



## HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

*Inquiry into the use of independent contractors and labour hire arrangements*

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### **Aged Care Queensland**

Aged Care Queensland Incorporated is the Queensland peak body for the providers of aged and community care and retirement services. Those providers are in both the not for profit and for profit sectors. Our membership includes Churches, Charitable and Indigenous organisations, private and public companies and ethnic groups.

Members of ACQI are both large and small business and have a diversity of operations with many functions being undertaken by employees and others through a range of outsourcing arrangements.

The shortage of skilled labour in the market and the need to finely tune their business arrangement to undertaking core functions has seen the Industry move more to independent contractors and labour hire arrangements both by choice through a strategic direction and by necessity due to the effects of a skills shortage.

The areas of skills shortage that impact most of the service provision of members is that of Nursing and Allied Health staff, and the contracting arrangements vary due to the demographic implications in Queensland.

### **The Status and Range of Independent Contracting and Labour Hire Arrangements**

#### *Allied Health Staff*

While some members employ Allied Health staff directly, a large proportion of the Industry would contract the services of a local business. These services are not seen as traditional services from a labour hire company however they are, in many instances, providing staff to the facility and the tools of trade that are required for them to undertake their work are provided by the Facility.

If we can define Labour hire as “*An arrangement whereby a ‘labour hire company or agency provides individual workers to a client or host with the labour hire being ultimately responsible for the worker’s remuneration’*”

In rural and remote areas throughout Queensland the services of the Allied Health staff may be provided by an independent contractor

#### *Nursing Staff*

Nursing and care staff are only outsourced because of a skills shortage. In the main, nursing staff would either be a casual employee or from a labour hire company.

### *Electricians, Plumbers Maintenance and Ground Staff*

While some members employ these staff directly a large proportion of the Industry contract the services of a local business to provide services. In many instances these services are provided by local trades people acting as independent contractors.

### *Domestic and Kitchen Staff*

Whilst some members employ these staff directly a large proportion of the Industry would contract the services of the local business for heavy cleaning. A number of facilities have moved to outsourcing their catering services.

### *Clerical and General Staff*

In cases of staff shortages, labour hire companies would be used.

## **Ways Independent Contracting Can Be Pursued Consistently Across State and Federal Jurisdictions**

### *Insurance*

This industry is becoming more high risk and, while it may not be as high risk as the acute care sector, it is still a mounting cost which is preventing independent contractors from operating in this Industry. The risks associated with the industry reduce an employers ability to attract staff possessing these skills. Many facilities cannot accommodate a full time staff member and the part time option does not allow for career pathways that professional staff are seeking. Issues around professional indemnity costs are significantly impacting on the Industry.

### *Occupational Health and Safety*

The importance of occupational safety is highlighted by the incidence of workplace injuries (which currently stands at a higher rate than the average across all industries) and occurrences and adverse effects are becoming increasingly complex.

Whilst it cannot be expected that a labour hire firm could cover all aspects of occupational health and safety that is specific to individual workplaces, unless detailed in the contract, those aspects of occupational health and safety that are general to all workplaces should be the responsibility of the labour hire firm or the independent contractor.

### *Anti discrimination (harassment and workplace bullying) etc*

The amount of litigation in this area is increasing and it is incumbent on the Employer to ensure that they have policies in place and required training etc for employees. Those areas of law which are a general requirement for all employers should ensure that the onus of responsibility is back on the labour hire firm or the independent contractor, not on the organisation that engages their services.

### *Whether a person is an Independent Contractor or an Employee*

Under s275, of the *Queensland Industrial Relations Act 1999* a Full Bench may make an order declaring a class of persons to be employees rather than contractors; and the principal of their 'contract' to be employer.

This situation is different from that of a single worker who may be an employee or may be an independent contractor and this area has led to confusion within the Industry.

The Queensland unfair contract provisions were revamped in June 1999 to provide Queensland Industrial Relations Commission with greater powers to void contracts, arrangements or understandings that it considered to be unfair that included independent contracts.

In order to ensure that a person is classified as an independent contractor, organisations have to ensure that they have developed a contract of service – signed by both parties – that ensures all of the provisions are included which will ensure that if challenged an employee would be regarded as an independent contractor.

The requirements of these tests do not reflect the broad Industry requirements for example, use of own tools, in most cases a physiotherapist who is contracted to provide a service will utilise the facility equipment. The determination of whether the person is an employee or an independent contractor involves weighing up and balancing the competing factors to consider the relationship between the parties in totality.

In *Kennedy v Oceania Aviation Services Pty. Ltd. (2003)* Commissioner Blades of the QIRC summarised the *indicia* applicable to the determination of whether a person is an independent contractor as:-

- whether the putative employer exercised or has the right to exercise control over the manner in which the work is performed, place of work and the like;
- whether the worker performs work for others ( or has a genuine and practical entitlement to do so);
- whether the worker has a separate place of work and/or advises his or her services to the world at large;
- whether the worker provides and maintains significant tools and equipment;
- whether the putative employer has the right to suspend or dismiss the person engaged;
- whether the putative employer presents the worker to the world at large as an emanation of the business;
- whether income tax is deducted from remuneration paid to the worker;
- whether the worker is remunerated by periodic wage or salary or by reference to the completion of tasks;
- whether the worker is provided with paid holidays or sick leave;
- whether the worker involves a profession or trade or distinct calling on the part of the person engaged;
- whether the worker created goodwill or saleable assets in the course of his or her work; and
- whether the worker spends a significant portion of his or her remuneration on business expenses.

### **The Role of Labour Hire Arrangements in the Modern Australian Economy**

Contemporary practice in the Aged and Community Care Industry will necessitate the use of more staff from labour hire organisations to meet the contingencies of residents

and clients. This is due to the need to ensure, because of budgetary constraints, that there are no extra or surplus staff rostered and that, should extra staff be required for short periods or because of a range of skill requirements, that they can be accessed.

**Strategies to Ensure Independent Contract Arrangements are Legitimate**

A standard form should be developed that is signed highlighting the requirements of both parties. If the form has been read and understood then the person cannot at some future date decide that they are an employee. This form should apply throughout Australia.

The onus of responsibility for the general legal requirements should also be placed on the Independent Contractor.

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