

Independent Contracting and Labour Hire Arrangements
House of Representatives Standing Committee on Employment, Workplace
Relations and Workplace Participation

Introduction

1. What is meant by the term labour hire is subject to some conjecture. In the Victorian Inquiry into Labour Hire¹ the committee gave what might be considered an ordinary sense definition of labour hire as a work arrangement that is *characterised by a triangular relationship between the worker, the labour hire agency and the host. The worker has a contractual agreement with the labour hire agency to work for the host, but no contract with the host. The host pays a fee to the labour hire agency for the provision of labour and so has a contractual relationship with the agency. The host has day-to-day control over the worker, but the worker contracts with and is paid by the agency.*²
2. However recent arbitral and judicial decisions have established the variances that may exist with the engagement of a labour hire worker. As such it might be more prudent to recognise labour hire simply as a tripartite relationship between worker, agency and host employer where the contractual and control relationships may and do vary.
3. Although some arguments have develop concerning the interpretational issues surrounding the engagement of independent contractors, and the labour hire sector, in the main the Qld approach to dealing with this sector and these workers has addressed these complexities.
4. However as with most contemporary employment issues, there is capacity to recast the legislative framework to achieve an even greater level of consistency in the definitional area. In doing so, there is no suggestion that what exists could not continue to operate affectively: but there could movement toward a more streamlined legislative framework.
5. Any alternate suggestion of "opting out" of any industrial legislative framework for labour hire or for contractors would create a malaise in this sector.

Qld Legislative Framework

6. Qld has defined the relationship between labour hire companies, host employers, and labour hire workers within the *Industrial Relations Act 1999*. Section 6(2)(d) defines employer in part as follows:

¹ Economic Development Committee (December 2004) *Interim Report – Inquiry into Labour Hire Employment in Victoria*

² P.5 *ibid*

A group training organisation or labour hire agency that arranges for an employee (who is party to a contract of service with the organisation or agency) to do work for someone else, even though the employee is working for the other person under an arrangement between the organisation or agency and the other person.

7. Section 6(3) defines the term labour hire agency as an *entity that conducts a business that includes the supply of services of employees to others.*
8. Section 275 deals with the deeming provisions wherein the commission is granted the power to declare person who perform work in an industry under a contract for services to be employees, if it considers that such persons would more appropriately be regarded as employees.
9. Section 276 deals with unfair contracts. This provision gives the commission the power to amend or declare void an unfair contract if it is a contract for services (or a contract of services if it is not covered by an industrial instrument). Contracts are considered unfair if it was an unfair contract after it was entered into, or became an unfair contract after it was entered into because of the conduct of the parties, amongst other reasons.
10. Separate to the *Industrial Relations Act 1999* the *Health and Safety Act 1995* considers a labour hire organisation that hires a worker to a client company to be the legal employer of the worker. While the labour hire firm is viewed as the legal employer, the client has equal responsibility for the worker when the worker is working for them.
11. Under the *Workers' Compensation and Rehabilitation Act 2003* a worker is defined in Schedule 2. In part it provides as follows:

...

2. A person who works for another person under a contract (regardless of whether the contract is a contract of service) unless—

(a) the person performing the work—

(i) is paid to achieve a specified result or outcome; and

(ii) has to supply the plant and equipment or tools of trade needed to perform the work; and

(iii) is, or would be, liable for the cost of rectifying any defect in the work performed; or

(b) a personal services business determination is in effect for the person performing the work under the *Income Tax Assessment Act 1997* (Cwlth), section 87.

...

7. A person who is party to a contract of service with a labour hire agency or a group training organisation that arranges for the person to do work for someone else under an arrangement made between the agency or organisation and the other person.

8. A person who is party to a contract of service with a holding company whose services are let on hire by the holding company to another person.

12. An employer is defined in Schedule 3. Part 1 provides for persons who are employers. In part it states:

1. A person who lends or lets on hire the services of a worker who is party to a contract of service with that person continues to be the worker's employer while the worker's services are lent or let on hire.

2. If a labour hire agency or group training organisation arranges for a worker who is party to a contract of service with the agency or organisation to do work for someone else, the agency or organisation continues to be the worker's employer while the worker does the work for the other person under an arrangement made between the agency or organisation and the other person.

3. If a holding company lets on hire the services of a worker who is party to a contract of service with the holding company, the holding company continues to be the worker's employer while the worker's services are let on hire.

...

13. Part 2 provides for persons who are not employers. In part it provides for:

1. A person is not the employer of a person who works for the person under a contract (regardless of whether the contract is a contract of service) if—

(a) the person performing the work—

(i) is paid to achieve a specified result or outcome; and

(ii) has to supply the plant and equipment or tools of trade needed to perform the work; and

(iii) is, or would be, liable for the cost of rectifying any defect in the work performed; or

(b) a personal services business determination is in effect for the person performing the work under the *Income Tax Assessment Act 1997 (Cwlth)*, section 87-60.274 *Income Tax Assessment Act 1997 (Cwlth)*, section 87-60 (Personal services business determinations for individuals)

Statistical Data

14. Definitional difficulties in establishing the prevalence of labour hire workers are evident and this impacts on statistical collection.
15. The ABS collects data through the Forms of Employment Survey (FOES) which captures labour hire workers through the identification of who was paying them for their work. Separately the Melbourne Institute of Applied Economic and Social Research administer the Household Income and Labour Dynamics Australia survey (HILDA). This survey data unlike FOES tracks the member participants. The survey question for this survey does not mirror FOES, by asking the participant who employed them. Neither set of data differentiates between dependent and independent contractors.
16. Referring to the FOES data from 2001, this shows a comparable level of labour hire employment across Qld and Australia – 1.8% and 2.2% respectively. As such, in 2001, in Qld there were approximately 23 500 labour hire workers; with a corresponding level of 162 000 Australia wide.
17. The Productivity Commission³ confirms this figure by identifying that in 2002 labour hire employees were the equivalent of 2.9% of all employed persons Australia wide.⁴ This data relies upon the HILDA survey.
18. The Productivity Commission then go on to state that *it appears highly likely that the economy wide rate of labour hire employment was around 3 per cent of all employed persons in 2002.*⁵
19. The growth of labour hire is more evident when contrasting FOES figures to those collected in 1998. Over that period of time labour hire workers doubled.⁶ And relying upon the Productivity Commission data, labour hire workers in workplaces with 20 or more employees *grew from 33 000 in 1990 to 190 000 in 2002, an increase of 15.7 per cent per year. Further, the proportion of labour hire workers among all employees of these workplaces grew almost fivefold from 0.8 per cent in 1990 to 3.9 per cent in 2002.*⁷
20. It has been estimated that almost all on-hire workers are engaged on a casual basis,⁸ with the duration of the engagement on average being around 6 weeks (RCSA) though the ACTU has estimated that around 10% of on-hire workers have been with the same client for two years or more.⁹

³ Laplagne, P; Glover, M and Fry, T (2005) *The Growth of Labour Hire Employment in Australia* Melbourne

⁴ P.4 *ibid*

⁵ P.7 *op cit*

⁶ ABS Forms of Employment Survey Cat No.6359.0 1998 and 2001

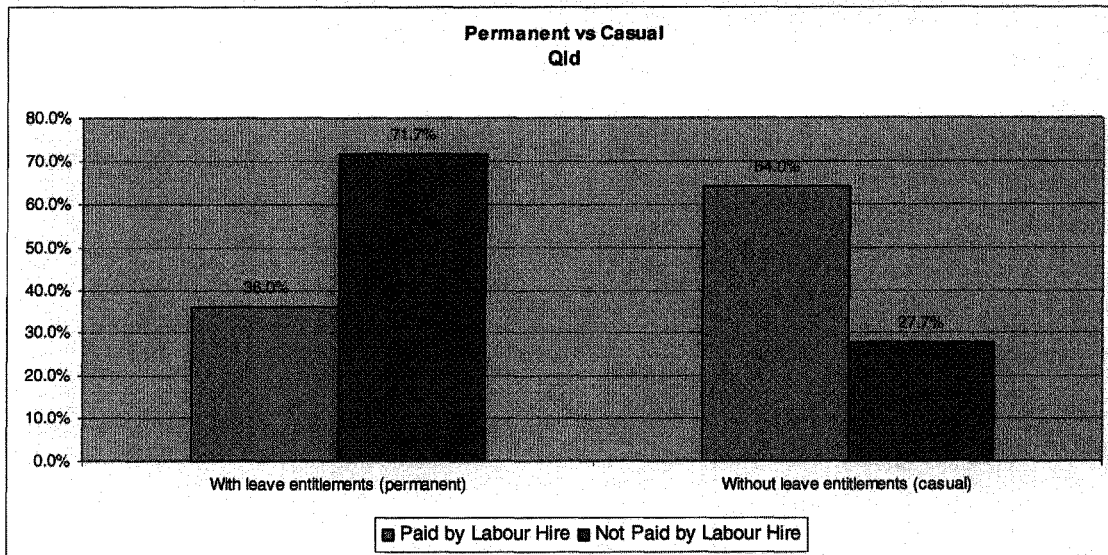
⁷ P.4 Laplagne, P; Glover, M and Fry, T (2005) *The Growth of Labour Hire Employment in Australia* Melbourne

⁸ AIG Submission to the NSW Labour Hire Taskforce (2000)

⁹ ACTU Submission to the NSW Labour Hire Taskforce (2000)

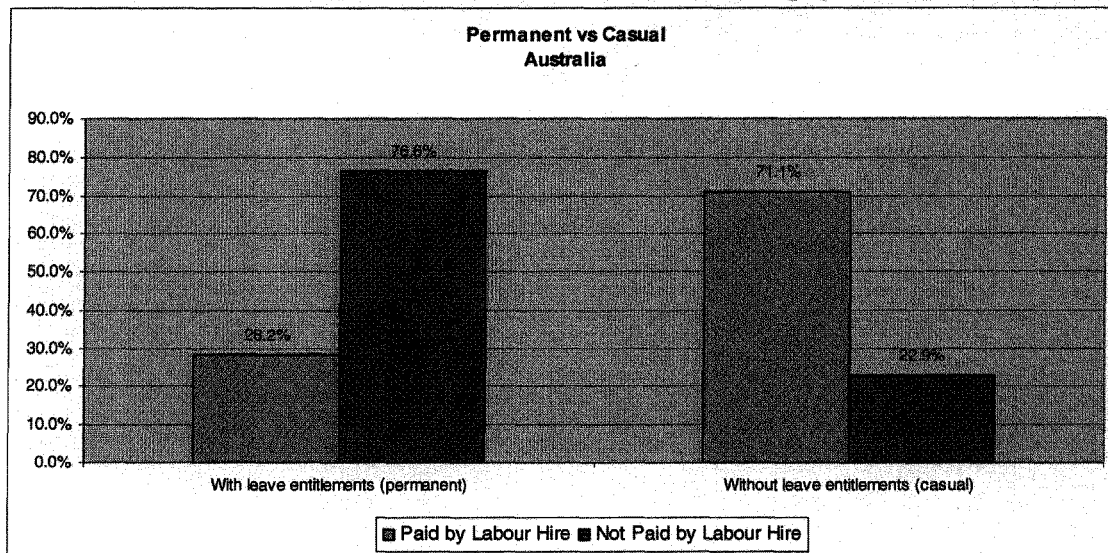
21. Relying upon FOES data, the proportion of Qld labour hire workers that are engaged on a casual basis is the inverse of those that are directly engaged on a permanent basis. This is outlined in the chart below.

Chart 1 – Labour Hire – Permanent versus Casual Engagement - Qld



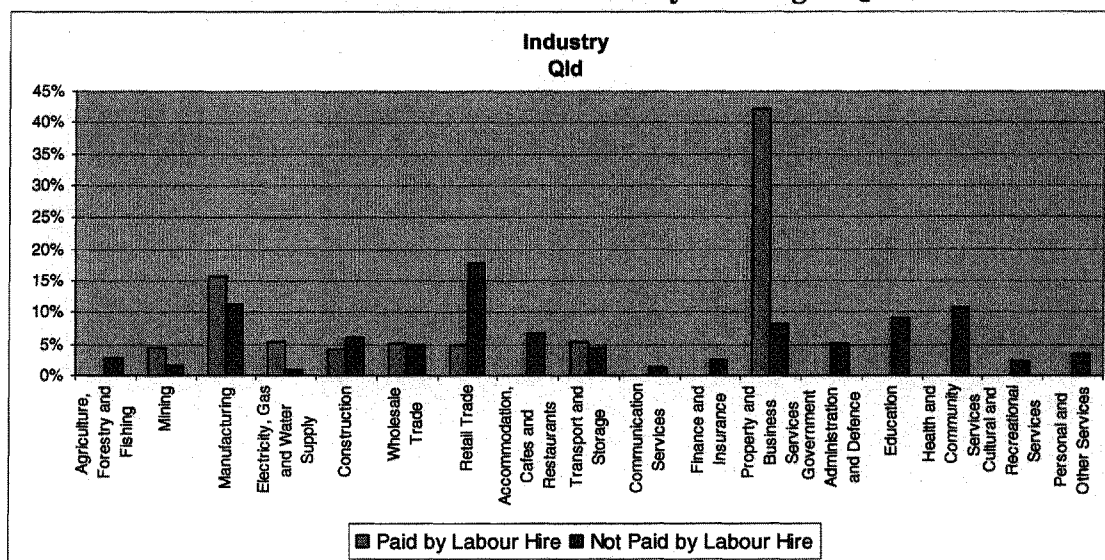
22. There is little difference between the Qd data and that available for Australia.

Chart 2 – Labour Hire – Permanent versus Casual Engagement – Australia



23. There is a concentration of labour hire employment in the communication, manufacturing, and property and business service industries, Australia-wide.¹⁰
24. However, the industry concentration in Qld, relying upon FOES, differs somewhat. Although there is a concentration in the manufacturing, and property and business service industries, labour hire is also prevalent in mining; electricity, gas and water supply; and transport and storage.

Chart 3 – Labour Hire – Industry Coverage - Qld

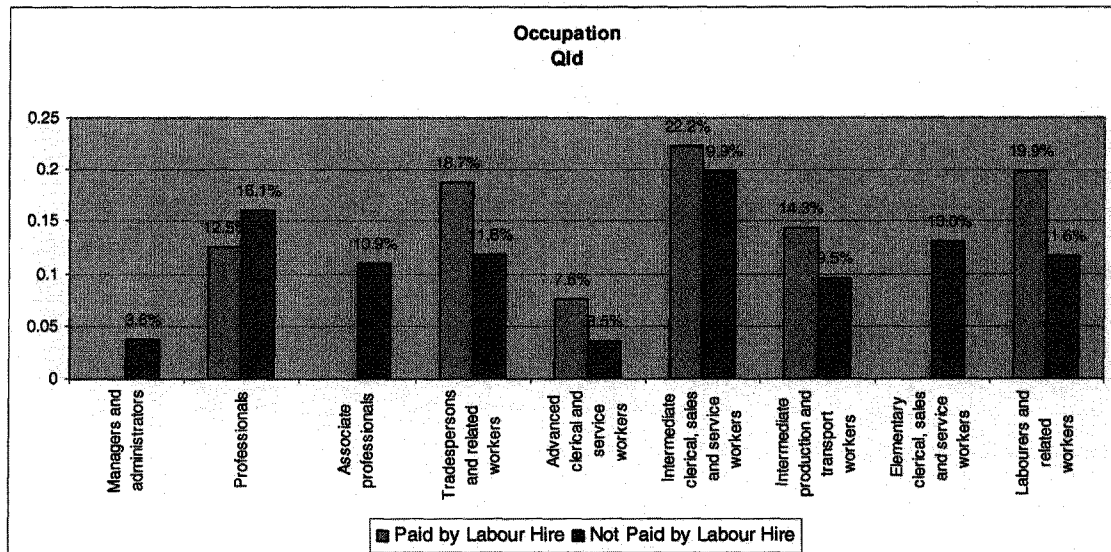


25. The Productivity Commission identify labour hire workers as more likely engaged to perform semi-skilled tasks, where they complement skilled workers.¹¹ However in Qld, Labour hire workers are engaged in all occupational groupings, with prevalence in trade and related areas, clerical and service areas, both advanced and intermediate, as well as in semi-skilled areas.

¹⁰ P.26 Laplagne, P; Glover, M and Fry, T (2005) *The Growth of Labour Hire Employment in Australia* Melbourne

¹¹ P.23 ibid

Chart 4 – Labour Hire – Occupational Breakdown - Qld



26. It is not only the prevalence of on-hire workers, but the conditions under which such workers are engaged. The Finance Sector Union for example have estimated that those engaged within the finance sector, principally within call centres and operations sections, are paid between \$1.00 and \$3.00 per hour less than permanent employees.¹² This feature of differential wage rates is also evident when you consider award regulation. In NSW the general clerical award contains five classification levels; whilst the clerical award covering the labour hire sector has only four classification levels.¹³

27. Issues surrounding lack of safe work practices are evident in the labour hire sector. Although data on the Qld impact is not available, it is feasible to apply data such as that applicable to Victoria, and assume similar statistical breakdown applies to all other states. In the Underhill report¹⁴ prepared for Worksafe Victoria, an identification of changed occupational concentration on labour hire claimants over the mid-1990s to 2000 is evident. In the mid 1990s *injured labour hire employees were more likely to be tradespersons and related workers.*¹⁵ By 2000 a change in occupational claimants to intermediate production and transport workers, labourers and related workers occurs. Of note however are the claims by non-labour hire workers as *much less concentrated in these occupations.*¹⁶

¹² (2001) DIR *labour Hire Taskforce Final Report* NSW p.30

¹³ FCU Draft Submission to the NSWLC for the labour Hire Taskforce (2000)

¹⁴ Underhill, E (October 2002) *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A literature review and analysis of Victorian worker's compensation claims* Victoria University Melbourne

¹⁵ P.55 *ibid*

¹⁶ P.55 *op cit*

28. Underhill's report advanced a range of reasons for the higher injury rate within the labour hire sector. Amongst these were the itinerancy of assignments, the age and experience of the workers, the types of work that they undertake and the requests of host employers. The unfamiliarity of workplaces in which they are placed, and the transience means a limited opportunity to familiarise with the workplace. Corresponding to age is the lower level of experience in combating workplace risk. It may also be likely that the worker is exposed to work that they may not be familiar with thus compounding the risk factor.

Labour Hire Engagements

29. Examples of how the labour hire sector operates are limited.
30. To a large extent this reflects the concern contractors have in relation to securing ongoing engagements through the labour hire firm. As with a range of precariously engaged workers the pursuance of a "complaint" against the employer can result in a diminution of employment opportunities with that employer.
31. One example of labour hire work is that of Vincent Fenech. Mr Fenech was employed by Mindrill in Mackay, Queensland. Fenech had been engaged by that company for a period of 4 months. His employment was terminated when the company determined that they would no longer directly employ certain occupations, but rather utilise a labour hire company.
32. The labour hire firm, CHR Employment Services employed Fenech and placed him at Mindrill. He was employed for a period of 11 months by CHR and for that duration of time placed at Mindrill.
33. His employment was terminated by CHR, and the Qld IR commission limited his right to unfair termination on the basis that he had not served the prerequisite 12 months employment. In effect, the 4 and 11 months were not cumulative.¹⁷
34. Fenech later pursued, through his union, an application for breaches of freedom of association provisions, relating to his membership of a union, and his union activities as a delegate for that union.¹⁸
35. The commission in considering that application noted that *(N)otwithstanding a contract of employment which provided for Mr Fenech to be moved between sites and which did not guarantee maximum or minimum hours of work, Mr Fenech had ongoing and regular work at Mindrill's worksite. ... it was reasonable for Mr Fenech to have an expectation that he would continue to work at Mindrill's worksite for the foreseeable future ...*

¹⁷ AMEPKIU and CHR Employment services (2003) 173 QGIG 486

¹⁸ AMEPKIU and CHR Group (2005) 178 QGIG 64

Alternate Proposition

36. There more instances of litigation in relation to determining whether contractors (dependent and independent) are employees, and therefore subject to industrial relations legislation,¹⁹ in many instances this is not dissimilar to other precariously engaged workers.
37. The capacity to ensure consistency in terminology across the legislation is important not only in ensuring a recognisable term, but in the effective administration of legislation that pertains to work.
38. There is a degree of manipulation by some employers and labour hire firms in relation to the indicia used for establishing who is an employee and who is a contractor (dependent and independent). Litigation surrounding this point is not extensive, but is growing, both in the federal and state jurisdictions, with Queensland not being precluded from this litigation.
39. This however reflects the contemporary work environment, and is not inconsistent with levels of litigation surrounding casual engagement.
40. In any litigated matter, an assessment of the work performed is undertaken using a range of indicia. The indicia are applied to the work circumstances of the individual in an endeavour to establish whether an employment relationship exists. This *proceeds on the assumption that the courts will know an employment contract when they see it.*²⁰
41. Underpinning the indicia is the general principle that the greater degree of control, the more likely the individual is an employee. The indicia are as follows:
 - Level of integration into the workplace
 - The supply and or maintenance of tools and equipment
 - Payment on task completion or time worked
 - The degree of loss, or profit from the job
 - The capacity to work for others
 - The capacity to sub-contract
 - Responsibility for taxation deduction
 - Responsibility for work cover insurance
 - The receipt of holiday or sick leave

¹⁹ Note should be made that legislation pertaining to anti-discrimination captures both employees and contractor, as does superannuation legislation which deals with wages paid to employees and those received under any contract that is "wholly or principally for the labour of the persons for whom the payments are made". Health and safety legislation also imposes duties and obligations beyond the traditional concept of employment.

²⁰ Stewart, A (2002) *Redefining Employment* Australian Labour Law Conference

42. The last three indicia are viewed as less important in establishing whether the worker is an employee or not.
43. There is a growing wealth of authorities, both arbitral and judicial, that is relied upon in determining the worker's employment status. However there has been a greater degree of clouding in regard to determining the status of the worker since the *Odco case*²¹ culminating in the *Kangan Batman TAFE case*.²² In both these instances a triangular employment arrangement existed whereby the agent enters into a contractual arrangement with the worker, who is then subsequently hired to the client. The worker undertakes the work for the client at their premises, but is paid by the agency. The client pays a fee to the agency which covers the worker's wages and other associated on-costs together with a profit margin. If the client no longer wishes to use the worker's services then the worker returns to the agency, where if they have an ongoing contract they may be assigned other work.
44. This triangular arrangement although muddying employment law has not placed in jeopardy the deeming of such workers as employees for the purposes of work cover legislation in Victoria,²³ or Qld.
45. The issue from the QCU perspective is to arrive at a consistent definition for the purposes of all pieces of work related legislation: not to remove the industrial legislative framework. Rogue labour hire firms would relish the chance to coerce and manipulate their workers, much like what happened with Mr Fenech, if given the opportunity. The chance for such coercion and manipulation would lie in the type of proposal promoted by the federal Coalition government in their considerations surrounding contractors.
46. To this end, the QCU support the comments made by the ACTU, concerning that point, in their submissions to this committee.
47. If a review of contractors and labour hire firms is to occur, then the framework in which to do that is within the parameters of determining firstly whether the workers is working under a contract of service, or under any other contract whereby the individual undertakes to perform personally any work or services for another party to the contract, provided that the other party is not a client or customer.
48. Although it is not possible to adopt an exhaustive or conclusive definition of employment, the notion of referring to a "worker", plus reliance on the recognised indicia, with reference to the tribunal for additional issues, including the practical reality of the relationship, is a realistic answer the issue of independent contracting and labour hire.

²¹ *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104

²² *Advanced Australian Workplace Solutions v Kangan Batman TAFE* (1999) Print S0253

²³ See *Accident Compensation Commission v Odco Pty Ltd* (1990) 64 QLJR 606

49. In an environment where labour hire employment is increasing exponentially, there is a great degree of benefit in ensuring a common approach to the rights and obligations placed on the labour hire worker, the labour hire firm, and the on-hire employer. Consistency in terminology and definition across a range of areas relating to employment, such as health and safety, workers' compensation, industrial relations, and taxation, provide some guidance to achieving this outcome.