



Submission to the Finance and Administration Committee

Inquiry into the Practices of the Labour Hire Industry in Queensland

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Queensland Nurses' Union
106 Victoria St, West End Q 4101
GPO Box 1289, Brisbane Q 4001
P (07) 3840 1444
F (07) 3844 9387
E qnu@qnu.org.au
www.qnu.org.au

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Introduction

The Queensland Nurses' Union (QNU) thanks the Finance and Administration Committee (the Committee) for the opportunity to make a submission to the Inquiry into the Practices of the Labour Hire Industry in Queensland.

Nursing and midwifery is the largest occupational group in Queensland Health (QH) and one of the largest across the Queensland government. The QNU is the principal health union in Queensland covering all categories of workers that make up the nursing workforce including registered nurses (RN), registered midwives, enrolled nurses (EN) and assistants in nursing (AIN) who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 53,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNU.

Although labour hire arrangements have been a feature of the labour market for decades, it is now becoming a growth industry with many large employers preferring this form of engagement over traditional forms of direct employment. The QNU has a significant interest in measures to protect our members from employment practices that seek to cut labour costs by undermining job security and conditions of employment.

Recommendations

The QNU recommends:

the revised Queensland industrial relations legislation contains provisions

- enabling the conversion of labour hire employment to direct employment after six months of work,
- requiring licensing of labour hire companies. These companies must be able to demonstrate they have the capital to operate a legitimate business;

the committee

- investigates the connection between the use of works visas and unscrupulous behaviour by some labour hire firms,
- recommends restoration of the federal rights of trade unions to investigate suspected breaches of labour hire protections.

Labour Hire as an Employment Strategy

Labour hire is a form of indirect employment in which an agency supplies workers to work at a workplace controlled by a third party (the host), usually in return for a fee from the host (O'Neill, 2004). Labour hire arrangements are similar to employment placement services, and comprise a part of the employment services industry. However, it may be assumed that when an employment placement agency secures a worker a job, their relationship will finish. With labour hire arrangements, the three-way relationship between host, agency and worker will continue for the period of the assignment (O'Neill, 2004). Many organisations appear to have turned to labour hire after they have reduced or contracted out their own internal human resource function.

The relationship that a person may have with a labour hire firm varies. Once their job commences, some of these employees effectively cease involvement with the labour hire firm. They become employees of, and are therefore paid by, the 'host employer'. The majority of employees who find their job through a labour hire firm are not paid by the labour hire firm. The remaining group can be considered employees of a labour hire firm as they are paid by the labour hire firm. These are known as labour hire workers (ABS, 2010).

Whilst labour hire presents potential difficulties for vulnerable workers who have less capacity to assert their own employment rights, the emerging 'sharing economy' is particularly concerning for the union movement as nations struggle with population growth and increasing density. The 'sharing' economy is a collaborative consumption model based on access rather than ownership. Collaborative consumption startups use the internet and social media to facilitate peer-to-peer exchanges, allowing people to share assets and services directly with those who require them. It is broadly defined as the peer-to-peer-based activity of obtaining, giving, or sharing access to goods and services, coordinated through community-based online services (Hamari, Sjoklint, Ukkonen, 2014).

This type of economy includes online trading sites like eBay and Gumtree, car sharing services like GoGet, peer-to-peer rental services like Open Shed, errand services like Airtasker and clothes swapping services like the Clothing Exchange. Many more startups focusing on diverse products and services are operating in Australia (Reidy, 2013).

While there may be potential in this sector for creating new businesses that allocate value more fairly, are more democratically organized, reduce eco-footprints, and can bring people together in new ways, there are many risks to workers. Since 'for-profit' platforms have started to take large sums of outside investment from venture capitalists, the situation has become more contested by politicians, regulators, and the businesses being 'disrupted' by these technologies (Schor, 2014).

In the United States, local officials are investigating platforms and restricting activity. Workers are organizing against some of the more aggressive platforms largely because it is based on evading regulations and breaking the law, subjects consumers to substandard, possibly unsafe products and shifts risk onto employees under the guise of 'sharing' (Schor, 2014).

Where labour hire is breaking down traditional employment practices, the sharing economy will present greater risks to workers as they move into even less regulated work platforms based on the exchange of goods, labour and services.

Prevalence

Labour hire in the form of temping agencies has been a feature of the Australian labour market since the 1950s (Hall, 2002). Throughout the late 1980s and 1990s the labour hire industry grew significantly as a flexible alternative to a workforce of permanent employees across a range of industries. There are now around 5,798 temporary staff services enterprises across Australia (IBISworld, 2016)

Estimating the number of Australian labour hire workers varies according to methodologies, data sources and time periods. According to the ACTU (2012), the number of labour hire workers is between 2 and 4 per cent of the workforce.

The most recent ABS data indicates in 2008 there were 122,200 people who were paid by a labour hire firm. Almost two thirds (61%) of labour hire workers were men. The age profile of male and female labour hire workers was quite different. Male labour hire workers had a younger age profile, with over a third aged 15 to 24 years, compared with 9% of female labour hire workers. A greater percentage of female labour hire workers were aged 45 to 59 years.

This in part reflects the occupations and industries that labour hire firms supply labour for, and that men and women commonly work in, such as technicians and trade workers and machinery operators and drivers for younger men, and clerical and administrative workers for older women. Labour hire workers had an age distribution that was concentrated more around the younger age groups than for employees generally (ABS, 2010).

IBISWorld publishes a large collection of industry reports indicating industry's supply chain, economic drivers, key buyers and markets. According to their recent report (2016), the major industries using labour hire services nationally are information technology and telecommunications, construction and trades, health care and medical sectors. Government, defence, and the mining, energy and utilities sectors also play a part.

Host businesses use labour hire workers and suppliers in a variety of ways. These include:

- Filling very short term vacancies with labour hire workers, in a conventional 'temping' model;
- Filling regular seasonal requirements with labour hire workers, such as in the agricultural or food processing industries;
- Filling specific functions within the business with labour hire workers with particular skills, such as maintenance;
- Using labour hire as a longer-term supplement to an ongoing workforce, with ongoing and labour hire employees working alongside each other performing the same work;
- Using labour hire to entirely replace an ongoing workforce, such as in the meat industry (Victorian Government, 2015).

According to IBISWorld, the temporary staff services industry in Australia generates annual revenue of \$18.5 billion and is expected to have annualised growth of 1.4 per cent through to 2020-21 (slightly down on the annual 1.8 per cent growth level in the five years to 2015-16). IBISWorld notes there are many significant foreign players in the domestic market which contributes to the temporary staff services industry's globalisation level. Many large international companies have established offices in Australia as their major international client companies are global in their operations. IBISWorld anticipates further globalisation within this industry over the next five years (IBISWorld, 2016, p.4).

Labour Hire in Health Services - Consumer Directed Care

The community care sector in Australia is gradually moving towards a demand driven model of service delivery in the disability and aged care service sector under the National Disability Insurance Scheme (NDIS) and Consumer Directed Care (CDC). Where once these services were delivered in a block funding model spread across consumers, providers will now operate within individualised budgets. From 2017, these individualised budgets will be attached to the consumer rather than the provider. Substantially increased expenditure on aged care and disability support should see an increase from 72,000 to 100,000 Home Care Packages by 2017/18, with more than 40,000 additional packages expected to be available between 2017/18 to 2021/22 (Department of Social Services, 2015; Deloitte, 2014).

CDC allows the consumer to choose the services they want within an allocated budget. Consumer choice will drive behaviour for individuals to consider personality and likeability in their buying behaviour. In some cases, consumers may increasingly demand 'softer' skills from support workers more so than formal qualifications or experience. Customer service skills such as communication and attentiveness to the needs of the individual will be highly

valued by consumers and therefore service providers. Increasingly, consumers will seek access to a workforce with specific cultural, linguistic and technical skills. As a result, providers will need to compete and tailor support to meet the individual needs of their customer base (Deloitte, 2015).

The move to CDC reflects the very clearly expressed preference of most older Australians to stay in their own home as long as possible, with individualised support and to have some level of control of the design and delivery of the services they receive, including flexibility in the timing and scheduling. CDC is an increasingly common feature of community care strategies around the OECD countries. The 2015/16 Federal Budget announced home care reforms explicitly designed to privatise choice and control over aged care and further reduce regulation for aged care providers.

As CDC is becoming embedded in the home care sector, there has been an associated rise of in the number of agencies that seek to match clients to care workers including registered and enrolled nurses. These workers are not directly employed by the agencies and therefore not subject to the rigorous recruitment and training requirements of regulated services.

Within the health sector, the emergence of these unregulated services raises concerns on many levels about the quality of care people might receive and the level of protection for both the workers and the public. Community care providers may increasingly leverage their carer workforce as a more cost effective alternative to more highly trained resources i.e. nurses, especially for customers with less complex needs (Deloitte, 2015). This may put patient safety at risk.

Any shift towards a reduction in occupational licensing, reliance on private certification schemes and reputation mechanisms, avoidance of industry specific regulatory frameworks and the exclusion of certain types of health workers from employment law will inevitably impact on the nature of the aged care nursing workforce.

The QNU maintains that only qualified nurses can deliver total nursing care that delivers high quality and cost-effective outcomes.

Effects of Labour Hire

There may be some potential benefits of labour hire arrangements. For businesses, labour hire provides flexibility in managing areas and times of operational need. For some workers labour hire arrangements may:

- provide greater flexibility in hours of work;
- provide a path to other employment, and/or ongoing employment;

- provide an opportunity to gain skills and experience in an industry where they may not otherwise have been able to secure employment.

However, the growth of unstable, non-regular patterns of work that characterise labour hire has implications for the living standards of these workers. The growth of labour hire and the many problems it has generated for workers is of concern for the union movement. The rising prevalence of contracting-out of services to include labour changes the employment relationship. Contractual mechanisms for regulating labour may replace collective labour law, but they are a poor substitute. This has important implications for the way governments should approach the monitoring and enforcement of employment standards (Holley, 2014).

Based on various sources (Hall, 2002; Taylor, 2003, p. 302; O'Neill, 2004; Graham, 2007; Victorian Government, 2015; Senate Education and Employment References Committee, 2015) we have identified the following disadvantages:

- Labour hire is underpinned by cutting labour costs (labour hire workers are going to suffer lower rates of pay than directly employed employees);
- Employers avoid their employment obligations by contracting out. This contributes to the growth of non-standard employment, degrading employment standards and less protections for employees;
- Employees working under these conditions appear disinclined to speak out about their conditions largely out of fear;
- Labour hire substitutes the existing workforce with a more compliant and cheaper workforce with lesser pay and conditions;
- Labour hire offers limited employment security. It relies on casual employment, including many long-term casuals. This largely negates the protection of unfair dismissal afforded to other employees;
- Labour hire divides the recruitment and appointment functions between the employer and the client or host;
- Employees of labour hire companies have considerably less bargaining power;
- Ambiguities in the employment relationship poses a potential threat to occupational health and safety standards with a lack of clarity over parties' specific responsibilities
- There is serious under-reporting of workplace injuries. The obligation and ability to rehabilitate injured workers is often limited;
- Labour hire firms do not invest in training and development of staff;
- The use of sham independent contractors typically occurs where the labour hire contractor claims that a worker is an independent contractor when they are in fact an employee, usually in an effort to avoid the responsibilities associated with having employees;
- Labour hire may be used to replace rather than supplement an ongoing workforce;

- Labour hire structures have been linked to instances of ‘phoenix’ activity, namely the transfer of assets of an indebted company into a new company (such as an associated labour hire entity operated by the same director/s), to evade tax, employment and other legal obligations;
- Labour hire workers may have less of a ‘workplace voice’ in the host’s workplace than directly employed workers, may find it harder to join a union and may be excluded from collective bargaining about the conditions which apply to their work;
- Low barriers to entry into the labour hire sector allow opportunistic operators to easily enter and work in an industry. Some labour hire suppliers are driven by price considerations to the detriment of compliance with workplace laws;
- Labour hire workers may be denied access to the benefits of the collectively negotiated labour agreements of the principal business and these businesses may not accept responsibility for the welfare of this class of worker, particularly in the areas of health and safety and training. The problems for injured labour hire workers are compounded in that they are less likely to have a specific work site to which to return for rehabilitation and return-to-work duties;
- One of the obvious inequities occurs when labour hire workers at a particular site may be paid the award rate, while their directly employed colleagues at the same site may be paid at a higher enterprise bargaining rate.

The Productivity Commission (2015) noted so-called ‘jump-up’ clauses that require businesses to engage subcontractors on the same terms as employees, or that limit the employment of casual and labour hire employees are, in spirit, contrary to the *Competition and Consumer Act 2010*. Employers should be able to use subcontractors, casual and labour hire employees as suits their business operations and the workers themselves. The Productivity Commission recommended the *Fair Work Act 2009* should be amended to prohibit restrictions on such employment arrangements in enterprise agreements.

The QNU rejects the Productivity Commission’s recommendation as a blatant acknowledgement that managerial prerogative must be advanced at the expense of protections for workers. Numerous inquiries¹ have shown the potential for exploitation of workers under this type of employment arrangement. Restrictions in enterprise agreements are necessary to curtail these activities.

Instead, the QNU seeks restoration of the federal rights of trade unions to investigate suspected breaches of labour hire protections. At present, unions can only investigate on behalf of a member (section 481 of the *Fair Work Act 2009*). They also have to give notice

¹ See for example Victorian Government (2015) Victorian Inquiry into the Labour Hire Industry and Insecure Work; Senate Education and Employment References Committee (2015) *Australia’s Temporary Work Visa Programs Interim Report*; Department of Industrial Relations (2001) *Labour Hire Task Force Final Report*, Report of the Task Force to the Department of Industrial Relations, New South Wales.

which allows employers to hide evidence, (although they can make application not to have to provide notice). In our view, improving workers' rights is a better alternative to reliance on the powers and resources of the Fair Work Ombudsman (FWO) to monitor and enforce regulation.

Regulation of Labour Hire

Labour hire arrangements have some benefits for workers in that they have an agent looking for work with conditions that suit the individual. Businesses have an immediate advantage in 'numerical' flexibility, particularly the ability to employ additional workers only for periods of demand, while not increasing the prime workforce numbers (O'Neill, 2014). However, labour hire is more likely to be a reaction to the impact of regulation and the compliance costs on employers. As a consequence of this, there are incentives for employers to access lesser or largely unregulated labour markets such as labour hire, which offer the prospect of potentially cheaper labour costs overall, and more importantly immunity from the legal obligations of an employer, such as unfair dismissal and workers' compensation obligations. Such a trend has led to a dual labour market - a primary core market of employees with comprehensive entitlements, and a secondary market of employees with fewer privileges (Graham, 2007).

IBISWorld (2016, p. 3) has noted that the level of regulation of labour hire 'is light and the trend is increasing'. Any change to industrial relations laws as has been occurring in recent years has the potential to alter conditions for operators in the industry.

Given the number of difficulties workers experience with labour hire, the concept of 'flexibility' that underpins this type of employment can mean either flexibility *of* the workforce or flexibility *for* the workforce. At present, it clearly favours the former.

The FWO has published a guide to assist employers of on-hire employees (also known as labour hire or agency employees) and their clients understand minimum obligations under the *Fair Work Act 2009* and modern awards and how they apply to on-hire employees and their employers.

The FWO (2013) makes it very clear the host organisation pays the on-hire business a fee for providing on-hire employees to work for them. On-hire employees are employed by the on-hire business; they are not employees of the host organisation.

As the employer, the on-hire business is responsible for ensuring employees receive their minimum employment entitlements at all times. On-hire employees are covered by the relevant modern award and the National Employment Standards (NES) regardless of the employment arrangements that are in place at the host organisation. On-hire employees

are not covered by an enterprise agreement made between a host organisation and its own direct employees unless the on-hire business itself is a party to the agreement.

An on-hire business may have its own enterprise agreement which will apply to an on-hire employee if it covers the work they perform. Depending on the provisions of the enterprise agreement, it may replace the provisions of the modern award (Fair Work Ombudsman, 2013).

Recent cases

Senate Inquiry (2015)

In 2015, the Senate Education and Employment References Committee conducted an inquiry into Australia's Temporary Work Visa program. The inquiry highlighted the exploitation of vulnerable migrant workers on Working Holiday Maker (WHM) visas and the role of labour hire contractors and sub-contractors in the systematic abuse of the WHM visa program.

The committee received evidence over several hearings about labour hire companies recruiting workers overseas in Hong Kong, Taiwan and South Korea. Recruitment typically occurred via Facebook advertisements containing information about work opportunities at certain meat processing plants in Australia (Senate Education and Employment References Committee, 2015).

Media investigations during 2015 revealed exploitative practices associated with the employment of temporary migrant visa holders other than 457 visa holders. The Australian Broadcasting Corporation's *Four Corners* program² exposed the exploitation of groups of migrant workers, many on WHM visas, in the meat processing and horticulture industries. These workers were underpaid, worked long hours and had sub-standard living conditions. Unscrupulous labour hire contractors were implicated in many of the instances of non-compliance with Australia's workplace laws (Senate Education and Employment References Committee, 2015).

Later in 2015, a joint investigation by *Four Corners* and Fairfax Media³ revealed the deliberate falsification of employment records by employers (franchisees) and the systemic underpayment of the wages and entitlements of international students working on temporary visas in many 7-Eleven convenience stores across Australia.

² See Meldrum-Hanna, C. & Russell, A. (2015) 'Slaving Away: The dirty secrets behind Australia's fresh food', *Four Corners*, Australian Broadcasting Corporation, 4 May.

³ See Ferguson, A. & Toft, K. (2015) '7-Eleven: The price of convenience', *Four Corners*, Australian Broadcasting Corporation, 31 August.

The Senate Education and Employment References Committee also noted that when the FWO investigated the complex web of interlinked labour hire contractors and subcontractors involved in the underpayment of wages to employees at Baiada's plants in NSW, many of these labour hire companies de-registered or went into liquidation.⁴

The ability of labour hire companies to wind up their activities upon exposure of their practices then to re-emerge in a different format allows them to abrogate their responsibility towards workers who are already vulnerable (Senate Education and Employment References Committee, 2015).

Kool v Adecco Industrial Pty Ltd [2016] FWC 925

Labour hire workers do not always understand their proper entitlements as evidenced recently in *Kool v Adecco Industrial Pty Ltd*. Here, The Fair Work commission (FWC) found a labour hire company had unfairly dismissed a factory worker after the employer wrongly concluded the worker was guilty of a clocking-off violation. The labour hire firm argued that

⁴ The FWO's Inquiry into the Baiada Group's labour procurement processes in New South Wales investigated a poultry processing industry dominated by two major entities, the Baiada Group and Ingham Enterprises where employees were not being paid their lawful entitlements. The Inquiry found the Baiada Group adopted an operating model that transferred costs and risks associated with the engagement of labour to an extensive supply chain of contractors responsible for sourcing labour.

The Inquiry also found that there were a number of entities throughout extensive supply chain networks which did not engage any workers or have any direct involvement in work undertaken within the Baiada Group's NSW processing plants or the sourcing or management of labour undertaking the work.

During the Inquiry, a large number of the entities identified in the supply chains finished trading, at times ceasing to exist the day before scheduled meetings with the FWO. The Inquiry found a large amount of work was performed 'off the books'. The Inquiry encountered a failure by the Baiada Group to provide any significant or meaningful documentation as to the nature and terms of its contracting arrangements with businesses involved in sourcing its labour. Moreover, the Baiada Group denied Fair Work Inspectors access to its three sites in NSW.

In summary, the Inquiry found:

- non-compliance with a range of Commonwealth workplace laws;
- very poor or no governance arrangements relating to the various labour supply chains;
- exploitation of a labour pool that is comprised predominantly of overseas workers in Australia on 417 working holiday visas, involving:
 - significant underpayments;
 - extremely long hours of work;
 - high rents for overcrowded and unsafe worker accommodation;
 - discrimination, misclassification of employees as contractors (Fair Work Ombudsman, 2015).

although the factory workers' placement with the company had ended, she was not dismissed, as she continued to be employed by the labour hire company and it continued to offer her alternative assignments (Workplace Express, 2016).

The FWC found her employment relationship had ended, but this had not been at the labour hire firm's initiative. The FWC accepted the company had 'simply acquiesced in the labour hire firm's decision without any independent verification of the misconduct alleged'. The FWC did not accept the factory worker remained employed by the labour hire firm after her assignment ended and the company did 'little, if anything' to place her in another position.

The FWC maintained the labour hire firm was unable to 'abrogate its responsibility to notify the factory worker of the reason related to her capacity or conduct, for her removal from a long term and steady placement and to give her an opportunity to respond to that reason. To hold otherwise would effectively allow labour hire employers to contract out of legislative provisions dealing with unfair dismissal'.

The FWC's ruling sums up the misunderstandings that surround the engagement of labour hire workers and statutory entitlements. Governments have a duty to monitor and enforce these standards, particularly for vulnerable workers who have less capacity to assert their own labour rights. (Holley, 2014)

We note this federal government is proposing a Registered Organisation's Commission as a specialist regulator of unions and employer associations even though most of these parties already comply with legislation governing their activities.⁵ Yet when regulatory measures such as labour hire licensing are put forward as a means of protecting workers, employers and labour hire companies object that they already comply with the law. According to Professor Anthony Forsyth (2016), head of the Victorian Labour Hire Inquiry, 'they said it would therefore be inappropriate for them to carry the burden of increased regulation and compliance aimed at cleaning-up small, rogue labour hire operators'.

Apparently it is acceptable to introduce an additional regulatory authority for the vast majority of unions and employer associations who also comply with the law, but this does not extend to labour hire agencies where there have been serious cases of unscrupulous exploitation of vulnerable workers, and breaches of workplace, health and safety, tax and migration laws on a systematic basis.

The FWO's inquiry into the Baida Group's employment practices is a prime example of these types of behaviour.

⁵ See the *Fair Work (Registered Organisations) Amendment Bill 2014* (Second reading negatived in the Senate, 14 May, 2014, 2 March 2015, 17 August, 2015).

QNU Case study

We have provided the following Queensland case study where a labour hire company sought to employ nurses on sub-class 457 visas.

Labour Hire Company

In 2013, the QNU became aware that a labour hire company had applied for a 'Labour Agreement' with the federal government to bring 150 nurses per year to work in Australia on sub-class 457 visas.

The company provided our peak body, the ANMF with a list of job titles of various nursing jobs, as part of its obligation to consult. The company indicated some positions were located in 'Brisbane' or 'Queensland' as well as the Gold Coast, Rockhampton Townsville and Cairns.

At that time, there was a large number of unemployed graduate nurses in Queensland and the previous government had cut more than 1300 full time equivalent (FTE) positions in the public sector. The QNU was concerned about the employment of overseas nurses to fill these vacancies.

The QNU used its communications network to seek expressions of interest in the positions. Within the first 3 days, we received calls from 48 members expressing interest in the jobs. Ultimately, we compiled a list of 55 members interested in these positions.

The labour hire company contacted these nurses and told all of them that they were unsuitable for the positions, despite many of them being very experienced nurses. The QNU wrote to the (then) Minister for Immigration urging him to consider terminating the Labour Agreement.

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