relevant safety system and policies in place.

The site representatives on construction projects are also diligent when it comes to identifying any deficiencies in licences or tickets for labour hire employees coming on to sites. They are ready to bring to the attention of authorities any labour hire discrepancies in relation to pay and conditions, including occupational health and safety laws.

Again the Queensland Government have powers of inspection and compliance under Work Health and Safety Act and there is a shared onus in the act of both the Labour Hire Company and the Owner of the Business. We have assisted many of our members over the years whereby common law cases list both employers in actions and both have obligations under the Act. However the outcome of these claims is always determined over the particular circumstances of the injury and liability is assessed on each individual case.

➤ *Workcover*

Workcover Queensland is “no fault” insurance scheme and covers all workers and will process claims regardless of the employers premium status. MEA is not aware of a case in which a labour hire worker has been denied entitlements in relation to an incident in which Workcover would be applicable. This provides Workcover protection for both employees and labour hire workers however again this is an enforcement issue across all industries about employers paying premiums and Workcover Qld have the necessary powers to investigate and prosecute all employers for underpayment of premiums.

Allegations of exploitation, harassment and other mistreatment of workers employed by companies

➤ *Exploitation*

MEA is not aware of any evidence of exploitation in relation to the exploitation of workers employed by labour hire companies, including consistent underpayment of wages, in the electrical industry.

➤ *Harassment*

From interactions with our members harassment of workers employed by labour hire companies in the electrical industry is more likely to be from union members and delegates on site.

In one example, an employer on a project in Ann St, Brisbane had employees refuse to undertake works to complete a fire safety system. The employer had no choice but to

engage labour hire as the deadline for the first inspection was pressing. A union organiser attempted to have the labour hire employees removed from site as he claimed that they were not appropriately licensed. The labour hire employees did in fact hold the required licences and the actions of the union delegates only delayed the commencement date of the licensed electricians

Whether tendering and employment practices create an uneven playing field for competing businesses;

According to Queensland Government data, the State Government in 2015 awarded \$2.450* Billion in contracts in excess of \$10,000 utilising a number of different tendering process, pre qualification and request for tender processes. The Queensland Government is the largest single "Principal" by value and sheer number of requests. This playing field is not uneven and we would suggest that the private sector field is also even, as long as the tendering processes are done ethically and the employment practices comply with the law. Simple competition is not in itself uneven, but the nature of the circumstances.

(* <https://data.qld.gov.au/dataset/queensland-government-contracts-directory-awarded-contracts/resource/fa30b38a-1624-474d-bf55-e3a816691d2e>)

➤ *Free market economy*

Australia operates as a free market economy, where businesses must be able to compete in order to survive and provide a Principal/ Customer value for money. Provided workplace and related laws are being adhered to, it is the right of any business owner to arrange their labour force in a way that will maximise their profit margins. Whether this is through a permanent workforce, fixed term contracts, part time, shift work or casual. For those with fluctuating work availability, labour hire may be the best option for their business and it is the right of any legitimate business owner to make this decision in order to compete or in some cases even tender for larger opportunities. Small organisations do not have staff sitting idle waiting for opportunities to arise.

Importantly working in conjunction with competition laws is a common law principal of Restraint of Trade. Restraint of Trade renders provisions of a law, regulation or contract, which impose restrictions on a person's freedom to engage in trade or employment, illegal, and as such unenforceable, unless they are demonstrated to be reasonable for the person and the public.

➤ *Queensland Government Procurement Policy*

In light of the issues raised in the preceding paragraphs the Queensland Government procurement policy highlights that Tender's are evaluated against a criteria and that the Tendering process itself is governed by the Australian Standard 4120-1994 Code of Tendering.

The Queensland Government Department of Housing and Public Works has released Conditions of Tender Lump Sum Tenders using AS2124 General Conditions of Contract in March 2016**

The document explains, to the Tenderer, how the tendering process is undertaken. The Queensland Governments policy objective is to ultimately deliver best value for money for Queensland Tax payers, which mirror that of the Competition laws objectives. Specifically this document states

10. TENDER EVALUATION

- 10.1 *The Principal shall evaluate Conforming Tenders in accordance with the tender evaluation criteria contained in Schedule 1or, in the absence of a Schedule 1, on the basis of best value for money for Government. (emphasis added)*
- 10.2 *The Principal, if it determines to evaluate an Alternative Tender, shall evaluate such Alternative Tender on the basis of best value for money for Government which may, or may not, be the tender evaluation criteria contained in Schedule 1.*
- 10.3 *Where both Conforming and Alternative Tenders have been evaluated, the Principal may accept that Tender which on a view of all circumstances represents the best value for money for government.*
- 10.4 *In the event that the Tender contains an ambiguity in relation to the tender sum, then the amount in words at Item 2 of the Tender Form shall prevail.*

The following extract at Schedule 1 states

Schedule 1 to Conditions of Tender – Tender Evaluation

...

Tender Evaluation Criteria – Conforming Tenders

<i>Criterion 1.</i>	<i>Tender Sum</i>	<i>Weighting</i>	<i>100%</i>
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Where a Tenderer tenders a rate for the provisional number of delay days stated in the Tender Form and a higher rate for delay days thereafter then, for the purposes of evaluating tenders only, the tender sum shall be adjusted by deleting the Provisional Delay Allowance plus GST and adding the total of the provisional number of delay days multiplied by the higher tendered rate plus GST.

(** <http://www.hpw.qld.gov.au/SiteCollectionDocuments/AS2124ConditionsTender.doc>)

➤ *Fair Work Building and Construction Building Code*

The Building Code acts as a further mechanism to discourage unlawful workplace relations activity on building sites.

The regulation of labour hire in Australian jurisdictions and internationally and effective enforcement mechanisms, including bonds, licensing, registration and other forms of compliance.

As detailed above, the electrical industry certainly has enforcement mechanisms in place that regulate abuse of labour hire arrangements. These include stringent licensing requirements and worker protections, enforcement action by regulatory bodies and judicial bodies as well as oversight by both employer and employee bodies to ensure all rights and obligations are adhered to.

An example of the already effective enforcement measures in place is the action taken by the Fair Work Ombudsman in 2015 against a labour hire company contracting workers to the hotel industry. An inquiry conducted by the FWO revealed workers were underpaid with unlawful deductions being made from their wages. As a result of the FWO investigation the labour hire company agreed to a back payment plan for all workers and signed an Enforceable Undertaking with a number of conditions included to ensure future compliance with Award conditions. As well as the FWO making the case information available on their website,

employer groups took note and provided advice to their members on how to meet their obligations under the *Fair Work Act*.

As an added compliance strategy, the Australian Tax Office (ATO) introduced in 2013 Building Compliance Reporting measures², whereby all companies and their accounts must detail to the ATO all subcontractors and amounts paid to them.

With such measures already in place, MEA would caution against any other regulatory red tape being imposed upon employers in relation to their legitimate labour hire arrangements. We would also recommend that the Queensland government consider a more focused inquiry into the industry's most likely to rely on labour hire. It may in fact not be the labour hire industry, but the industry itself utilising labour hire workers that may have a history of noncompliance with workplace laws.

CONCLUSIONS

In summary it is our submission that in Queensland

- i. Competition in business has always been a feature and that Australia's current economic success has been built since the early 1990's when protectionism was vastly reduced. This has been built within a framework of competition, consumer, employee and restraint of trade statute and common law.
- ii. There are no systemic issues that have been identified with tendering or employment models that require addressing
- iii. Labour hire was, is, and will continue to be an appropriate form of business and a feature of the construction industry
- iv. Currently State and Federal legislation provides significant audit, investigation, reporting and prosecution powers to enable effective enforcement if so desired by the relevant agencies.

We appreciate the opportunity to comment of the issues raised and are available if required to provide further written or verbal submissions if requested.



Jason O'Dwyer
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² <https://www.ato.gov.au/Business/Building-and-construction/In-detail/Taxable-payments-reporting/Taxable-payments-reporting--building-and-construction-industry/>