



Queensland
Government

Queensland Treasury

Our Ref: 521288/2, 3159250, 00391-2016
Your Ref: 15.16.01

Ms Di Farmer MP
Chair
Finance and Administration Committee
Parliament House
George Street
BRISBANE QLD 4000

Email: fac@parliament.qld.gov.au

Dear Ms Farmer

I acknowledge receipt of your letter dated 29 January 2016 in relation to the Queensland Parliament's Finance and Administration Committee (the Committee) Inquiry into the practices of the labour hire industry in Queensland, and your request for assistance from the Office of Industrial Relations (OIR), Queensland Treasury.

I confirm that the OIR is available to assist the Committee and attend the public briefing on Wednesday, 24 February 2016. Officers who will be attending the public briefing are;

- Mr Tony James, Executive Director, Industrial Relations Policy and Regulation;
- Mr Paul Goldsbrough, Executive Director, Workers' Compensation and Policy Services, Workplace Health and Safety Queensland;
- Ms Julie Nielsen, Executive Director, Compliance and Business Engagement, Workplace Health and Safety Queensland; and
- Ms Victoria Thomson, Director Industry Strategy, Workplace Health and Safety Queensland.

I enclose a written briefing from the OIR providing background information on the labour hire industry and responding to the Inquiry's terms of reference.

If the Committee requires any further assistance throughout the Inquiry, please contact Mr James. Mr James will be the Departmental point of contact throughout the Inquiry and can be contacted on _____ or by email at _____

I trust this information is of assistance.

Yours sincerely

Jim Murphy
Under Treasurer

Encl. (5) 18/2/16

Executive Building
100 George Street Brisbane
GPO Box 611 Brisbane
Queensland 4001 Australia
Telephone +61 7 3035 1933
Facsimile +61 7 3035 3202
Website www.treasury.qld.gov.au
ABN 90 856 020 239

Briefing for the Finance and Administration Committee Inquiry into the practices of the labour hire industry in Queensland.

Abstract

The growth of labour hire type arrangements within a broader employment services industry comes amidst a rapidly changing and flexible labour market, constraints in the operations of public employment services and the use of networks for the placement of workers. Claims of exploitation of workers (including underpayments, discrimination and harassment) in the employment services industry are common, particularly where foreign workers use employment agent type services to find employment. Recent allegations of exploitation of workers in the agricultural and food processing industries supplying major supermarkets was reported in the ABC's *Four Corners* report "Slaving Away". More recently, in December 2015, a Victorian labour hire operator was fined \$42,840 for deliberately underpaying two workers.

The regulatory landscape for labour hire in Queensland is spread across the Commonwealth, State and Local Government jurisdictions. It is administered through separate and diverse regulatory agencies within each tier of Government. The *Fair Work Act 2009* (Cth) (FW Act) comprehensively regulates private sector employment to the exclusion of State law. The Commonwealth also administers taxation, migration and border protection laws. The State provides regulation for workplace health and safety, worker's compensation and a range of other worker and general protections legislation. Local Government has by-laws for regional planning and accommodation. All tiers of Government have a significant interest in ensuring community cohesion, compliance with the law and the elimination of exploitation.

The Office of Industrial Relations, Queensland Treasury has prepared three papers to assist the Finance and Administration Committee with its inquiry into the practices of the labour hire industry in Queensland. The first paper considers the regulation of the employment services industry predominantly through a review of contemporary research, case studies and current initiatives. The second paper considers Queensland labour hire industry trends, with particular regard to the treatment of workers' compensation, and the issues of sham contracting and other efforts to disguise, evade or shift legal obligations and responsibilities associated with employment. The third paper provides a description of the Horticulture Interagency Working Group which has been established to inform the whole of government approach to temporary migrant workers in the horticulture industry. Labour Hire companies are often central to temporary migrant workers' travelling and work experience in this industry.

Finance and Administration Committee inquiry into the practices of the Labour Hire Industry in Queensland

Submission from the Office of Industrial Relations, Queensland Treasury

Queensland labour hire industry trends¹

The ABS collect data on characteristics of employment biannually as part of the Labour Force Survey. The data relating to labour hire arrangements are estimates based on a sample of all persons who found their current job through a labour hire firm or employment agency. The most recent ABS data on employment through labour hire arrangements in Queensland is from August 2014. The ABS data reports on workers who are currently employed through a labour hire firm or employment agency as well as workers who found their current job through a labour hire firm or employment agency but are now employed directly by the business which engaged the labour hire firm. While this limits any analysis based on only those people currently employed via a labour hire firm, the data provides useful information about outcomes for persons who use labour hire to find employment. Detailed ABS data is presented in the tables in **Appendix 1**.

In September 2014 there were 103,900 persons in Queensland who found their job through a labour hire firm or employment agency. Of these, an estimated 59,100 (57%) were full-time males, 3,900 (4%) were part time males, 25,900 (25%) were full-time females and 15,900 (15%) were part-time females. These workers are employed across all industries with Manufacturing (11,200 persons, 11%), Construction (10,900 persons, 10%), Health care and social assistance (9,400 persons, 9%) and Public administration and safety (9,300 persons, 9%) accounting for a significant proportion of the total, see **Table 1**.

There was a broad presence across the occupational groups with 20,100 (19%) clerical and administrative workers, 19,900 (19%) technicians and trade workers, 18,700 (18%) professionals, 15,400 (15%) machinery operators and drivers, 14,600 labourers (14%). There were 13,900 (13%) workers who identified as public sector workers and 90,600 (87%) who identified as private sector workers, see **Table 1**).

Of the 103,900 workers in Queensland who found their job through a labour hire firm or employment agency, 34,100 (33%) had been in their current job for less than 12 months, 24,100 (23%) had been employed in their current job for one to two years, 23,600 (23%) for three to five years and 16,200 from six to nine years. There were 6,200 who had been in their current job for 10 to 19 years and 1,200 for over 20 years. Further, 84% of these workers expected to be in the same job in 12 months' time while only 16% or 16,400 expected to have changed employers in that time, see **Table 2**.

The majority of workers in Queensland who found their job through a labour hire firm or employment agency reported working between 35 and 44 hours per week. There were 20,000 workers who reported working less than 35 hours per week and 20,100 who reported working more than 44 hours per week, see **Table 2**.

Of the 103,900 workers in Queensland who found their job through a labour hire firm or employment agency, only 12,800 (12%) were currently registered with a labour hire firm and 21,100 (20%) were currently registered with an employment agency. The over two-thirds of the workers (71,000) were no longer registered with a labour hire firm or employment agency. With, 58,900 (57%) workers not registered with a labour hire firm or employment agency in the previous 12

¹ ABS Cat. No 6333.0, Characteristics of Employment, Australia, August 2014: Customised Reports, Unpublished

months and only 33,900 workers (33%) currently registered with a labour hire firm or employment agency, and less than a quarter 21,800 (21%) were being paid by the labour hire firm or employment agency, see **Table 3**. Interestingly, only in the administrative and support service industry where a majority of workers were paid by the Labour hire firm or Employment agency, see **Table 4**.

The average earnings of workers in Queensland who found their job through a labour hire firm or employment agency (\$1,295 per week) were higher than the average earnings for Queenslanders generally² (\$1,102). Overall males who found their job through a labour hire firm or employment agency earned \$1,494 on average compared to an average of \$1,328 for all Queensland males at the time. However, full-time males who found their job through a labour hire firm or employment agency earned \$1,569 on average compared to \$1,701 for all Queensland full-time males. A similar pattern was present for females where the average for all females in Queensland was \$847 and the average for females who found their job through a labour hire firm or employment agency was \$972. For full-time females throughout Queensland the average was \$1,234 and the average for full-time females who found their job through a labour hire firm or employment agency was \$1,158, see **Table 5**.

Of the 103,900 Queenslanders who found their job through a labour hire firm or employment agency, 69,600 (67%) had paid leave entitlements while 35,300 did not, 28,600 (28%) had earnings that varied from pay to pay while 74,300 (72%) had stable earnings, similarly 78,100 (75%) usually worked the same number of hours each week while 25,800 (25%) worked varying hours and 4,700 worked on a fixed term contract while 99,100 did not, see **Table 6**.

Detailed occupational data are presented in **Table 7**. Queenslanders who found their job through a labour hire firm or employment agency are spread broadly across the occupations. Specialised managers (9,800), Business, human resource and marketing professionals (7,000), road and rail drivers (5,300) and numerical clerks (5,200) are the most common occupations.

Selected demographic data are presented in **Table 8**. Queenslanders who found their job through a labour hire firm or employment agency are spread reasonably evenly across the main working age groups with 25,900 aged 25-34 years, 27,400 aged 35-44 years and 20,700 aged 45-54 years. There were 73,200 persons born in Australia and 34,400 born overseas. There were 86,200 persons living in a household with family members of which 64,400 were a husband wife or partner and 16,300 were non-dependent children.

Office of Industrial Relations Queensland is able to supplement the ABS data with data from the Workers' Compensation Scheme as the premiums charge Labour Hire firms is based on the industry the worker is actually employed in.

Queensland labour hire industry trends based on Workers' Compensation scheme data

This data is provided to compliment the ABS data provided in the previous section. The two main reasons for providing this data is to:

- fill in the gaps of the ABS data; and
- provide a more accurate picture of the impact labour hire has on the workers' compensation scheme, which unlike the ABS data excludes Queensland workers covered under the National Comcare scheme.

According to the Queensland Workers' Compensation scheme data, labour hire as a percentage of all workers compensation claims for 2014-15 was 3.8%. As illustrated in **Table 9**, industries with the

² ABS Cat.No 6302.0 Average Weekly Earnings, June 2014.

highest percentage of labour hire claims made are other services (9.3%), mining (8.3%), construction (7.0%), manufacturing (6.5%) and transport, postal, and warehousing (6.5%).

With the exception of other services, these industries also represent the largest concentrations of labour hire workers (full-time equivalent bases) covered by the Queensland's workers' compensation scheme, see **Table 10**. The largest concentration of labour hire workers in Queensland are found in the manufacturing industry (17.3%), followed by mining (13.7%), public administration and safety (8.5%), and construction (7.2%).

In contrast, the largest proportion of labour hire workers as a percentage of all workers within that industry are located in mining (10.6%), information media and telecommunications (5.8%), electricity, gas, water and waste services (5.5%) and manufacturing (4.2%).

Table 11, shows the movements in the proportions of total declared wages associated with labour hire workers (which is used as a proxy for relative industry size) by industry for the past 3 years. Over the three years to 2014-15, labour hire as a whole has been relatively stable only increasing by 0.1 percentage point from 2.1% in 2012-13 to 2.2% in 2014-15.

At the industry level, the largest increases in total declared wages occurred in mining, accommodation and food services, administrative and support services and transport, postal and warehousing. While the largest reductions occurred in arts and recreation services, professional, scientific and technical services, and construction.

As shown in **Tables 12** and **13**, the normal weekly earnings of labour hire workers is relatively consistent with that of non-Labour Hire workers. Based on claims that received a weekly benefit in 2014/15, Labour Hire injured workers received on average only 3% less than non-Labour Hire workers. Differences exist in individual industries and occupations, however this is likely due to differences in skill typically sought for Labour Hire roles within these industries and occupations. Also due to the relatively small numbers of claims in a number of the industries and occupations some of these differences should be interpreted with caution.

Workers' Compensation in the Labour Hire Industry

Queensland's workers' compensation scheme is regulated by the *Workers' Compensation and Rehabilitation Act 2003* (the Act). These workers' compensation laws provide coverage for workers employed under a variety of employment arrangements.

Two agencies administer Queensland workers' compensation scheme:

- the Office of Industrial Relations (within Queensland Treasury) – implements the government's policy and legislative agenda, regulates insurers, provides legal and medical dispute resolution, provides rehabilitation advisory services and promotes education about the scheme, and manages the wider nexus between workers' compensation and work health and safety; and
- the Insurers (i.e. WorkCover Queensland and self-insurers) – WorkCover Queensland is the sole commercial provider of workers' compensation insurance and claims services in Queensland and is the insurer for 90 per cent of the claims made in Queensland. There are 28 self-insurers that administer the remaining 10 per cent of claims lodged.

Like all other schemes in Australia, Queensland operates a 'no fault' statutory scheme. Under the scheme, any worker who is injured in the course of their work is entitled to statutory compensation. Statutory compensation includes weekly income replacement benefits while the worker is unable to work as well as cover for medical, rehabilitation and other expenses. In addition, if the worker suffers a permanent impairment from the injury, the worker may also be entitled to a lump sum payment.

All employers who engage workers must have a workers' compensation insurance policy with WorkCover unless they are a licensed self-insurer. An employer's insurance policy covers any costs that may be incurred from their workers' injuries, including the costs of any common law claims made against the employer.

Employers insured with WorkCover pay a premium to meet the cost of this insurance. This premium is used to administer the insurance business, make payments to injured workers for income replacement and medical treatment, rehabilitation and return to work support, injury prevention activities and scheme administration.

For the 2014-15 year WorkCover issued workers' compensation premiums to over 150,000 Queensland employers, providing accident insurance for over two million Queensland workers. The net premium revenue received by WorkCover for this period was \$1.392 billion. There were 78,966 new statutory claims made from workers for this period, with \$761.7 million paid for statutory claims and \$499.1 million for common law claims.

The extent and nature of labour hire in the workers' compensation scheme

A labour hire employer is defined as an employer who is wholly or substantially engaged in supplying workers to another entity (the client business) on a fee or contract basis, and is not a separate service entity for the client business.

WorkCover report for the 2014-15 year it held 908 labour hire employer policies and received \$42.5 million in premium from these employers. This represents approximately 44,000 workers employed by labour hire employers in Queensland with a total wages paid of approximately \$3 billion.

The average premium rate paid by labour hire employer was \$1.39 per \$100 of wages, compared to the scheme's average premium rate of \$1.20 per \$100 of wages.

WorkCover report that the claims rate for labour hire employers is 1.03 claims per \$1 million of wages paid compared to the all industries claim rate of 0.68 claims per \$1 million of wages paid. This claims rate for the labour hire industry equates to approximately 3,151 claims from injured workers. The average statutory cost per claim for an injured labour hire worker was \$7,497 compared to the all industries average of \$7,399. The return to work rate for labour hire employers is 92.7% compared to the all industries return to work rate of 93.2%.

Workers covered by the workers compensation scheme

The definition of worker has evolved over time in response to changes in employment relationships. As employment through non-standard employment arrangements has grown and traditional employer/employee arrangements have declined, the definition of worker for workers compensation purposes has been amended to ensure that persons are not engaged in non-standard employment arrangements for the purpose of evading workers' compensation premiums and to ensure that workers under these non-standard arrangements have appropriate workers' compensation coverage.

Section 11 of the Act defines who is a worker for the purpose of workers' compensation. The definition of worker was amended on 1 July 2013 to align it with the Pay As You Go (PAYG) test applying under Australian Taxation Office (ATO) laws. This change was made to achieve greater uniformity for employers by aligning the definition more closely with the obligations they may have under the Australian tax system. It achieves this by excluding from the definition of worker, persons

who are not entitled to have PAYG withholding tax payment made under the *Taxation Administration Act 1953*.

The ATO has developed an employee/contractor decision tool (<https://www.ato.gov.au/Calculators-and-tools/Employee-or-contractor/>) to assist employers determine if a person is a worker for the purpose of assessment for PAYG withholding under the *Taxation Administration Act 1953* (Cwlth), schedule 1, part 2-5. If the tool determines a person is an employee then they are a worker and need to be covered for workers' compensation, regardless of any other contractor arrangements (such as the worker having an ABN or being registered for GST).

The effect of this definition is that an employer is able to rely on the status of a person for PAYG tax purposes as the determinate for inclusion or otherwise for workers' compensation purposes. This reduces uncertainty for business and reduces the costs associated with administering multiple tests.

In addition to this general definition of worker, the Act provides specific clarity that persons engaged in a contract of service with one party and is then lent or hired to a third part are deemed to be workers for the purpose of the Act (Schedule 2 Part 1 sections 4, 5, and 6). This provision is supported by further provision that deems a person who lends for hires the services of one person to another is deemed to be the employer for the purpose of the Act (Schedule 3 sections 1, 2, and 3).

Once an injured person is found to be a worker they have an entitlement to statutory benefits and access to common law. If a person is not appropriately classified by their employer as 'worker' in the employer's premium calculations, this will have no effect on their employment status for the purposes of the statutory scheme. This means that benefits provided by the scheme (such as rehabilitation, monetary payments) are available to workers who find themselves purportedly classified as an independent contractor under a sham arrangement.

Premium calculation for labour hire employers

WorkCover structure policy premium so that premium collected in a year is sufficient to pay for all injuries that occur in that year, regardless of the actual year the entitlement will be paid. The average premium rate for labour hire employers is structured to meet this costs to the scheme. As a consequence labour hire employers as a general rule have no greater impact on WorkCover's premium income than any other legitimate employer. However, a labour hire employer that engages in phoenixing has an impact on WorkCover premium income and, as a consequence, on the premium levied on all other legitimate employers.

The impacts on labour hire phoenixing cannot be directly reported by WorkCover as WorkCover does not record the reasons for cancellation of policy. Further it cannot report on the number of labour hire employers that ceased operation due to being placed into administration or being wound up without being able to meet its debts.

In 2014-15, 197 labour hire employer policies were cancelled (19.3% of all labour hire policies held). This compares to the all industries policy cancellation rate of 10.3%. These labour hire employers represented small employers with annual wages averaging \$6,596 up to large employers with annual average wages of more than \$7.5 million. The total wages reported for all these cancelled policies was \$105 million dollars, representing \$2.5 million in premium.

The average premium rate for a labour hire employer who cancelled their policy was \$2.36 per \$100 of wages, 69% greater than the average labour hire premium. The total premium written off in 2014-15 from cancelled labour hire employer policies was approximately \$300,000.

There are two workers' compensation related incentives that may lead to a labour hire employer phoenixing their business. The first is due to a poor safety culture causing increased injury rates that in turn drive up the employers workers' compensation claims costs and result in a WorkCover premium rate far in excess of the average labour hire industry premium rate. The second is to incur significant unpaid WorkCover premium debt and wind the business up to avoid payment of this debt.

These incentives to phoenix a company applies equally to all companies and not just labour hire businesses. However a business with equipment and other assets will lose these in the event the business is wound up, creating significant capital loss and greater costs to re-establish the business. A labour hire employer on the other hand may only have workers and no equipment or assets owned by the business, if this business is wound up there is no loss of capital and minimal costs to re-establish the business.

Workers' Compensation Premiums

The quantum of premium paid by an employer in Queensland varies according to the size, claims experience and industry of the employer. Premium collected in a year is to pay for all injuries that occur in that year, which will be paid out in that year and over future years. Premium is calculated using the Experience Based Rating (EBR) system which multiplies an employer's wages by their premium rate. It is designed to reward employers with good injury prevention and management.

Changes in premium for employer with wages of \$1.5 million or less per year (small to medium employers) are capped at a movement of 10 per cent per year, with the minimum premium being 80 per cent of the average industry rate and the maximum premium being 120 per cent of the average industry rate. For employers with wages greater than \$1.5 million, the movement in premium is determined by their EBR. There is no cap on the premium rate for large employer, however when the premium reaches 200% of the industry average the employers premium is capped if they agree to participate in the Injury Management and Prevention program (see work health and safety section for further details).

For the purpose of determining premium, employers are allocated to a single WorkCover Industry Classification (WIC). WorkCover will allocate the WIC that is considered to correspond to, or most closely describes the employer's predominant business activity, it is not determined by the type of work each worker is engaged in.

In comparison, the average premium rate for a labour hire employer is calculated by multiplying the wages paid for each industry supplied to by the average premium rate for that industry. For example a labour hire employer that only supplies labour to the construction industry would have an average premium of \$4.056 per \$100 of wages; a labour hire employer that supplies the Financial and Insurance Services and the Professional, Scientific and Technical Services and the total wages paid is 50 per cent for each industry would have an average premium of \$0.4925 per \$100 of wages.

Labour Hire	Average Premium Rate
Contract Staff Services (Own Administration Staff)	0.622
Agriculture, Forestry and Fishing	3.483
Mining	1.864

Manufacturing	3.212
Electricity, Gas, Water and Waste Services	0.809
Construction	4.056
Wholesale Trade	1.678
Retail Trade	1.856
Accommodation and Food Services	2.193
Transport, Postal and Warehousing	3.985
Information Media and Telecommunications	0.975
Financial and Insurance Services	0.330
Rental, Hiring and Real Estate Services	0.777
Professional, Scientific and Technical Services	0.655
Administrative and Support Services	1.518
Public Administration and Safety	1.081
Education and Training	0.774
Health Care and Social Assistance	1.503
Arts and Recreation Services	1.448
Other Services	1.775

If the labour hire employer has a low claims rate (i.e. they have a good safety record) then their actual premium will be less than the average premium. If the labour hire employer has a high claims rate then they will pay a premium greater than the average premium.

A new business taking out a policy for the first time will have their premium calculated by multiplying their wages by 100% of their industry rate for the first eighteen months of their accident insurance policy. EBR will not come into effect until after this time as there is no claims experience available to determine their performance.

If an employer has a premium rate greater than the average then this may lead them to become uncompetitive. If the employer can phoenix the business then their WorkCover premium will immediately reduce to the average industry rate without the employer having to change any systems to improve safety or reduce workers' compensation claims costs.

WorkCover can also consider succession criteria to enable an employer's claims and wage history to carry over to a new policy so that the employer's premium does not start back on the industry rate.

Phoenixing to avoid payment of WorkCover premium debt

WorkCover premium is paid provisionally—that is, an employer pays for insurance at the beginning of a period, and it is adjusted at the end of the period. If the employer's estimated and actual wages from the previous financial year differ, WorkCover will calculate the difference in premium costs and add or deduct this amount from the employers current provisional premium (depending on whether wages were under or overestimated).

If the employer significantly under estimates their annual wages then that will result in a significantly increased WorkCover premium owed in the next financial year. If the employer fails to pay the premium on time, WorkCover may apply interest to the outstanding amount and the employer is not covered by a policy. In the event that a claim is made against the employer's policy during this period then WorkCover will pay the worker their compensation entitlements and may charge this back to the employer as additional premium.

Impact of sham contracting on workers' compensation premiums

On 24 May 2011, the Minister for Education and Industrial Relations established a tripartite Industry Reference Group to investigate the incidence and impact of sham contracting arrangements in Queensland's building and construction industry, see **Attachment 1**.

Estimates were made of whether workers' compensation premiums made by Queensland construction employers were sufficient to cover not only their employees but also workers engaged as dependent contractors possibly under sham arrangements. The estimates indicated that the number of sham or dependent contractors for which workers' compensation premiums were not paid was low – only 1,336 persons in 2009-10.

This report also included the outcomes of research conducted by Workplace Health and Safety Queensland that sought to estimate workers' compensation premium coverage in construction in Queensland, see **Attachment 1**. The research found that in the construction industry in 2009-10, employers declared considerably more workers (143,971) than there were actual employees (127,218). The report concluded that construction employers were effectively paying workers' compensation premiums to cover dependent contractors as well as employees.

As previously reported, the construction industry has the largest proportion of workers engaged as a contractor or by a labour hire employer. This finding reinforces the conclusion that Queensland workers' compensation laws are providing effective coverage for all Queensland workers. In addition, this outcome highlights the effectiveness of WorkCover in ensuring that employers are paying correct workers' compensation insurance premiums.

Further, in the circumstance that claim is accepted for an injured worker who had been engaged in a sham arrangement WorkCover has the power to recover the full cost of the claim from the uninsured employer and to recover unpaid workers' compensation premium that should have been paid.

Enforcement of workers' compensation laws

The Office of Industrial Relations is responsible for regulating the workers' compensation scheme and for monitoring the performance of insurers. WorkCover is responsible for ensuring that employers hold a valid accident insurance policy and for recovering any debt owed by uninsured or underinsured employers.

WorkCover's premium compliance function focuses on the investigation and audit of businesses to ensure they are meeting their premium obligations under the Act. The program targets uninsured and underinsured businesses across all industries. WorkCover's premium compliance has significantly increased after changing from a fieldwork-based process to a desk-based auditing process supplemented by fieldwork. This approach ensures:

- the most efficient use and return on resource investment given the challenges posed by the large geographical size of Queensland. Desk-based auditing allows for an increased number of targeted audits to be completed per auditor;
- appropriately experienced staff are completing audits; and
- better audit coverage across Queensland using more targeted and sophisticated detection methods than the traditional fieldwork model.

In recent years, WorkCover has also introduced the following strategies to enhance its compliance functions:

- sophisticated data mining;

- focussed and increased auditing in relation to Office of State Revenue (OSR) data matching exceptions;
- data matching to the Australian Business Register (ABR) and the contact of all new business that have not taken out a policy; and
- self assessment strategies that put an onus on policyholders to correct mistakes and which also promotes an educational experience.

Over the last three years, WorkCover's strategy has been to focus on industries such as construction, transport, tourism and agriculture rather than employment arrangements such as labour hire. Within the 2014-15 year WorkCover completed one wage review on a labour hire employer, who was identified to be underinsured. As part of WorkCover's onsite education program, they also visited seven labour hire employers who were all deemed to be compliant.

For 2015-16 WorkCover commenced a compliance project focussing on labour hire employers within the agriculture industry in the Wide Bay-Burnett region. WorkCover conducted a total of 46 employer visits with ten employers found to be under-insured. The project found that the majority of farm owners were compliant with a solid understanding of workers' compensation matters. However, the biggest employer in the industry are backpacking hostels, who are becoming the labour hire providers for farm owners. While the majority of these employers had appropriate cover, steps were taken to educate and establish a policy or adjust the cover of under insured employers.

WorkCover have heavily focused on the construction industry during the 2014-15 and 2015-16 years. Within the 2014-15 year WorkCover conducted 1079 educational site visits to employers within the construction industry, showing a non-compliance rate of 16% which equated to 92 underinsured and 78 uninsured employers. WorkCover work closely with employers in the construction industry to ensure that they have adequate coverage and that they have a solid understanding of worker definition and how to apply this when completing their annual declaration.

WorkCover continue to work closely with QLeave to obtain up to date data to assist with identifying potentially uninsured and underinsured employers within the construction industry.

The regulation of labour hire in other Australian workers' compensation jurisdictions

Queensland's approach to insuring labour hire employers differs from other jurisdictions. Queensland is a centrally funded scheme. In centrally funded schemes, a single public insurer performs most, if not all, of a workers' compensation insurer's functions. This is in contrast to jurisdictions like Western Australia, Tasmania, Australian Capital Territory and the Northern Territory, which are privately underwritten schemes. In these schemes most, if not all, insurer functions are provided by the private sector, through approved insurance companies. New South Wales, Victoria and South Australia have hybrid schemes, employing both types of funding arrangements. In a hybrid scheme, the public central insurer is responsible for underwriting, funds management and premium setting. Other functions, such as claims management and rehabilitation, are outsourced to private sector providers, including insurance companies for claims management and companies with specialised expertise in injury management for rehabilitation.

A benefit of Queensland's scheme structure is that insurance can be automatically provided to all workers regardless of the employer having a current policy or not. As WorkCover is the single insurer it is able to pursue the costs incurred directly from the uninsured employer.

All other jurisdictions have multiple insurers or claims managers. This creates difficulties in determining who should provide benefits and entitlements to a worker of an uninsured employer. To overcome these difficulties, all other jurisdictions have structured their workers' compensation legislation to deem host employers and principal contractors as the employer of labour hire workers or subcontractors (if they are individuals) in specified circumstances. These circumstances are either a situation where the labour hire employer or subcontractor does not hold workers' compensation insurance or the host employer or principal contractor does not hold an indemnity from labour hire employer or subcontractor for their liability. A jurisdictional comparison is provided at **Attachment 2**.

Work Health and Safety in the Labour Hire Industry

The work health and safety (WHS) laws provide a framework to protect the health and safety of all workers, irrespective of their place of employment or industry that they work in. There are a range of enforcement options available under the *Work Health and Safety Act 2011* (WHS Act) to respond to health and safety incidents and issues, ranging from issuing improvement notices through to initiating legal proceedings.

Workplace Health and Safety Queensland (WHSQ) use these enforcement measures to respond to safety concerns within the labour hire industry. However, WHSQ also recognise that enforcement is not the only effective method of ensuring compliance within this industry. WHSQ also undertake a number of broader initiatives aimed at educating and working with labour hire companies to improve their systems of work and prevent health and safety issues from arising.

WHSQ also acknowledge there may be opportunities to improve the current methods of responding to health and safety concerns within the labour hire industry. Given the number of government agencies with regulatory responsibilities for different aspects of the labour hire industry (e.g. immigration, industrial relations, workers' compensation, taxation), there may be ways to better coordinate enforcement activities, such as through joint compliance campaigns and enhanced information sharing.

Work health and safety (WHS) regulatory framework

The WHS Act provides a regulatory framework which ensures work health and safety duties apply to a wide range of work environments and employment relationships.

Under section 19 of the WHS Act, a 'person conducting a business or undertaking' (PCBU) has a primary duty of care to ensure the health and safety of its workers. This includes:

- providing safe systems of work,
- providing adequate facilities for the welfare of workers,
- providing information, training and supervision necessary to protect persons from risks to their health and safety, and
- monitoring the health of workers and the conditions of the workplace to prevent illness or injury to workers.

The meaning of a PCBU under the WHS Act ensures that this primary duty of care extends beyond the traditional employer/employee relationship and also applies to the labour hire industry, where a labour hire company will assign workers to work for another host business or sub-contractor.

The WHS Act also specifically provides that duty-holders cannot contract out of their WHS obligations. This means that labour hire companies cannot avoid their duty to ensure the health and safety of labour hire workers during their placement at a host business.

Under section 16 of the WHS Act, more than one PCBU can have a duty for the same matter. This provision is particularly relevant to labour hire arrangements, as both the labour hire company and the host business have the same primary duty to ensure, so far as is reasonably practicable, the health and safety of the workers. Under labour hire arrangements, this includes duties of both the labour hire company and host business to provide training, instruction and information to workers about the nature of risks associated with the work.

Where PCBUs have a duty for the same matter, the WHS Act requires that they consult, cooperate and coordinate activities with each other, so far as is reasonably practicable. In the context of the labour hire industry, a host employer must consult with the labour hire company on any proposed changes to the workplace that may affect work health and safety. Similarly, labour hire companies must ensure arrangements are in place to consult and coordinate with host businesses. Host businesses and labour hire companies must also consult with each other in relation to who will provide necessary equipment to workers such as personal protective equipment.

The WHS Act also provides a broad definition of 'worker' instead of 'employee' to recognise the changing nature of work relationships and ensure that health and safety protections are extended to all types of workers. The definition sets out different types of work arrangements that may exist, specifically identifying workers who carry out work as an employee of a labour hire company who have been assigned to work in another PCBU.

The WHS Act also provides for workplace consultative mechanisms such as health and safety representatives (HSRs). The role of HSRs is to represent workers in a work group on matters relating to WHS, and they have the power to investigate complaints which are raised by members of the work group. While this consultative mechanism is available to labour hire workers, there can be practical challenges for labour hire workers to access such measures, including the temporary nature of their work and their limited understanding of WHS systems.

Following the introduction of the national model WHS laws in 2012, Safe Work Australia (SWA) published a legislative fact sheet, '*Labour hire: duties of persons conducting a business or undertaking*'. The factsheet provides a useful summary of how the model WHS laws apply to labour hire arrangements and is available on the SWA website at:

- <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/labourhirefactsheet>.

Providing accommodation to labour hire workers

The primary duty of care under section 19 of the WHS Act specifically requires workers' accommodation provided by a PCBU to be maintained, so far as is reasonably practicable, so that the worker is not exposed to risks to health and safety. This duty only applies in relation to accommodation that is owned or managed by the PCBU, in circumstances where the occupancy is necessary for the worker's engagement because other accommodation is not reasonably available. This duty is relevant to labour hire arrangements in the horticultural and agricultural industries where itinerant workers are generally provided accommodation by their host employer.

The *Managing the work environment and facilities Code of Practice 2011* (the Code) sets out more detailed guidance to PCBUs in relation to accommodating workers. Codes of practice are admissible in court proceedings under the WHS Act and Regulation and courts may regard a code as evidence of

what is known about particular hazards or risks and rely on it in determining what is reasonably practicable in the circumstances.

The Code provides practical information on how to maintain a physical work environment that is without risks to health and safety, and applies to all types of workplaces including those that are mobile, temporary and remote. The Code outlines specific guidance about outdoor and isolated work, as well as the accommodation requirements for regional workers. For example, the Code specifies that accommodation facilities provided to remote workers should meet all relevant structural and stability requirements, meet electrical and fire safety standards and have adequate lighting, heating, cooling and ventilation.

Current WHS compliance and enforcement mechanisms

When PCBU's such as labour hire businesses fail to meet their duties under the WHS Act, WHS inspectors have a number of enforcement tools available to secure compliance. These include:

- issuing improvement notices, prohibition notices, non-disturbance notices, or unsafe equipment notices;
- issuing on-the-spot fines;
- suspending or cancelling a licence holder's accreditation;
- initiating prosecutions or legal proceedings; or
- entering into enforceable undertakings.

There are a number of considerations in determining which enforcement measure is appropriate in each circumstance, including the degree of seriousness of the contravention and whether there are imminent or immediate risks to workers' health and safety.

The WHS Act provides inspectors with the power to enter workplaces at any time, which assists them in making inquiries in relation to health and safety issues and ensures that suspected contraventions of the WHS Act are promptly investigated and appropriately managed. In addition to their compliance role, inspectors also work with employers to develop and improve their systems of work. Inspectors regularly undertake inductions, on the job coaching, mentoring and training on a wide range of issues in workplaces, which help employers better understand their WHS obligations. One of the key challenges for WHS inspectors in relation to enforcement is being able to identify all workplaces where outsourced workers carry out work and monitor compliance with health and safety laws. This can be further complicated where workplaces are temporary and in remote locations.

Current WHS initiatives to respond to issues in the labour hire industry

In addition to its routine compliance and enforcement regime, WHSQ is currently undertaking a number of targeted initiatives focussed on issues within the labour hire industry. Some of these initiatives are outlined below.

Horticultural industry

The horticulture industry is one of Queensland's largest agriculture sectors by farm gate value, with an estimated value of \$4.07 billion for 2015-16 (source AgTrends). Production is widespread occurring between the NSW border and the tropical north. The wide geographic and latitudinal ranges allow for great diversity in crops, farming systems and production seasons. Major vegetable production regions include the Locker Valley, Bundaberg - Wide Bay, and the Bowen-Gumlu region.

Fruit and nut production is concentrated in south east Queensland, Bundaberg - Wide Bay, central Burnett, Bowen-Gumlu, and the coastal wet tropics.

Horticultural production employs 14,100 people, or about 24% all people employed in Queensland agriculture (ABS and Australian Food Statistics 2012-13). However, these figures do not include casual employees which are a significant proportion of the workforce. A reliance on seasonal, temporary employees in regional Queensland leads to close ties with regional tourism.

Limits on local casual labour supply, the seasonal nature of the work and the need to harvest perishable crops quickly drive the Queensland's horticulture industry's widespread employment of casual workers, including temporary migrant workers (migrant workers). Many growers rely on the services of labour hire companies to provide an integrated recruitment and employment service. Reports from government agencies, local councils, the industry and media evidence that horticulture labour hire companies are often central to other aspects of the migrant workers travelling and work experience, such as provision of accommodation and their transport.

Several characteristics that potentially make the migrant workers vulnerable to exploitation are:

- non-English speaking backgrounds;
- uninformed about their rights and responsibilities including how to seek advice or lodge a complaint;
- culturally differences including an reluctance to complain to authority;
- inexperience in the labour market and lack of knowledge about laws and standards;
- far from their home and support networks;
- dependent on staying with their employer to secure a visa extension;
- risk homelessness if not complaint; and
- some are undocumented or illegal, including visa over-stayers.

Concerns about the exploitation of migrant workers in the horticulture industry stretch back several years. In 2008, the then Queensland Workplace Rights Ombudsman, Commissioner Don Brown commenced an investigation into employment conditions within the fruit and vegetable picking industry in Bundaberg. The investigation revealed numerous issues including 'sham' subcontracting arrangements, the non-payment of superannuation and underpayment of wages. During this investigation numerous occupational health and safety issues were raised by backpackers. The federal Member for Hinkler, Keith Pitt MP, and more recently Senator Barry O'Sullivan, have raised issues in the Australian Parliament and sought a more coordinated enforcement approach from government.

In 2013, the Fair Work Ombudsman's (FWO) commenced a national 3 year Harvest Trail Campaign focussing on minimum wages and conditions, record keeping and payslips, and labour hire and supply chain issues. At a state-level, the Anti-Discrimination Commission of Queensland has been actively working with horticulture communities, such as Lockyer Valley and Southern Downs, to develop solutions. Locally, Councils recognise the value migrant workers bring to their regional economies both in terms of their labour and tourism value. However, the associated sub-standard living conditions, public health risks, and criminal activities pose risks to regional and rural Queensland's reputation as a safe and desirable community to visit.

In May 2015, the ABC television program Four Corners' claims of extreme labour exploitation, slave like conditions and black market labour gangs on farms and in factories supplying Australia's biggest supermarkets and fast food chains, shone a national spotlight on the problem.

Horticulture Worker Interagency Group

In July 2015, the Office of Industrial Relations established the Horticulture Worker Interagency Group (interagency group). The interagency group is currently developing a whole-of-government approach to address issues experienced by travelling workers, particularly Working Holiday (subclass 417) visa holders, in the horticultural industry.

The interagency group has representation from 13 Queensland Government and three Commonwealth Government agencies. The role of the interagency group is to improve the safety and well-being of travelling workers in the horticultural industry, and ensure relevant government agencies are working together to respond to issues within the industry.

The interagency group has agreed to undertake an intervention campaign across Queensland in 2016, to encourage compliance and alert employers in the horticultural industry of their legislative duties. This campaign will focus on key fruit and vegetable growing areas in the State, including Bundaberg, the Sunshine Coast, and North Queensland.

A government and industry forum will take place in Bundaberg on 20 April 2016 to share the work of the interagency group and consult with industry stakeholders and the community on issues related to temporary migrant workers in the horticultural industry.

Horticultural audits

In 2013, Workplace Health and Safety Queensland commenced an ongoing program which monitors compliance in the horticulture industry. The audit program focuses on safe systems of work including consultation between employers, contractors and workers, plant and machinery, quad bikes, rural chemicals, and remote work. Delivery is through a mobile service delivery model where inspectors concentrate in a particular geographical area, aligned with the harvesting season. Hostels, farms and contractor agencies, including labour hire, are involved in the campaign. Information sessions, assessments and advisory activities are conducted with a follow up enforcement campaign. To date WHSQ has primarily partnered with the Fair Work Ombudsman (wages and employment records), Queensland Police Service (cultural liaison and outreach; personal safety) and Industrial Relations Compliance (private employment agents).

Poultry processing industry

In July 2015, in response to consistently high serious work-related injury rates, WHSQ developed an intervention strategy focussing on labour hire workers within the poultry processing industry. It is common for the most repetitive and hazardous tasks in any industry to be conducted by casual or labour hire workers and WHSQ recognised that there has been an increasing proportion of poultry workers coming from labour hire companies. Labour hire companies are responsible for reporting and managing any injuries to labour hire workers, however, there is inconsistency in the reporting of injuries.

WHSQ's intervention strategy aims to reduce injuries in the poultry processing industry, particularly for labour hire and casual working holiday visa workers. In order to achieve this, WHSQ is conducting audits across Queensland to identify risks and exposure to hazards and develop appropriate injury management systems for workers in the industry. WHSQ has consulted with major employers such as Coles, Woolworths, McDonalds and Aldi to ascertain whether these organisations have established processes to audit their sub-contractors' compliance with their health and safety duties.

Injury Management and Prevention Program

WHSQ conducts an Injury Management and Prevention program (IPaM), which offers advice to selected employers who compared to other businesses of a similar size and nature, experience higher workers' compensation claim rates and costs. The IPaM program includes labour hire organisations and WHSQ has tailored some of its guidance material to address issues experienced in the labour hire industry.

In the second half of 2015, IPaM advisors delivered four workshops specifically with the labour hire industry in the Sunshine Coast, Gold Coast and Brisbane regions. The workshops provided participants with an overview of WHS systems relevant to their businesses. The information shared during the workshops also provided WHSQ with a greater understanding of the challenges faced by the labour hire industry.

As a result of the discussions at these workshops, the IPaM program is now developing a new engagement approach and support tools for the labour hire industry. The new approach will support labour hire host businesses and labour hire companies to work together to identify safety issues prior to, during and on ceasing placements at a host business.

Memorandum of Understanding with Department of Immigration and Border Protection

The Office of Industrial Relations on behalf of WHSQ, Electrical Safety Office and Industrial Relations Policy and Regulation has a Memorandum of Understanding (MOU) with the Department of Immigration and Border Protection (DIBP) in relation to the exchange of information for subclass 457 visa holders.

Although the MOU is not legally binding, it establishes a commitment from both OIR and DIBP to work cooperatively and exchange information in a timely manner in relation to the 457 visa program where it applies to each agency's respective legislation.

This exchange of information enables OIR to identify where migrant workers are located, their occupations, and whether any family members have accompanied them in Queensland. The MOU also specifies that DIBP will notify OIR of any work-related fatalities or safety incidents that are reported directly to them. This information is a valuable resource for OIR to develop and target appropriate education and awareness campaigns, as well as identify where significant WHS risks may exist in particular industries.

Other research on WHS issues in the labour hire industry

'At-risk' migrant workers

In late 2014, Safe Work Australia (Safe Work) conducted research (unpublished) as part of its emerging issues program in relation to 'at risk' migrant workers. The research explored:

- the specific WHS and workers' compensation issues faced by 'at risk' migrant workers,
- appropriate measures that could be pursued, and
- how WHS and workers' compensation issues can be integrated into the roles of existing government agencies' work and processes to ensure that 'at risk' migrant workers are properly protected under WHS and workers' compensation law.

The paper identified that while the WHS laws apply to all workers regardless of visa status, some groups of migrant workers may have a higher WHS risk than Australian-born workers. A number of factors were found to contribute to this higher risk, including:

- a lack of understanding of WHS and work rights due to poor English language proficiency,

- migrant workers prioritising job security over personal health and safety matters, and
- cultural attitudes of migrant workers towards WHS derived from their home country.

Safe Work also identified that these issues are often associated with other vulnerabilities at work, relating to wages, working conditions and discrimination.

The paper identified that workers on temporary work visas (such as subclass 457 visas) were particularly prone to WHS risks. Although the subclass 457 visa program supports skilled workers, the paper found that these workers represent a higher WHS risk, primarily because of language and cultural difficulties and the fact that 457 visa holders are employed in a wide range of hazardous industries such as construction, accommodation and food services.

Safe Work identified seven key areas for future action to ensure migrant workers are protected from work-related injuries and illnesses:

- improving data collection about and research on work-related injury, illness and death of migrant workers specifically;
- ensuring that information about WHS is widely accessible for migrant workers, including integrating this with employment and immigration agencies;
- working with community organisations to improve migrant workers' awareness of WHS issues;
- educating employers about their obligations towards migrant workers and best practice approaches towards supporting them in the workplace with the help of industry organisations;
- considering specific compliance, engagement, education and awareness-raising campaigns in high risk industries/work, including in supply chains;
- considering whether there are any impediments to temporary visa workers receiving their workers' compensation entitlements; and
- considering whether there are any adverse outcomes in visa policy for the WHS risks of 'at risk' migrant workers.

Safe Work identified a number of government agencies at the Commonwealth and State and Territory levels that interact with different aspects of migrant workers' lives and working conditions in Australia. These include agencies with portfolio responsibility for immigration, migration, social security, workplace relations, WHS education and enforcement, workers' compensation, law enforcement, taxation, consumer affairs, corporations' law and human rights. Given this, Safe Work considered there to be an opportunity for WHS issues to be addressed in the context of a holistic approach to the employment of migrant workers generally. This could include raising migrant workers' awareness of their work rights, including WHS matters, educating and supporting employers and better coordinating compliance and enforcement activities between relevant agencies.

Supply chains

The *Australian Work Health and Safety Strategy 2012–2022* (Australian Strategy) identifies supply chains and networks as one of the seven national Action Areas. Supply chains and networks are often established through formal or informal contractual arrangements to provide goods or services such as moving agricultural produce to a supermarket or car components to vehicle manufacturers.

The Australian Strategy outlines three key strategic outcomes in relation to supply chains and networks:

- Supply chain and network participants understand their cumulative impact and actively improve the health and safety of the supply chain.
- Commercial relationships within supply chains and networks are used to improve work health and safety.
- Industry leaders champion work health and safety in supply chains and networks.

In July 2011, Safe Work published a research paper on supply chains and networks which was initiated as part of the development of the Australian Strategy³. The paper critiqued evidence and concepts on supply chains and networks as they apply to WHS in the transport, agriculture, construction, manufacturing and health and community services sectors.

In summary, the paper highlighted the following:

- Supply chains can enable buyers to assume a dominant market position where they can dictate critical aspects of production and service delivery (notably cost and timing), which can result in poor WHS outcomes in supplier firms.
- Many small businesses (from farms to electronic service providers) operate at the bottom of a supply chain and the resulting contractual arrangements play a pivotal role in affecting working conditions.
- The outsourcing or sub-contracting of work typically involves the use of contingent workers such as self-employed sub-contractors, labour hire and casual employees (including seasonal labour), foreign guest-workers and (especially in developing countries) informal sector workers and child labour. These work arrangements are clustered at the bottom of the supply chain.
- Those at the bottom of the supply chain often have little if any scope to respond to WHS requirements.

The paper also found that three aspects of supply chains affect health and safety:

- the economic and reward pressures that become successively greater towards the bottom of the supply chain,
- disorganisation due to the small size of the work setting, use of precarious workers, the fragmented and complex nature of production, and the inability of workers to organise to protect themselves, and
- regulatory failure due to jurisdictional gaps (especially when international supply chains are involved).

The paper noted that the use of ‘person conducting a business or undertaking’ and ‘workers’ in the general duty provisions under the model WHS legislation have the potential to assist in addressing these challenges.

The report summarised that while supply chains have the potential for positive effects on health and safety at work, much of the available research across a range of industries—such as transport, construction, manufacturing, community services and agriculture—has found that sub-contracting and other aspects of work arrangements associated with supply chains have had a negative effect on work health and safety.

³ Quinlan, Dr Michael, ‘Supply chains and networks’, University of New South Wales, July 2011, <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/752/Supply-chains-networks-July-2011-Michael-Quinlan.pdf>

A research report commissioned by the Australian Council of Superannuation Investors in 2013 found that there was exposure to labour and human rights risks at the sub-sector level of some supply chains⁴. The research examined 34 S&P/ASX200 Consumer Staples and Consumer Discretionary companies and found:

- disclosure of efforts to proactively manage labour and human rights issues within their supply chains is significantly lacking. The report identified that 38 per cent of these companies have a publicly disclosed supply chain labour and human rights policy, and about 27 per cent of the companies disclose health and safety supply chain policies.
- no company that was assessed disclosed the nature of board-level oversight of labour and human rights risks, contrary to contemporary best practice, and
- only 30 per cent of companies cited supplier audits as a risk management tool.

⁴ Australian Council of Superannuation Investors and Regnan Governance Research and Engagement, June 2013, 'Labour and Human Rights Risks in Supply-Chain Sourcing', <http://www.acsi.org.au/research-reports-2/1004-labour-and-human-rights-risks-in-supply-chain-sourcing-investment-risks-in-sapax200-consumer-discretionary-and-consumer-staples-companies-public.html>.

Appendix 1. Data from ABS Cat. No 6333.0, Characteristics of Employment, Australia, August 2014: Unpublished Customised Reports

Table 1. PERSONS WHO FOUND THEIR JOB THROUGH A LABOUR HIRE FIRM/EMPLOYMENT AGENCY: Industry, Occupation and Sector–By full-time or part-time status in main job–By sex–Queensland									
	Males			Females			Persons		
	Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total
	'000	'000	'000	'000	'000	'000	'000	'000	'000
Industry of main job									
Agriculture, forestry and fishing	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Mining	6.0	0.0	6.0	0.0	0.0	0.0	6.4	0.0	6.4
Manufacturing	8.3	0.0	11.4	2.5	0.0	3.3	9.8	2.2	11.2
Electricity, gas, water and waste services	2.2	0.0	3.8	0.0	0.0	0.0	2.2	0.0	3.8
Construction	9.8	0.0	10.4	1.5	0.0	1.5	11.8	0.0	10.9
Wholesale trade	2.2	0.0	2.2	0.0	0.0	0.0	4.8	0.0	4.8
Retail trade	1.6	1.3	1.9	2.1	3.5	2.5	2.6	1.9	7.0
Accommodation and food services	1.1	0.0	1.1	0.0	2.0	2.6	1.8	2.0	2.9
Transport, postal and warehousing	5.0	0.0	5.0	0.0	0.0	1.5	3.3	0.0	6.0
Information media and telecommunications	0.0	0.0	0.0	0.0	0.0	0.0	1.5	0.0	1.5
Financial and insurance services	2.1	0.0	3.4	1.9	1.4	3.4	3.0	2.9	5.3
Rental, hiring and real estate services	0.0	0.0	0.0	2.0	0.0	2.5	2.0	0.0	2.5
Professional, scientific and technical services	1.5	0.0	1.5	3.5	0.0	3.5	4.0	0.0	5.0
Administrative and support services	6.1	0.0	5.6	4.2	0.0	4.2	9.2	0.0	6.5
Public administration and safety	6.1	0.0	6.1	1.4	0.0	2.7	4.8	0.0	9.3
Education and training	0.0	0.0	3.0	1.3	1.4	4.0	4.9	2.3	5.8
Health care and social assistance	3.9	0.0	3.9	1.5	5.9	6.1	4.9	5.9	9.4
Arts and recreation services	2.6	0.0	2.6	0.0	0.0	0.0	1.5	0.0	1.5
Other services	2.6	0.0	2.6	0.0	0.0	0.0	3.9	0.0	3.9
Occupation of main job									
Managers	10.3	0.0	10.3	1.4	0.0	3.4	12.6	0.0	13.1
Professionals	10.9	0.0	11.5	4.0	2.4	6.8	13.3	5.9	18.7
Technicians and trades workers	15.6	0.0	18.3	3.2	0.0	3.2	16.2	0.0	19.9
Community and personal service workers	1.5	0.0	1.5	0.0	3.4	3.4	1.5	3.4	4.5
Clerical and administrative workers	2.1	0.0	3.3	11.6	4.1	14.7	15.7	6.5	20.1
Sales workers	0.0	0.0	0.0	0.0	2.0	3.1	1.5	3.4	6.5
Machinery operators and drivers	10.7	0.0	14.5	1.5	0.0	1.5	14.9	0.0	15.4
Labourers	6.7	1.5	10.4	1.6	1.5	3.6	9.9	3.0	14.6
Sector of main job									
Public	6.4	0.0	6.4	4.4	4.9	5.9	9.9	4.9	13.9
Private	51.6	3.9	56.6	22.9	11.5	33.4	74.1	17.0	90.6
Total	59.1	3.9	65.7	25.9	15.9	41.2	82.4	19.4	103.9

Table 2. PERSONS WHO FOUND THEIR JOB THROUGH A LABOUR HIRE FIRM/EMPLOYMENT AGENCY: Duration, Expected duration and Hours worked–By full-time or part-time status in main job–By sex–Queensland										
		Males			Females			Persons		
		Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total
		'000	'000	'000	'000	'000	'000	'000	'000	'000
Continuous duration with current employer/business										
	Fewer than 12 months	15.9	1.7	18.6	10.6	1.9	13.4	25.9	4.0	34.1
	Under 3 months	4.0	1.4	4.9	4.7	1.3	5.0	8.6	1.4	8.9
	3 and under 6 months	3.8	0.0	3.8	4.0	1.3	2.4	9.0	1.3	9.9
	6 and under 12 months	9.1	1.8	9.3	3.9	0.0	5.7	11.5	3.0	12.2
	1–2 years	13.4	1.6	13.9	4.2	3.4	7.6	20.7	4.0	24.1
	3–5 years	17.1	0.0	15.4	4.7	1.9	7.0	21.3	3.3	23.6
	6–9 years	11.4	0.0	8.9	1.9	2.8	4.3	13.7	2.5	16.2
	10–19 years	2.0	0.0	2.0	2.1	2.1	3.7	3.0	4.8	6.2
	20 years or more	0.0	0.0	0.0	0.0	1.2	1.2	0.0	1.2	1.2
Expected future duration with current employer/business										
	Expected to be with current employer/business in 12 months	48.7	5.1	51.1	23.5	15.4	37.4	68.6	18.4	87.5
	Did not expect not be with current employer/business in 12 months	9.8	2.1	11.4	4.3	1.4	4.3	14.9	1.5	16.4
Hours usually worked in main job										
	Less than 10 hours	0.0	1.4	1.4	0.0	2.7	2.7	0.0	3.1	3.1
	10–19 hours	0.0	2.0	2.0	0.0	5.0	5.0	0.0	4.2	4.2
	20–29 hours	0.0	1.9	1.9	0.0	6.5	6.9	0.0	8.5	9.0
	30–34 hours	0.0	0.0	1.6	1.7	2.1	2.1	1.6	2.6	3.7
	35–39 hours	15.7	0.0	15.7	15.8	0.0	15.8	30.0	0.0	30.0
	40–44 hours	24.1	0.0	24.1	7.0	0.0	7.0	30.6	0.0	30.6
	45–49 hours	3.5	0.0	3.5	1.9	0.0	1.9	7.1	0.0	7.1
	50–59 hours	8.3	0.0	8.3	0.0	0.0	0.0	8.3	0.0	8.3
	60–69 hours	1.5	0.0	1.5	0.0	0.0	0.0	1.5	0.0	1.5
	70 hours and over	3.2	0.0	3.2	0.0	0.0	0.0	3.2	0.0	3.2
Total		59.1	3.9	65.7	25.9	15.9	41.2	82.4	19.4	103.9

Table 3. PERSONS WHO FOUND THEIR JOB THROUGH A LABOUR HIRE FIRM/EMPLOYMENT AGENCY: Registration with Labour Hire firm/Emploment agency and source of pay–By full-time or part-time status in main job–By sex–Queensland									
	Males			Females			Persons		
	Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total
	'000	'000	'000	'000	'000	'000	'000	'000	'000
Whether currently registered with labour hire firm/employment agency									
Registered with a labour hire firm	8.9	0.0	12.1	2.5	0.0	1.9	12.9	1.8	12.8
Registered with an employment agency	10.4	2.1	9.2	4.4	2.9	10.7	12.6	4.4	21.1
Not currently registered	41.0	3.9	41.7	18.5	10.7	28.2	55.3	13.6	71.0
Whether registered with labour hire firm/employment agency in the last 12 months									
Registered with a labour hire firm in the last 12 months	12.5	0.0	14.2	4.9	0.0	5.2	15.9	0.0	17.3
Registered with an employment agency in the last 12 months	11.6	1.8	14.4	8.6	6.6	14.3	19.6	6.5	29.2
Did not register with an employment agency/labour hire firm in the last 12 months	35.6	3.1	37.6	11.3	8.4	19.8	49.5	11.5	58.9
Whether paid by labour hire firm/employment agency									
Paid by labour hire firm/employment agency	16.7	0.0	14.7	6.5	1.1	6.6	22.2	2.3	21.8
Was not paid by labour hire firm/employment agency	42.9	5.9	47.3	18.8	13.4	33.2	63.9	16.7	79.5
Total	59.1	3.9	65.7	25.9	15.9	41.2	82.4	19.4	103.9

Table 4. PERSONS WHO FOUND THEIR JOB THROUGH A LABOUR HIRE FIRM/EMPLOYMENT AGENCY: Industry and occupation of main job—By whether paid by labour hire firm/employment agency—Queensland				
		Paid by labour hire firm/employment agency	Was not paid by labour hire firm/employment agency	Total
		'000	'000	'000
Industry of main job				
	Agriculture, forestry and fishing	0.0	0.0	0.0
	Mining	1.6	6.6	6.4
	Manufacturing	2.6	8.7	11.2
	Electricity, gas, water and waste services	0.0	2.2	3.8
	Construction	3.2	10.8	10.9
	Wholesale trade	0.0	2.6	4.8
	Retail trade	0.0	5.5	7.0
	Accommodation and food services	0.0	2.9	2.9
	Transport, postal and warehousing	0.0	3.2	6.0
	Information media and telecommunications	0.0	1.5	1.5
	Financial and insurance services	0.0	5.3	5.3
	Rental, hiring and real estate services	0.0	2.5	2.5
	Professional, scientific and technical services	0.0	4.5	5.0
	Administrative and support services	7.2	3.7	6.5
	Public administration and safety	2.7	5.0	9.3
	Education and training	0.0	5.8	5.8
	Health care and social assistance	1.6	6.4	9.4
	Arts and recreation services	0.0	2.6	1.5
	Other services	0.0	1.9	3.9

			Males			Females			Persons		
			Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total
Weekly earnings in main job											
	Under \$200	'000	0.0	1.3	1.3	0.0	1.5	1.5	0.0	2.4	2.4
	\$200 to less than \$400	'000	0.0	1.6	3.1	0.0	1.4	1.4	0.0	3.9	3.9
	\$400 to less than \$600	'000	5.1	0.0	5.1	1.7	1.6	3.2	3.4	2.1	8.3
	\$600 to less than \$800	'000	2.7	2.6	6.4	4.5	2.9	7.9	8.4	5.3	15.3
	\$800 to less than \$1,000	'000	8.1	0.0	8.1	6.3	0.0	9.2	12.7	0.0	16.3
	\$1,000 to less than \$1,200	'000	9.0	0.0	9.0	5.3	1.5	6.3	15.5	1.5	16.0
	\$1,200 to less than \$1,400	'000	4.8	0.0	4.8	5.9	0.0	4.8	8.5	0.0	10.1
	\$1,400 to less than \$1,600	'000	4.9	0.0	4.9	2.0	1.7	4.6	7.3	1.7	9.0
	\$1,600 to less than \$1,800	'000	6.0	0.0	6.0	0.0	0.0	0.0	4.6	0.0	4.6
	\$1,800 to less than \$2,000	'000	3.5	0.0	3.5	1.5	0.0	1.5	5.0	0.0	7.0
	\$2,000 to less than \$2,500	'000	7.5	0.0	7.5	0.0	0.0	0.0	9.1	0.0	9.1
	\$2,500 to less than \$3,000	'000	3.3	0.0	3.3	0.0	0.0	0.0	3.3	0.0	3.3
	\$3,000 and over	'000	2.6	0.0	2.6	0.0	0.0	0.0	4.2	0.0	4.2
Total		'000	59.1	3.9	65.7	25.9	15.9	41.2	82.4	19.4	103.9
Weekly earnings in main job (percentiles and quantiles)											
	10th percentile	\$	734	136	579	681	141	334	696	139	457
	20th percentile	\$	900	291	759	800	294	600	865	300	683
	25th percentile (1st quartile)	\$	969	322	900	852	307	650	950	303	750
	30th percentile	\$	1000	345	963	904	395	686	965	351	835
	40th percentile	\$	1144	370	1051	962	494	800	1055	490	964
	Median weekly earnings in main job	\$	1314	606	1250	1072	616	950	1200	609	1095
	60th percentile	\$	1646	650	1571	1176	678	1005	1400	650	1250
	70th percentile	\$	1887	653	1840	1253	807	1181	1722	719	1500
	75th percentile (3rd quartile)	\$	2000	675	1975	1330	857	1233	1830	802	1726
	80th percentile	\$	2122	697	2106	1382	970	1319	1954	879	1852
	90th percentile	\$	2507	1866	2500	1585	1396	1500	2404	1425	2302
Mean weekly earnings in main job		\$	1569	686	1494	1158	663	972	1447	669	1295

Table 6. PERSONS WHO FOUND THEIR JOB THROUGH A LABOUR HIRE FIRM/EMPLOYMENT AGENCY: Selected main job characteristics–By full-time or part-time status in main job–By sex–Queensland

	Males			Females			Persons		
	Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total
	'000	'000	'000	'000	'000	'000	'000	'000	'000
Whether had paid leave entitlements									
With paid leave entitlements	42.9	0.0	43.8	16.8	8.0	26.8	59.3	10.8	69.6
Without paid leave entitlements	17.3	5.2	22.0	8.5	4.6	13.5	24.1	10.6	35.3
Whether earnings/income varied from one pay period to the next in main job									
Earnings/income varied	14.3	1.5	18.5	5.1	6.6	13.1	20.5	8.0	28.6
Earnings/income did not vary	45.4	3.5	46.2	19.8	10.3	29.1	62.5	14.4	74.3
Whether guaranteed a minimum number of hours each week									
Guaranteed a minimum number of hours	50.3	2.5	53.3	21.1	9.3	32.4	70.8	11.3	83.6
Not guaranteed a minimum number of hours	7.8	3.0	11.9	3.3	3.7	6.4	10.5	8.6	20.3
Whether usually works the same number of hours each week in main job									
Usually worked the same number of hours	46.0	3.1	47.4	20.7	9.9	30.1	66.7	13.5	78.1
Did not usually work the same number of hours	12.1	3.4	15.1	3.2	4.1	9.7	15.8	9.4	25.8
Whether worked on a fixed term contract in main job									
Worked on a fixed-term contract	4.0	0.0	5.3	1.4	0.0	1.4	5.3	0.0	4.7
Did not work on a fixed-term contract	56.8	3.3	59.1	23.0	15.9	37.4	78.2	19.3	99.1
Total	59.1	3.9	65.7	25.9	15.9	41.2	82.4	19.4	103.9

Table7. PERSONS WHO FOUND THEIR JOB THROUGH A LABOUR HIRE FIRM/EMPLOYMENT AGENCY: Occupation (2 digit) of main job–By sex and by full-time or part-time status–Queensland						
	Males	Females	Full-time workers	Part-time workers	Total	
	'000	'000	'000	'000	'000	
Occupation of main job						
Managers	10.3	3.4	12.6	0.0	13.1	
Chief executives, general managers and legislators	0.0	0.0	0.0	0.0	0.0	
Farmers and farm managers	0.0	0.0	0.0	0.0	0.0	
Specialist managers	5.1	1.4	9.3	0.0	9.8	
Hospitality, retail and service managers	0.0	0.0	0.0	0.0	0.0	
Managers nfd	0.0	0.0	0.0	0.0	0.0	
Professionals	11.5	6.8	13.3	5.9	18.7	
Arts and media professionals	0.0	0.0	0.0	0.0	0.0	
Business, human resource and marketing professionals	5.6	1.5	8.1	1.7	7.0	
Design, engineering, science and transport professionals	1.7	0.0	0.0	0.0	0.0	
Education professionals	0.0	1.5	0.0	1.5	1.5	
Health professionals	1.4	4.0	2.9	2.0	4.0	
ICT professionals	2.8	0.0	2.7	0.0	2.8	
Legal, social and welfare professionals	0.0	0.0	0.0	0.0	0.0	
Professionals nfd	0.0	0.0	0.0	0.0	0.0	
Technicians and trades workers	18.3	3.2	16.2	0.0	19.9	
Engineering, ICT and science technicians	3.0	0.0	4.0	0.0	4.0	
Automotive and engineering trades workers	4.3	0.0	4.3	0.0	4.3	
Construction trades workers	4.6	0.0	4.6	0.0	4.6	
Electrotechnology and telecommunications trades workers	4.5	0.0	4.5	0.0	4.5	
Food trades workers	0.0	0.0	0.0	0.0	0.0	
Skilled animal and horticultural workers	1.5	0.0	1.3	0.0	1.5	
Other technicians and trades workers	0.0	0.0	0.0	0.0	0.0	
Community and personal service workers	1.5	3.4	1.5	3.4	4.5	
Health and welfare support workers	0.0	0.0	0.0	0.0	0.0	
Carers and aides	0.0	2.1	0.0	2.1	2.1	
Hospitality workers	0.0	0.0	0.0	0.0	0.0	
Protective service workers	0.0	0.0	0.0	0.0	0.0	
Sports and personal service workers	0.0	0.0	0.0	0.0	1.5	
Clerical and administrative workers	3.3	14.7	15.7	6.5	20.1	
Office managers and program administrators	2.0	1.8	2.3	0.0	1.6	
Personal assistants and secretaries	0.0	1.3	1.3	0.0	1.3	
General clerical workers	0.0	3.3	3.7	1.5	3.3	
Inquiry clerks and receptionists	0.0	4.3	1.6	1.9	4.0	
Numerical clerks	1.5	4.2	5.2	0.0	5.2	
Clerical and office support workers	0.0	0.0	0.0	0.0	0.0	
Other clerical and administrative workers	0.0	2.3	1.4	0.0	2.3	
Sales workers	0.0	3.1	1.5	3.4	6.5	
Sales representatives and agents	0.0	1.9	1.4	0.0	1.8	
Sales assistants and salespersons	0.0	2.6	0.0	2.0	2.5	
Sales support workers	0.0	0.0	0.0	0.0	0.0	
Machinery operators and drivers	14.5	1.5	14.9	0.0	15.4	
Machine and stationary plant operators	5.6	2.1	5.0	0.0	5.0	
Mobile plant operators	1.6	0.0	1.4	0.0	2.5	
Road and rail drivers	4.7	0.0	4.2	0.0	5.3	
Storepersons	1.6	0.0	1.6	0.0	3.7	

Table 8. PERSONS WHO FOUND THEIR JOB THROUGH A LABOUR HIRE FIRM/EMPLOYMENT AGENCY: Selected characteristics–By full-time or part-time status in main job–By sex–Queensland

	Males			Females			Persons		
	Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total	Full-time workers	Part-time workers	Total
	'000	'000	'000	'000	'000	'000	'000	'000	'000
Age group (years)									
15–19	0.0	0.0	0.0	0.0	0.0	1.2	1.6	0.0	1.4
20–24	9.2	1.7	11.5	2.0	1.7	3.1	11.2	1.7	13.0
25–34	15.1	1.8	14.3	6.0	2.1	8.1	19.7	3.3	25.9
35–44	18.6	0.0	18.6	5.6	3.6	8.8	24.8	3.6	27.4
45–54	13.5	1.5	16.6	6.8	0.0	7.2	18.4	2.3	20.7
55–59	1.4	0.0	1.9	2.3	3.2	5.1	5.6	1.8	7.9
60–64	2.3	0.0	2.3	1.5	2.0	5.4	2.4	2.0	4.9
65 and over	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	2.2
Country of birth and elapsed years since arrival in Australia									
Born in Australia	39.0	2.8	43.0	16.2	12.7	27.5	54.8	16.7	73.2
Born overseas	19.0	1.5	20.1	8.1	3.1	11.7	27.6	6.2	34.4
Arrived within the last 5 years	4.4	0.0	4.4	0.0	0.0	1.8	5.3	0.0	6.9
Arrived 5–9 years ago	6.1	0.0	6.4	0.0	0.0	2.1	4.5	1.5	7.5
Arrived 10–14 years ago	3.6	0.0	3.6	0.0	1.4	1.4	5.1	1.4	6.0
Arrived 15–19 years ago	1.6	0.0	1.6	4.4	0.0	4.4	4.7	0.0	4.7
Arrived 20 years or more ago	4.4	1.7	6.5	4.2	1.6	3.4	9.1	1.6	11.3
Country of birth									
Born in Australia	39.0	2.8	43.0	16.2	12.7	27.5	54.8	16.7	73.2
Born overseas	19.0	1.5	20.1	8.1	3.1	11.7	27.6	6.2	34.4
Oceania and Antarctica	8.8	0.0	8.8	4.1	0.0	4.6	10.4	0.0	13.4
North-West Europe	5.9	1.5	5.5	2.7	0.0	4.2	10.2	2.9	10.1
Southern and Eastern Europe	1.7	0.0	1.7	0.0	0.0	0.0	1.7	0.0	1.7
North Africa and the Middle East	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
South-East Asia	0.0	0.0	0.0	0.0	0.0	0.0	3.9	0.0	3.9
North-East Asia	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Southern and Central Asia	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Americas	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Sub-Saharan Africa	1.5	0.0	1.5	1.7	0.0	2.8	4.1	0.0	3.3
Relationship in household									
Family member	45.6	3.5	52.9	20.4	12.9	33.8	67.6	16.5	86.2
Husband, wife or partner	35.7	3.0	37.7	16.2	10.4	23.7	48.3	14.9	64.4
With dependants	19.8	0.0	19.8	7.3	5.4	13.7	26.0	6.5	33.5
Without dependants	14.8	2.0	16.2	5.5	3.6	10.0	23.9	5.5	27.7
Lone parent	2.4	0.0	2.4	4.3	1.3	4.1	2.8	1.3	4.2
Dependent student	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Non-dependent child	8.1	1.6	8.7	3.4	2.2	5.1	13.5	3.9	16.3
Other family person	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Non-family member	11.5	1.9	13.0	3.1	1.5	4.0	14.5	3.4	19.5
Lone person	6.3	0.0	3.9	3.4	0.0	2.9	5.8	1.5	8.7
Not living alone	7.9	1.4	6.0	1.7	0.0	3.2	6.7	1.9	10.3
Relationship not determined	1.4	0.0	1.4	0.0	0.0	1.4	1.8	0.0	1.8
Total	59.1	3.9	65.7	25.9	15.9	41.2	82.4	19.4	103.9

Table 9 – Workers’ Compensation Labour Hire claims lodged as a percentage of all claims lodged by industry 2014-15

Industry	Labour Hire Claims	All Claims by Industry	Labour Hire as a % of Claims
Accommodation and Food Services	229	5,890	3.9%
Administrative and Support Services	51	2,412	2.1%
Agriculture, Forestry and Fishing	136	2,179	6.2%
Arts and Recreation Services	4	1,392	0.3%
Construction	688	9,785	7.0%
Education and Training	13	6,504	0.2%
Electricity, Gas, Water and Waste Services	61	1,180	5.2%
Financial and Insurance Services	4	827	0.5%
Health Care and Social Assistance	80	11,545	0.7%
Information Media and Telecommunications	15	506	3.0%
Manufacturing	882	13,596	6.5%
Mining	195	2,350	8.3%
Other Services	253	2,723	9.3%
Professional, Scientific and Technical Services	15	1,608	0.9%
Public Administration and Safety	123	6,675	1.8%
Rental, Hiring and Real Estate Services	12	1,113	1.1%
Retail Trade	135	7,575	1.8%
Transport, Postal and Warehousing	360	5,577	6.5%
Wholesale Trade	96	4,149	2.3%
Total	3,352	87,568	3.8%

Table 10 – Estimated Labour Hire Full-time equivalent worker numbers for 2014-15 based on Workers' Compensation declared wages

Industry	Estimated FTE Labour Hire	Labour Hire as % of whole industry	% of all Labour Hire workers across industries
Accommodation and Food Services	2,932	2.1%	6.0%
Administrative and Support Services	1,189	1.7%	2.4%
Agriculture, Forestry and Fishing	1,491	4.1%	3.0%
Arts and Recreation Services	1,154	4.1%	2.4%
Construction	3,511	2.0%	7.2%
Education and Training	337	0.2%	0.7%
Electricity, Gas, Water and Waste Services	1,536	5.5%	3.1%
Financial and Insurance Services	904	1.4%	1.8%
Health Care and Social Assistance	3,425	1.1%	7.0%
Information Media and Telecommunications	821	5.8%	1.7%
Manufacturing	8,499	4.2%	17.3%
Mining	6,728	10.6%	13.7%
Other Services	502	0.7%	1.0%
Professional, Scientific and Technical Services	1,168	0.9%	2.4%
Public Administration and Safety	4,190	2.9%	8.5%
Rental, Hiring and Real Estate Services	304	0.7%	0.6%
Retail Trade	1,861	0.9%	3.8%
Transport, Postal and Warehousing	3,541	3.4%	7.2%
Wholesale Trade	2,846	2.4%	5.8%
Total scheme	49,055	2.2%	100.0%

Table 11 – Labour Hire as a percentage of declared wages by industry 2012-13 to 2014-15

Industry	2012-13	2013-14	2014-15
Accommodation and Food Services	1.4%	1.6%	1.9%
Administrative and Support Services	1.3%	1.8%	1.6%
Agriculture, Forestry and Fishing	3.7%	3.6%	3.9%
Arts and Recreation Services	0.7%	0.5%	0.5%
Construction	2.2%	2.1%	1.8%
Education and Training	0.1%	0.1%	0.2%
Electricity, Gas, Water and Waste Services	4.8%	5.0%	5.5%
Financial and Insurance Services	1.0%	0.9%	1.0%
Health Care and Social Assistance	0.8%	0.8%	0.9%
Information Media and Telecommunications	4.5%	3.7%	5.0%
Manufacturing	3.8%	3.5%	3.7%
Mining	5.8%	6.6%	8.5%
Other Services	0.7%	0.7%	0.7%
Professional, Scientific and Technical Services	2.4%	1.8%	1.8%
Public Administration and Safety	2.4%	2.5%	2.5%
Rental, Hiring and Real Estate Services	0.7%	0.7%	0.6%
Retail Trade	0.9%	0.8%	0.9%
Transport, Postal and Warehousing	2.3%	2.6%	2.8%
Wholesale Trade	2.2%	1.8%	1.9%
Total scheme	2.1%	2.1%	2.2%

Table 12 – Normal weekly earnings of compensated time lost claims by Labour Hire and Industry

Industry	Labour Hire Weekly Earnings	Non Labour Hire Weekly Earnings	% Difference
Accommodation and Food Services	\$672	\$751	-10%
Administrative and Support Services	\$799	\$824	-3%
Agriculture, Forestry and Fishing	\$837	\$888	-6%
Arts and Recreation Services	N/A	\$829	N/A
Construction	\$1,310	\$1,504	-13%
Education and Training	\$1,172*	\$1,140	3%*
Electricity, Gas, Water and Waste Services	\$1,587	\$1,573	1%
Financial and Insurance Services	\$785*	\$1,127	-30%*
Health Care and Social Assistance	\$880	\$1,025	-14%
Information Media and Telecommunications	\$1,151*	\$1,348	-15%*
Manufacturing	\$940	\$1,073	-12%
Mining	\$1,874	\$2,369	-21%
Other Services	\$1,102	\$1,035	6%
Professional, Scientific and Technical Services	\$3,055*	\$1,420	115%*
Public Administration and Safety	\$1,123	\$1,278	-12%
Rental, Hiring and Real Estate Services	\$895*	\$1,036	-14%*
Retail Trade	\$798	\$778	3%
Transport, Postal and Warehousing	\$1,010	\$1,246	-19%
Wholesale Trade	\$871	\$1,094	-20%
Total scheme	\$1,093	\$1,130	-3%

* Average normal weekly earnings are based on fewer than 10 claims and as a result figures should be interpreted with caution.

Table 13 – Normal weekly earnings of compensated time lost claims by Labour Hire and Occupation

Occupation	Labour Hire Weekly Earnings	Non Labour Hire Weekly Earnings	% Difference
Managers	\$1,116*	\$1,398	-20%
Professionals	\$1,283	\$1,442	-11%
Technicians and Trades Workers	\$1,499	\$1,233	22%
Community and Personal Service Workers	\$679	\$980	-31%
Clerical and Administrative Workers	\$864	\$1,081	-20%
Sales Workers	\$621*	\$757	-18%
Machinery Operators and Drivers	\$1,085	\$1,296	-16%
Labourers	\$1,042	\$1,051	-2%
Other/Unknown Occupation	\$1,157	\$1,130	2%
All Occupations	\$1,093	\$1,130	-3%

* Average normal weekly earnings are based on fewer than 10 claims and as a result figures should be interpreted with caution.

Attachment 2.

Jurisdictional comparison of circumstances in which a contractor may be deemed the employer of a labour hire or subcontractor's workers

State/Territory	Circumstances in which a contractor may be deemed employer of a subcontractor's workers	Relevant Act and section
Queensland	Nil	<i>Workers' Compensation and Rehabilitation Act 2003</i>
New South Wales	If a subcontractor does not hold insurance at the time a worker is injured, the contractor is deemed to be the employer. (This type of provision is essentially a compliance mechanism to ensure contractors only engage subcontractors that have workers' compensation policies.)	<i>Workers Compensation Act 1987</i> Section 20: Principal liable to pay compensation to workers employed by contractors in certain cases
ACT	If a subcontractor does not hold insurance at the time a worker is injured, the contractor is deemed to be the employer. (This type of provision is essentially a compliance mechanism to ensure contractors only engage subcontractors that have workers' compensation policies.)	<i>Workers Compensation Act 1951</i> Section 13: Liability of principal for uninsured contractor's injured worker
South Australia	If a subcontractor does not hold insurance at the time a worker is injured, the contractor is deemed to be the employer. (This type of provision is essentially a compliance mechanism to ensure contractors only engage subcontractors that have workers' compensation policies.)	<i>Return to Work Act 2014</i> Section 4(4): Interpretation

State/Territory	Circumstances in which a contractor may be deemed employer of a subcontractor's workers	Relevant Act and section
	compensation policies.)	<p><i>Return to Work Regulation 2015</i></p> <p>Section 5(8): Contract of service and other terms (section 4 of Act)</p>
Victoria	Only individuals engaged by the contractor in dependant subcontractor arrangements are deemed to be workers of the contractor. (This type of provision is essentially a compliance mechanism to ensure contractors do not enter into sham arrangements to avoid workers' compensation obligations.)	<p><i>Workplace Injury Rehabilitation and Compensation Act 2013</i></p> <p>Schedule 1: Further Interpretative Provisions</p> <p>Part 1: Persons Deemed To Be Workers Or Employers</p> <p>Section 9: Contractors</p>
Western Australia	The contractor is deemed to be the employer of all workers engaged by their subcontractor/s. Each contractor is entitled to indemnity from subcontractor/s for the contractor's liability. Where damages are claimed the deeming does not apply.	<p><i>Workers' Compensation and Injury Management Act 1981</i></p> <p>Section 175: When principal, contractor and sub-contractor deemed employers</p>
Tasmania	The contractor is deemed to be the employer of all workers engaged by their subcontractor/s. The contractor is entitled to indemnity from subcontractor/s for the contractor's liability.	<p><i>Workers Rehabilitation and Compensation Act 1988</i></p> <p>Section 29: Liability of principal in case of workers employed by contractors</p>

State/Territory	Circumstances in which a contractor may be deemed employer of a subcontractor's workers	Relevant Act and section
Northern Territory	<p>The contractor is deemed to be the employer of all workers engaged by their subcontractor/s. The contractor is entitled to indemnity from subcontractor/s for the contractor's liability.</p> <p>Note: Common law damages unavailable in Northern Territory.</p>	<p><i>Return to Work Act</i></p> <p>Section 127 Subcontracting</p>

The Employment Services Industry

Introduction

The employment services industry operates to support business by providing employment arrangements that make available workers to carry out work under the direction and control of the business.

There are two mechanisms available to businesses to engage with the employment services industry to employ labour. These are (1) private employment agency; and (2) labour hire arrangements.

Private Employment Agents

The supply of workers through a private employment agency arrangement is characterised by the agent being paid a fee by the business to supply work seekers to that business. While the agent may “vet” potential workers, the final decision to select and hire a particular worker is usually made by the business. Once the worker is engaged by the business they work under their direction and control as an employee or contractor to that business. The private employment agent has no further responsibility to, or employment relationship with, the worker.

In Queensland, private employment agents are regulated by the *Private Employment Agents Act 2005*, the *Private Employment Agents (Code of Conduct) Regulation 2005* and the *Industrial Relations Act 1999* (see Section 3). The legislative definition of private employment agent specifically excludes labour hire type arrangements which are therefore not regulated by the legislation.

Labour Hire

Similar to private employment agents, labour hire agencies are paid a fee by a business to supply work seekers to that business. The distinction with a private employment agency is that the worker is supplied to the business as an employee of the labour hire agency, with the labour hire agency remaining responsible for the payment of wages and other obligations as an employer, even though the worker may work under the day-to-day direction and control of the client business.

Labour hire agencies are not regulated by specific legislation but, as employers, they are regulated by the Commonwealth *Fair Work Act 2009* and by other laws that place obligations on employers. This position is confirmed

by several cases for paid wages and unfair dismissal in the federal jurisdiction.

Table of Contents

Introduction.....	1
1. Regulation of Labour Hire Arrangement: A Study of Queensland Labour Hire Agencies by Daniel Graham (2007)	3
2. ILO C181 – Private Employment Agencies Convention	5
3. Regulation of the Employment Services Industry in Queensland – <i>Private Employment Agents Act 2005</i> and <i>Private Employment Agents (Code of Conduct) Regulation 2015</i>	7
4. Recruitment & Consulting Services Association Australia & New Zealand (RCSA) – A proposal for an Employment Service Industry Code	11
5. Four Corners “Slaving Away” Report.....	15
6. Literature Reviews	18
7. Case Studies – Court Decisions	21
8. Other Inquiries.....	24
9. Victorian Inquiry - Summary of Background Paper (October 2015)	24
10. Bibliography	30

1. Regulation of Labour Hire Arrangement: A Study of Queensland Labour Hire Agencies by Daniel Graham (2007)

As a response to a changing economic, managerial and regulatory environment, labour hire represents a controversial area of legal, industrial and social significance. This paper, written by Daniel Graham, was a thesis submitted for the Doctor of Philosophy (PhD) Degree to T.C. Beirne School of Law, University of Queensland (2007). While this paper provides the reader with an extensive view into labour hire in Queensland and Australia, for the purpose of this paper, only selected chapters will be examined.

A significant issue of labour hire arrangements is due to its unique tripartite nature. The labour hire industry is antithetical to common law employment principles. It is argued that the nature of the labour hire relationship creates problems with allocation of risk and legal responsibility, which are not satisfactorily recognised or resolved by the law. Difficulties arise because there are two parties, a labour hire agency and a “client”, and both assume or split the traditional functions of an employer. The area of labour hire employment however is not specifically regulated, but is subsumed under common law contract of employment principles.

The author explains the growth of labour hire as a reaction to the impact of regulation of adding further costs and obligations on employers. As a consequence of this, there are incentives for employers to go to less or largely unregulated labour markets such as labour hire, which offer the prospect of potentially lower 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 the situation of a primary core market of employees, and a secondary market of employees with fewer privileges. To prove this theory the author did extensive exploratory fieldwork, including surveys and interviews with labour hire agencies, peak business groups, unions and labour hire workers.

A survey was undertaken by 34 agencies as to the benefits of clients arising from labour hire arrangements:

- 19 agencies referred to the advantage in that labour hire workers could be dispensed with relative ease, in comparison to permanent employees who may be entitled to, for example, unfair dismissal legislation;
- 17 agencies expressed that industrial legislation in general (such as the laws covering workers compensation, occupational health and safety, and superannuation), is a driver towards a greater use of labour hire as it allows businesses to avoid these employer responsibilities;
- 19 agencies referred to the convenience factor in recruitment and human relations management.

The author also interviewed three labour hire workers, one white collar female and two industrial workers to determine their views of labour hire arrangements.

1. Female white collar

Advantages

- “The main benefit indicated was the flexibility it gives you, if you are lucky enough, as I have been, to find an employer who will take you on for a long

term assignment and at the same time be flexible with your hours, you can get the best of both worlds”; and

- Interesting employment experiences that labour hire could provide, through getting an insight into different types of work.

Disadvantages

- The nature of the relationship “can sometimes make you feel inferior because you don’t have the benefits of guaranteed pay, holiday leave or sick pay, even though the hourly rate is meant to cover for these things;
- There’s no loyalty to an employer, in light of the fact as a labour hire worker she could be dismissed with 48 hours’ notice;
- Pay did not seem to equate with the amount of work done compared to others; and
- Some permanent workers hold the opinion that labour hire workers were taking their work and found them to be a threat.

2. Industrial workers

In comparison the industrial workers only positive aspect to labour hire arrangements was potentially financially rewarding for professional workers and those prepared to work long hours.

Negatives

- They were both strongly of the view that labour hire was a stressful work environment to be in. One worker commented that most of the people he knew wanted to get out of labour hire, whether they happened to be in manufacturing, the motel industry or construction;
- Insecure nature of the labour hire relationship;
- Inability to obtain loans, as “casual workers”, they often do not qualify;
- Reluctant to make complaints in fear of losing their jobs;
- Very little loyalty by labour hire workers to their host employers and vice versa; and
- Never getting to know the culture of a particular company, due to the shortness of placements.

The thesis concludes that the labour hire industry should be seen as a discreet and distinct part of employment law, that policymakers must give consideration to the consequences of “over-regulation” and that some consideration should be given as to direct regulation of the labour hire market.

The author provides a number of considerations for resolving the issues in the labour hire industry, namely;

- the consideration into a new judicial and legislative approach to labour hire which acknowledge its unique tripartite nature. The Recruitment & Consulting Services Association Australia & New Zealand proposed Code is an example of this and is discussed in part 6 of this paper; and
- the consideration into a basic registrations system of labour hire agencies, that would screen out the unethical and unconscientious operators, who are likely to create unfair competition for bona fide operators through dubious cost cutting and safety skimping measures.

2. ILO C181 – Private Employment Agencies Convention

On 3 June 1997, the International Labour Organisation (ILO) adopted C181 – Private Employment Agencies Convention. Article 2(3) of Convention 181 provides that, amongst other things, the purpose of the Convention is to allow the operation of private employment agencies as well as the protection of the workers using their services, within the framework of its provisions. Convention 181 has not been ratified by Australia, however some States and Territories have considered the Convention in their corresponding legislation. To date, thirty-one countries have ratified the Convention.

Definition of private employment agency

Convention 181 defines the term **private employment agency** (Art 1) as any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

- a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;
- b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks;
- c) other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organisations, such as the provision of information, that do not set out to match specific offers of and applications for employment.

Though these definitions are clearly described, state legislative instruments in Australia separate the jurisdiction of sections (a) and (c) (private employment agencies) from (b) (labour hire or employers). This does not violate Convention 181 as Article 2(4)(b) allows for exceptions to the provisions in respect of certain categories of workers, as well as specified types of services provided by private employment agencies. However, this has resulted in a jurisdictional issue for regulation of employment agencies as services often encompass all three areas.

Protections to workers

The convention provides workers (which includes jobseekers per Article 1(2)) with a number of protections. Article 5 protects workers on equality of opportunity towards employment, without discrimination on the bases of race colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by nation law and practice, such as age or disability. This provision provides a minimal standard of protection for members to meet.

Under article 7 private employment agencies are not legally able to charge directly or indirectly in whole or in part, any fees or costs to the workers. Again members are able to make exceptions of this provision through Art 7(2), which states in the interest of the workers concerned, and after consulting the most representative organisations of employers and workers, the competent authority may authorize exceptions in respect of certain categories of worker, as well as specified types of services provided by private employment agencies. This has once again led to a number of different approaches between ILO members. In essence what this article tries to

achieve is that agencies primary income should be received through charges on the employer and not out of the pockets of jobseekers and workers.

Article 8 provides further protection to migrant workers/ foreign workers through the use of appropriate measures including laws or regulations which provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses, where appropriate to prevent the abuse of migrant workers recruited or placed in its territory by private employment agencies. This aspect is becoming more of importance as the number of migrant workers/foreign workers continues to grow as traveling becomes easier and less expensive (more than 226,800 working holiday maker visas were granted in the last financial year).

Licensing

Another aspect in which the ILO provides wide variation to members is the regulation of licensing. Article 3(2) provides that a member shall determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate nation law and practise. The primary reasoning for this article was to provide members a way in which they could manage the sector through the use of a database. This would give members more control and a better understanding of the market.

Essence of the C-181 Convention

Overall the convention provides members with a sufficient but flexible framework that, when followed in good faith, would result in legislation that allows for the operation of a financially successful private employment agency sector (the primary income being through a third party), as well as a system that ensures the safety of workers and job seekers (predominantly through articles 5, 7, 8, 11).

3. Regulation of the Employment Services Industry in Queensland – *Private Employment Agents Act 2005* and *Private Employment Agents (Code of Conduct) Regulation 2015*

Legislative Background

The licensing and regulation of employment agents in Queensland commenced with the *Labour Exchange Act of 1915*. This was replaced by the *Labour and Industry Act 1946*, which contained similar provisions. However regulations regarding the operation of the Act were repealed the following year.

Although the Commonwealth Employment Service had been established in 1946, demand for the services of private employment agents remained and in 1963 the *Labour and Industry Act 1946* was amended to reactivate the licensing and regulation provisions. These regulations were cited as the *Private Employment Regulations of 1963*. This legislation was replaced by the *Private Employment Agencies Act 1983*, which was amended in 1985 to provide, among other things, for theatrical performer and model agents to charge applicant employees a prescribed fee.

A review from 2000-2005 to address National Competition Policy (NCP) led to a repeal of the legislation after which the *Private Employment Agents Act 2005* (PEA Act) & *Private Employment Agents (Code of Conduct) Regulation 2005* (PEA Code 2005) were introduced.

In accordance with the findings of the NCP Review, the PEA Act and PEA Code 2005 do not require agents to be licensed to operate in the industry. The PEA Code provides for standards of conduct and service that must be provided by agents to work seekers. If those standards are not complied with agents can face legal sanctions including prosecution and ultimately, injunctions to prohibit them from operating in the industry. The PEA Code 2005 was drafted in consultation with representatives of stakeholders including union members and employment agent groups.

In September 2015, the *Private Employment Agents (Code of Conduct) Regulation 2015* (PEA Code 2015) repealed PEA Code. Consideration of regulatory activity under the PEA Code 2005 and its objectives indicated no substantive issues which needed to be addressed and that the PEA Code 2005 adequately provided for standards to protect work seekers without imposing onerous obligation upon private employment agents. It was considered that if the required standards were discarded, work seekers and others in the industry, could be left vulnerable to unsatisfactory conduct by private employment agents. It was concluded that, maintain the Code in its current form would deliver the greatest net benefit to the community. As such the provisions in PEA Code 2005 were continued with minimal change, and a new PEA Code 2015 repealed PEA Code 2005.

Definitions and Jurisdiction

In the PEA Act a private employment agent is defined under Section 4 (1), as a person, in the course of carrying on business and for gain—

- a) offers to find—

- i. casual, part-time, temporary, permanent or contract work for a person; or
- ii. a casual, part-time, temporary, permanent or contract worker for a person; or
- b) negotiates the terms of contract work for a model or performer; or
- c) administers a contract for a model or performer and arranges payments under it; or
- d) provides career advice for a model or performer.

Section 4(3) of the PEA Act provides that a person is not a private employment agent if, for an agreed rate of payment to the person –

- a) the person makes a worker of the person available to perform work, whether under a contract of service or a contract for service, for a client of the person; and
- b) the worker works under the client's direction; and
- c) the person is responsible for performing the obligations owed by a person to the worker, including paying the worker for the work.

The provision excludes “labour hire” arrangements (i.e. Company A provides workers to Company B to perform work under Company B's direction but the workers remain employees or contractors to Company A) from the definition of private employment agent and therefore from regulation by the PEA Act. In the private employment agent arrangement, workers become the employees of, or contractors to the company with which they are placed.

As a company that provides employees under a labour hire arrangement remains their employer, all the legislative regulation of the employment relationship applies to the labour hirer. Given the industrial relations jurisdictional arrangements in Queensland since 2010 where private sector employment is regulated by the Commonwealth, the *Fair Work Act 2009* (FW Act) is considered to provide for the regulation of labour hirer/employers.

Protection to Workers

The PEA does not directly provide the protection outlined in the ILO, however it does require agents to have a reasonable knowledge of the PEA Act, the PEA Code 2015, and any other Act relevant to the private employment agent's business including (Part 2 Div 1 Sect 5) –

- *Anti-Discrimination Act 1991*
- *Fair Trading Act 1989*
- *Work Health and Safety Act 2011*
- *Workers' Compensation and Rehabilitation Act 2003*
- Commonwealth FW Act

Fee Charging

Section 408D of the *Industrial Relations Act 1999* (IR Act) provides that a private employment agent must not directly or indirectly demand or receive from a person, other than a model or performer, looking for work (a **work seeker**) a fee for finding, or attempting to find, the person work.

An exception to this is that private employment agents and managers of models and performers are permitted to charge fees of a prescribed percentage from models and performers.

The PEA Code 2015 prohibits the charging of fees from Australians seeking work outside Australia or from overseas workers seeking work in Australia. The PEA Code 2015 also prohibits agents from charging fees for other services as a condition of finding work for a work seeker.

This upholds the provisions set out by the ILO and the major protection provided by Queensland's legislation, that an agent's primary income should be received through charges on the employer with whom workers are placed and not out of the pockets of jobseekers and workers.

Registers

The PEA Code 2015 requires business to maintain registers of workers, employers and placements.

These provisions create a record, which can be traced and used in any allegations against private employment agents.

Licensing/ Injunctions and Code of Conduct

The PEA Act and PEA Code 2015 do not require agents to be licensed. However they establish a number of standards of service and conduct for agents which if not complied with in many cases are grounds for prosecution and if the agent is convicted of an offence, injunctions prohibiting their continuing operation in the industry. Some of those standards include –

- a) Agents must act honestly, fairly and professionally in the conduct of the agent's business.
- b) Agents must take reasonable steps to ensure the agent's employees comply with the PEA Act and PEA Code.
- c) Agents must not do anything that may unfairly jeopardise a work seekers current work or future work opportunities.
- d) Agents must not use information about a work seeker for a purpose other than finding work for the work seeker.
- e) Agents must not refer a work seeker to a person in Australia who is looking for workers if the work seeker is not legally entitled to work in Australia.
- f) Agents must not charge fees as a condition for finding work or for other services.
- g) Agents must provide written notice to employers of their fees for services.
- h) Agents must keep records of workers, employers, placements and correspondence as prescribed.
- i) Agents must provide information statements about the PEA Act and PEA Code to work seekers.
- j) Agents must provide financial statements of fees to models and performers.

The PEA Code 2015 also provides for injunctions to be imposed on agents who contravene the fee charging prohibitions in the IR Act or a range of serious and sexual offences in the Criminal Code.

This system, which requires compliance with standards of conduct, restricts those who do not comply from continued operation as an agent giving the same effect as restricting operations in the industry without a license.

PEA Act and PEA Code 2015 – The System Overall

The PEA Act and PEA Code 2015 in conjunction with the IR Act provide specific protections to work seekers that exceed those in ILO Convention 181 by providing for a prohibition on fee charging from work seekers and prescribing specific standards of conduct and service (including knowledge of other relevant employment related legislation) which if not complied with may lead to prosecution and the imposition of injunctions which will prohibit an agent's continued operation in the industry.

However the legislation is limited in its application only to the classic private employment agent model. Labour hire type arrangements – on the basis that a labour hirer is no more than a specialised type of employer – are excluded as they are regulated by the same laws that apply to any other employer. It is arguable whether that approach is preferable given the increasing usage of labour hire arrangements and the volume of common law and statute law regulation affecting employment.

4. Recruitment & Consulting Services Association Australia & New Zealand (RCSA) – A proposal for an Employment Service Industry Code

Background

The RCSA is the leading industry and professional body for the recruitment and the human resources services sector in Australia and New Zealand. It represents over 3,300 companies and individual members. An Australian Competition and Consumer Commission endorsed RCSA Code for Professional Conduct has operated since 2003, but only in respect of RCSA members.

After consultation with the Commonwealth Government, the RCSA recently released a proposed Employment Services Industry Code (ESIC), which aims to provide a single national framework for the regulation of all providers of a wide range of employment services including 'on hire/labour hire' employment and contractual services. It is not intended that the ESIC would apply to employment services in respect of models and performers.

The proposed ESIC aims to regulate the conduct of employment services and employers who use employment services at all points of the labour supply chain and eradicate unfair practices in engagement of labour.

It is proposed that the ESIC would operate under the Commonwealth *Competition and Consumer Act 2010* (subject to its approval as a regulation by the Commonwealth Government). At the request of the Commonwealth Government the RCSA is conducting public consultation on the proposed ESIC through distribution of a draft code and consultation sessions. Public consultation was conducted between 15 June 2015 and 14 August 2015.

General Features of the ESIC

Its objectives include regulating the role of an employment services provider in a well-functioning labour market, promoting and supporting good faith dealings in the supply of employment services, regulating standards of conduct in the industry, ensuring transparency, certainty and minimisation of disputes, providing a dispute resolution process and promoting the principles of ILO Convention 181.

It does not override, but operates in addition to any law of the Commonwealth, a State or a Territory that applies to an employment services provider. In relevant instances it requires compliance with applicable laws (e.g. fee charging restrictions and record keeping).

It covers a wide range of employment provider services including:

- Placement services – work seekers or information about work seekers is presented for employment or engagement as a contractor by the customer (equivalent to a private employment agent),
- On-hire employee or contractor services – an employee or contractor of the employment services provider performs work under the customer's instruction (equivalent of a labour hire agency),
- Contracting services – completion of a defined scope of work for the customer using either employees or contractors of the employment services

- provider working under instructions of the customer (equivalent of a labour hire agency),
- Contractor management services – undertaking responsibility for the performance of any aspect of a contract for work seeker performance without directly employing or engaging the work seeker,
 - Workforce consulting services – identification and response to the customer’s workforce issues and the recommendation and implementation of strategies to assist the customer achieve business success, and
 - Work seeker representation services – representation, advice or assistance to a work seeker to find, retain or prepare for work.

It provides for an Employment Agents Advisory Council whose members are appointed by the responsible Minister and include; an independent chair, a person who is a member of the Australian Competition and Consumer Commission, three persons representing employment services providers and one person representing employee organisations. The Council’s functions include advising the Commission on content and operation of the code and resolving disputes.

It extends to the regulation of conduct of employment service providers and agents engaged by them in in dealings outside Australia.

It provides for an independent dispute resolution procedure, which may be escalated to arbitration. However its proposed status as a Commonwealth regulation would also allow for access to legal remedies under the *Competition and Consumer Act 2010* including compensation, prosecution and injunctions.

It provides for written employment agreements to meet prescribed content standards.

It includes vulnerable worker protections (e.g. preventing exploitation and child employment protection).

Specific Features - Code of Conduct/Professional Knowledge

The RSCA code includes provisions similar to Queensland’s PEA Code including:

- 1) Obligations to act in good faith
- 2) Keeping customers and work seekers informed
- 3) Act in accordance with its customer’s instructions
- 4) Rights to present
- 5) Protection of private and confidential information

Like the PEA Code 2015, the ESIC would require employment services providers to develop and maintain a satisfactory and up to date level of relevant professional knowledge and understanding of this code, and any other laws relevant to the conduct of its business as an employment services provider.

Specific Features - Fees

In regards to fees charged from work seekers fees, the ESIC does not provide any direct provisions but requires compliance with applicable laws, for example:

- 1) An employment service provider must not charge to a worker seeker any fee that is not permitted by law.
- 2) An employment services provider may only charge a fee to a work seeker provided that all the following conditions have been met:
 - a) The employment services provider has disclosed the charge in writing to its customer and to the work seekers;
 - b) The employment services provide has obtained professional advice that the fee and its amount is lawful and not unconscionable.

Specific Features - Dispute Resolution

The ESIC requires the employment/designation of a code compliance manager and requires them to respond to code complaints in accordance with a written complaints handling procedure developed by the employment services provider consistently with the objects of this code and reviewed annually. After receiving a complaint against either or both of an employment services provider, agent or employee in writing, it would be the code compliance manger's responsibility to take reasonable steps to investigate and conclude the complaint within 20 business days of receiving the complaint.

This does not affect the right of a party to bring a code complaint to legal proceedings, whether under an employment services agreement or otherwise.

Record Keeping

The ESIC would require employment service providers to maintain accurate and thorough records of each employment services transaction in which it is involved. The records would also be required to record all fees charged to work seekers, any code complaints and upon reasonable request, make it available for inspection for any statutory body that has authority.

Like the current legislation the proposed code would require employment services provider to make and maintain records (Sect 109)

- 1) An Employment services provider must make and maintain accurate and thorough records of each employment services transaction in which it is involved.
- 2) Without limiting 1) an employment services provide must make and keep such accounts and records as are required by or under:
 - a) An Australian law; or
 - b) An employment services agreement to which the employment services provides is a party.

The records would also be required to record all fees charged to work seekers and, upon reasonable request, make it available for inspection by the Commission and any statutory body that has authority to inspect it in connection with the investigation of any alleged breach of human rights in work and pre-work areas. Employment services providers would be required to keep in its possession all records and accounts made for at least 6 years after the day the record or account came in existence. These provisions are similar to those already operating in the PEA Code 2015.

RCSA and the ESIC – The Overall System.

The proposed ESIC has a much wider range of objectives both in the type of conduct with which it deals including many commercial arrangements between an employment services provider and a customer (employer) and the range of services within its jurisdiction which most notably includes labour hire type services excluded from Queensland's legislation. As a Commonwealth regulation it would also provide a common set of standards and obligations across all States and Territories. In one aspect it does fall short of the Queensland legislation by failing to cover models and performers seeking work.

Consequently, the proposed ESIC may on balance be seen as complementary to Queensland's legislation and a desirable addition and extension of regulation in an industry of both social and financial significance. As far as it can be ascertained it is not intended to and does not operate to negate any of our existing legislative requirements. In fact it consistently states that employment services providers must comply with relevant legislation.

During its development as a mandatory code or after its establishment, the ESIC could be considered as a legislative vehicle to include additional regulation of the employment services industry especially labour hire arrangements if that is considered appropriate.

Consultation Period

From June to August 2015, RCSA conducted broad public consultations, through webinars, face-to-face presentation in Melbourne, Sydney, Brisbane Adelaide and meetings with interested stakeholders. There were over 80 responses covering a wide range of views. The majority of submissions strongly supported the introduction of the ESIC as a prescribed industry code, on grounds of national consistency, fairer competition, raising professional standards, improved transparency, stronger work seeker protections, eradication of unfair practices and more effective dispute resolution and enforcement. Some submissions queried the need for the Code.

Following the first consultation, the RCSA has carried out a second consultation. The consultation sought submissions supported by evidence on the question of whether the Service Delivery Standards and Business Diagnostic Standards:

1. could achieve the market coverage and penetration of a mandatory prescribed industry code within a comparable timeframe;
2. could be made to extend to cover business and individual standards of users of employment services;
3. could be supported by a dispute resolution standard equivalent to that proposed in the ESIC; and
4. could give guidance to courts having to identify by reference to any applicable industry code and good faith standard whether parties had acted unconscionably.

The consultation period closed on 31 December 2015. To date, the findings of that consultation have not been released.

5. Four Corners “Slaving Away” Report

Introduction

On 4 May 2015, the ABC’s *Four Corners* Report “Slaving Away” claimed to have uncovered unscrupulous labour hire companies operating on vegetable farms and in chicken factories. It found that Working Holiday Visa holders (417 workers) are subjected to long working hours, degrading living conditions and were unpaid wages, and that women who came forward to make allegations were most at risk.

The following segment outlines the alleged cases aired in “Slaving Away”

Baiada Adelaide Chicken Factory

It was raised that two foreign workers worked in the Baiada Adelaide chicken factory through a labour hire contractor named KC Fresh Choice. It was alleged that when KC Fresh Choice took over, the foreign workers’ pay was reduced to \$18 an hour, considerably lower than the award wage, which is above \$25 an hour. Both workers were made to work up to 18 hours a day, 7 days a week, without a toilet or meal break for hours and hours on end. One worker kept a personal logbook which showed that he had been underpaid by \$30,000, whilst the other worker was owed \$28,000 in unpaid wages.

These workers were just two of the 100 labour hire workers under Baiada in the factory where it was believed all workers were being unfairly mistreated. Through the use of a hidden camera and microphone, *Four Corners* was able to show Mo receiving a security pass belonging to a worker no longer at the factory, from a supervisor at Baiada. It was insisted that not only are Baiada exploiting workers but they are employing workers on expired or invalid visas.

This is not the first time Baiada have been in hot water with exploitation allegations.

Between November 2013 and June 2015, the Fair Work Ombudsman (FWO) also investigated Baiada, on a separate occasion. The FWO found:

- non-compliance with a range of Commonwealth workplace laws;
- very poor, or no governance arrangements, by all parties in the various labour supply chains; and
- exploitation of a labour pool comprised predominantly of overseas workers in Australia on the 417 working holiday visa.

In October 2015, Baiada Chicken agreed to a proactive compliance partnership with the FWO and declared it has a moral and ethical responsibility to stamp out contractors’ unlawful practices. Baiada set aside \$500,000 to reimburse any workers found to have been underpaid from January 2015.

Cucumber Pickers – Bundaberg

In Bundaberg cucumber pickers were being paid between \$12 and \$14 an hour, well below the legal hourly rate. In their search *Four Corners* found an Australian worker on the same farm, doing the same job, earning over \$20 an hour.

South Australia – D’VineRipe

D’VineRipe produces approximately 15,000 tonnes of tomatoes annually, propelled by hundreds of migrant workers. They have been displayed as a model employer in South Australia by the Government, even going to the extent of giving them \$2.5 million in funding. *Four Corners* reported that there up to a 100 workers were not being paid correctly. It was claimed that CNC Labour Hire supplies D’VineRipe with migrant workers on varying visas and rates of pay, and that one worker Stephanie was underpaid up to \$5 every hour. A number of workers were claimed to be lured to Australia by a Taiwanese travel agent called Glory Group who allegedly charged them almost \$1,500 in order for them to obtain a job. When they arrived they were taken to a house to live in with 10 other migrant workers. Then a worker for Glory Group coached the migrants on how to pass the interview. One worker made a sexual harassment claim, and was consequently dismissed by D’VineRipe.

Gippsland Victoria – Covino Farms

Convino produces packaged salads and pre-cut vegetables to Woolworth supermarkets, KFC and other fast food outlets. It’s alleged that Convino has around 200 labour hire workers through Chompran Enterprises who are working for \$14 an hour, \$7 below the award. The company has also received more than 30 improvement notices for breaches of workplace health and safety laws in the past 7 years.

Responses since the report

After the allegations were brought to light Cavino Farms and D’VineRipe terminated their agreements with their labour hire contractors. However a spokesman for Akers Farm says the company rejects the allegation that its workers are abused. Furthermore KC Fresh in a written response denies it is using illegal workers and that *we (KC Fresh) adhere to the Modern Award for poultry processing as set out by Fair Work Commission*. The letter also states that the conditions outlined in the report are “exaggerated and unsubstantiated”.

Akers Farm – Sweet Potato

It was alleged that hostels were recruiting people on 417 visas to work at the largest sweet potato grower in Queensland, Akers Farm. It is alleged that the owner and farm supervisor regularly verbally abused workers. An English backpacker on a 417 visa said that the owner was outright angry that they had sent her and her friends to the workplace rather than workers from Asia. While no direct losses of income occurred to these workers, Katie and her friends had their wages withheld for a number of days after they were told they would be paid.

417 Visa Holder Issues and other issues

Allegations of sexual harassment was also raised in the *Four Corners* Report. Currently, a Working Holiday Visa Holder can extend their visa from the initial year to two years, if the holder has worked three months in regional Australia and has a *Working Holiday visa: Employment Verification Form* signed by the employer. Allegations were raised that in exchange for a signature, worker were asked to perform sexual favours or pay a lump sum. It was also alleged that some labour hire companies are bringing in people to sexually service the workers.

6. Literature Reviews

The purpose of the literature reviews below is to provide a greater general understanding of the labour hire industry overseas.

Managing Labour Migration in Malaysia: Guest Worker Programs and the Regularisation of Irregular Labour Migrants as a Policy Instrument written by Amarjit Kaur (2014).

Malaysia was built on immigration and, like other labour-importing countries, acknowledges the case for temporary labour migration as a solution to labour shortages in the country. This article written by Amarjit Kaur was written in the Asian Studies Review 2014 and is separated into two segments, which provide a rich understanding into how labour hiring and outsourcing has evolved in Malaysia throughout the last 100 years. The first section examines the introduction of regional migration pathways in Southeast Asia from the 1970s to the early 1990s and the development of temporary guest worker programs in Malaysia. The second half explores Malaysia's immigration frameworks since the 1990s and contextualises the government's expanded role in regulating labour migration alongside endorsing bilateral accords with labour-sending countries including the Philippines, Cambodia, Burma, Laos, Vietnam and Indonesia. The following paragraphs will be a summary of the article.

While labour hiring in Malaysia dates back before WWII it was not until 1984 – 1986 that the government signed labour agreements with neighboring countries and numbers of labour hire workers drastically rose. Under these accords migrant were recruited in their own countries and provided with the necessary documentation to migrate and work. Thirty years on though the Malaysian systemic policy sequence is “running in circles”. The cycle begins by allowing “regulated” entrance but inadequate supervision results in a huge influx. The government then reacts by implementing a freeze on new admissions, followed by roundups/amnesty-cum-regularisation programs. After, the police conduct raids at workplaces and dwellings where illegal migrants are sent to detention camps pending deportation. Once the government is happy they have “resolved the issue” they reopen borders for legal migrant workers inevitably starting the process again. If the government continues a high dependence on overseas cheap labour hire workers they need a long-term approach which does not continue the cycle of roundups, deportations, amnesties and regularisation.

While expressing the abundant growth achieved through cheap foreign workers the author presents the negatives that have originated as well. Including that the outsourcing system has transformed many migrant workers into bonded labour, being traded at will among labour brokers. As a consequence of poor working conditions and entitlements, a number of local workers have been left out of the labour market.

The author concludes the article with their own personal beliefs. She concludes that it is unrealistic to depend on a "never-ending" supply of cheap foreign labour, while the steps taken in 2011 introducing a minimum wage for all workers may lead to the availability of a greater pool of local workers. Inevitably Malaysia will need to improve the quality of its labour force and review its policy, possibly in Malay preferences in employment and universities to address the root causes of loss of talent and the labour shortages in the country.

“Danger” in labour hire by Cecile Meier.

A raft of new labour-hire companies have set up in post-quake Christchurch, prompting concerns from unions and audits from the Ministry of Business, Innovation and Employment (MBIE). This article written in August 2014 is from “The Press”, a New Zealand owned newspaper company, which depicts the changes the recent earthquakes have had on workers and the labour hire industry. After recent earthquakes in Christchurch, a number of residents moved resulting in major labour shortages. A statement by the director of Tradestaff, an established labour hire company, reinforces this saying “that they have probably 30 – 40 vacancies that they can’t fill”, and this is the driving force to 17 new labour hire businesses. The article outlines that these new labour hire businesses are not necessarily playing by the same code of ethics and stringent health and safety standards, as of the 17 newly listed business only 5 registered with the RCSA. This is leading to the exploitation of migrant workers, receiving up to \$5 dollars less than if they were employed directly. Furthermore workers and employers are being charged up to \$6000 dollars each by labour hire businesses.

Overall the article provides the reader with a good understanding of the current situation, but does not address a method that the government, or an appropriate body, can take in order to address the exploitation. The author does however discuss that the MBIE is in the process of auditing 36 labour hire companies in Christchurch.

A Review of Licensing Arrangements for Labour Hire Firms by Dr. Elsa Underhill (2013).

In the past decade, a significant number of countries have either introduced licensing arrangements, or strengthened the requirements of existing licensing schemes. The Review paper, written by Dr. Elsa Underhill of Deakin University, endeavors to determine the effectiveness of various licensing arrangements in improving employment conditions for temporary agency workers. The paper undertakes a comparative analysis of licensing arrangements in five countries, including Japan, Singapore, South Korea, United Kingdom and the United States of America.

The author examines a number of key features of effective licensing systems including:

1. A United Kingdom type licensing system which does not create barriers to entry and does not offer protection to agency workers’ employment conditions, which only requires the supply of key information from the licensee such as contact details. (This is very similar to the states and territories of Australia that require licensing). Note that the United Kingdom does provide a licensing system under the *Gangmasters (Licensing) Act 2005*, for employers in the agriculture, shellfish and fishing industries. Applications are first made to the Gangmaster Licensing Authority (GLA), where various inspections are undertaken. Once a license is granted, the GLA will provide the details of the licensees on a public register and carry out targeted compliance checks.
2. Licensing systems which incorporate agency worker specific employment practices. The Japanese licensing scheme has seen a number of amendments in the past 25 years, from general prohibitions on agency work to freeing up practices and eventually reintroducing some of the earlier

restrictions after public outcry. (While Japan's licensing system regulates agency placement practices, the lack of enforcement, in the form of guidance rather than penalties, means there is no deterrent from acting illegally).

3. A licensing system that creates a barrier to entry, without improving employment standards. This is the case in Singapore where, until 2011, penalties in regards to operating without a license equated to \$5000 dollars. The fine was increased to \$80,000 and/ or up to two years imprisonment (\$160,000 and/or up to four years imprisonment for repeat offenders) diminishing the incentive to operate without a license. The system aims to encompass importers of foreign labour, rather than emphasise the importance of labour law compliance.

The Review Paper also compares the principles of the ILO Convention 181, which promotes the licensing or certification of employment agencies to mitigate the risk of "malpractice and abuse of clients". While it outlines the benefits associated to licensing and the requirements in regards to administrative and enforcement, many members do not have the financial resources and government stability to successfully implement licensing (Japan, Italy and France are the only countries from G20 to ratify).

The author concludes that "licensing is regarded as a means to an end, and not an end in itself." She further provides that "its effectiveness is intricately related to the nature of the labour laws which the licensing system supports." The Review Paper can be found at <http://dro.deakin.edu.au/view/DU:30064950>, for a further detailed overview of licensing arrangements in the five countries.

7. Case Studies – Court Decisions

FP Group Pty Ltd v Tooheys Pty Ltd [2013] FWCFB 9605

"Labour-hire was employer technical points rejected" by Workplace Info.

In 2013, the Fair Work Commission found the labour hire company, FP Group Pty Ltd, to be the true employer of the relevant workers and responsible for worker entitlements. Until 1991, all electrical trades work at Tooheys brewery was conducted internally by persons who were indisputably employees of Tooheys. However, Tooheys became dissatisfied with union-endorsed work practices and sought a significant change, which led to a contract with Feyman Pty Ltd a labour hire company to provide Tooheys with its required electrical services and labour, in a more flexible and efficient way. In 2011, the labour hire company lost the contract which led to employees taking action in unfair dismissal applications on Tooheys, arguing that Tooheys was the actual employer or at least the joint employer. In the first instance, Deputy President Sam dismissed the unfair dismissal application and on appeal referred the matter to a Full Bench. The Full Bench noted the concept of joint employment involving labour hire arrangements as a 'considerable development' but declined to act in this regard, as no Australian court had approached the analysis on the basis that the exercise of control over the worker by the hirer of labour hire arrangement may render the hirer, together with the labour hire company, a joint employer of the workers. After an analysis of the current law in detail, the Full Bench presented their findings stating *in any event, for Tooheys to have been a joint employer of the applicants, there must still have been express or implied contracts of employment between Tooheys and the applicants. For the reasons already stated, there were no such contracts' and thus FP Group was refused permission to appeal.*

Forstaff & Ors v the Chief Commissioner of State Revenue [2004] NSWSC 573

"Obligation to pay for service defines labour hire company as employer" by Workplace Info.

In July 2004, the NSW Supreme Court rejected a bid by Forstaff, a casual labour hire company, to recoup almost \$4 million dollars of payroll tax, after it found the company's obligation to pay workers for work performed created a contract of employment. Forstaff argued that the relationship between workers from 1994 to 1998 was not that of employer-employee, which would make it subject to the Pay-Roll Tax Act. Evidence provided by the Chief Commissioner of State Revenue to the courts showed Forstaff referring to "employees" in documentation given to workers. Further, Forstaff was responsible for payment, deducted PAYE and covered them for workers' compensation, which would not have occurred if the workers were merely contractors.

Awareness by Working Holiday Maker

"Backpacker rip-offs come out into open" by Pat Hannan, Growcom CEO (August 2015).

This article expands on some of the current issues around backpackers on 417 Working Holiday Visas, providing that *backpackers are becoming increasingly likely to make a complaint against their employers where they believe they have been unfairly paid or mistreated.* Figures provided in a joint submission by federal government agencies, including the FWO, indicate that backpackers are becoming

more knowledgeable about their rights and how to make a complaint. Commercial Services Manager, Donna Mogg, said that, in the past three years, the number of complaints from all 417 Working Holiday Visa holders to the FWO have jumped from 216 in the 2011-12 financial year to 1042 in the 2013-14 financial year, and that this trend is likely to continue. In addition, data showed a total of \$837,694 has been recovered for a total 2418 workers whose complaints have been finalised (to 31 December 2014). Ms Mogg concluded, *These figures are for all industries which employ 417 Working Holiday Visa holders, not just production horticulture, but the warning is clear. We believe that it is only a matter of time before the Fair Work Ombudsman catches up with the wrongdoers.*

Fair Work Ombudsman v Shrek Pty Ltd & Anor [2010] FMCA 907

“\$184,250 in fines for underpayment of Newcastle workers” by the FWO.

The FWO outlines a case where a labour hire company and its sole owner-director were fined a total of \$184,250 for deliberately underpaying 18 workers. Between March 2006 and June 2008, Shrek Pty Ltd (labour hire company) underpaid 12 clerical workers and six drivers a total of \$356,000 dollars. The Fair Work inspectors discovered the underpayments when they conducted a random audit of the company in 2008, finding that the workers were underpaid the minimum hourly rate, casual loadings, minimum shift pay, afternoon and night shift loadings, annual leave loadings and penalty rates for weekend, public holiday and overtime work.

Unlawful Deductions on Cleaners.

“Cleaners allegedly had \$130,000 unlawfully deducted from their wages” by the FWO.

In February 2014, the FWO outlined a case where a Melbourne recruitment and labour hire company allegedly falsified its employment records and unlawfully deducted tens of thousands of dollars from the wages of dozens of cleaners. In documents filed in the Court, the FWO alleged that Oz Staff Career Services unlawfully deducted a total of \$130,183 from the wages of 102 employees between December 2011 and May 2013, including “administration fees” of around \$25 a week and lesser amounts for ‘meal fees’. The FWO submitted that the deductions were unlawful because they were not principally for the benefit of the employees and the employees had not authorised them in accordance with workplace laws. Oz Staff Career Services faced maximum penalties of between \$33,000 and \$51,000 per breach, while the individuals each face maximum penalties ranging from \$6600 to \$10,200 per breach. The matter has not yet been heard before the Federal Circuit Court of Australia.

Federal Magistrates Court of Australia [2012] FMCA 846

“Court imposes \$48,000 penalty over underpayment of Indian student” by the FWO.

In October 2012, operators of a Victorian labour hire company were fined a total of \$48,000 for underpaying an Indian student. Butler & Blackberry Melbourne Pty Ltd, sent an Indian student to work in the junior mess hall at HMAS Cerberus naval base in Melbourne, where he was underpaid a total of \$8,990 for more than 430 hours work in 2010. Federal Magistrate John O’Sullivan found that both Scalia (sole director and part owner) and Blackberry Melbourne, had demonstrated a *general disregard for compliance with Australia’s workplace laws*. He also said *there is a need for general*

deterrence and to ensure employers understand they must take steps to ensure correct employee entitlements are paid, and handed down the high penalty.

Underpayment of 416 Seasonal Worker Program Visa Holders

“Queensland labour hire operator allegedly underpaid overseas workers \$77,000” by the FWO.

The FWO reported that a labour-hire operator is facing Court for alleged exploitation of workers from Vanuatu to pick fruit and vegetables in Queensland. The FWO has taken legal action against Queensland man Emmanuel Bani and his company Maroochy Sunshine Pty Ltd. Mr Bani allegedly recruited 22 workers from Vanuatu on 416 Seasonal Worker Program in July 2014 and was required to provide the workers with at least 30 hours of work each week and weekly wages of more than \$500. Mr Bani allegedly made only sporadic fruit and vegetable picking work in the Lockyer Valley, Sunshine Coast and Bundaberg areas over four to seven weeks. The FWO reports that thirteen workers were paid nothing at all and others were paid between \$50 and \$300, totaling an underpayment of \$77,649. Mr Bani faces penalties of up to \$10,200 per contravention and his company faces penalties of up to \$51,000 per contravention. The matter was listed before the Federal Circuit Court in Brisbane for a directions hearing.

Fair Work Ombudsman v Cardamone [2015] FCCA 3238

“Business fined \$42k over underpayments” by the FWO.

In December 2015, the FWO reported that a Melbourne company was fined \$42,840 after deliberately underpaying two workers. The penalty was imposed on the Director, who underpaid two workers a total of \$1970 for short periods in 2013 and 2014. He also breached sham-contracting laws by knowingly misclassifying one of the employees as a contractor and contravened his pay-slip obligations. A Court Order was also imposed in August to back-pay the two workers, however, it was not complied with. Judge Riley noted that Cardamone had been involved with five failed companies with combined deficiencies of over \$26 million and that he was disqualified by ASIC in 2011 from managing a corporation for five years.

Sydney labour hire operator alleged underpayment

“Sydney labour-hire operator allegedly underpaid 19 overseas workers more than \$45,000” by FWO.

In January 2016, the FWO reported that a Sydney labour-hire company is facing Court for allegedly underpaying 19 overseas workers, by more than \$45,000. The employees were also, allegedly, asked to pay bonds of up to \$300, which was unlawfully deducted from their wages. Further, pay slip laws were allegedly contravened. Ms Yan Hu, who operates the company faces penalties of up to \$10,200 per contravention and Global Express Consultancy faces penalties of up to \$51,000 per contravention. A directions hearing was listed for 5 February 2016 in the Federal Court in Sydney.

8. Other Inquiries

In response to the ABC *Four Corners* Report, the Victorian and South Australian State Governments announced inquiries:

- Victoria commenced an inquiry into the labour hire industry and insecure work to investigate the practices of labour hire companies, insecure work, sham contracting and the abuse of visas to avoid workplace laws and undermine minimum employment standards. Public submissions were due by 27 November 2015 and supplementary submissions by 29 February 2016. The Inquiry is required to report to the Victorian Premier and the Minister for Industrial Relations by 31 July 2016. Available at :
<http://economicdevelopment.vic.gov.au/about-us/strategies-and-initiatives/inquiry-into-the-labour-hire-industry-and-insecure-work>
- South Australia is also conducting an inquiry into labour hire practices to consider remuneration underpayments, exploitation of workers and provide recommendations to ensure a secure industry. Submissions closed on 27 July 2015. The inquiry is being conducted by the Economic and Finance Committee of the Parliament of South Australia. As part of the inquiry the South Australian Parliament's Economic and Finance Committee will visit the Riverland from 2 – 4 March 2016 to hear labour hire concerns and issues from regional stakeholders. The Committee will hold a public hearing on 3 March 2016 at the Berri Council Chambers in order to learn more about labour hire practices in regional South Australia. Available at :
<https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CId=292>

9. Victorian Inquiry - Summary of Background Paper (October 2015)

Chapter 3 - Labour Hire

- The major users of labour hire services nationally are said to be the IT and telecommunications, construction and trades, health care and medical sectors.
- Over the past five years the number of labour hire enterprises in Australia has grown significantly, including increased operations in regional areas. There are now an estimated 5,798 temporary staff services enterprises across Australia, with IBISWorld suggesting around a quarter of these are located in Victoria.
- Estimates of the proportion of labour hire workers in the Australian workforce are imperfect, and vary due to different methodologies, data sources and time periods. Two recent analyses indicate labour hire workers make up between 1.2 per cent and 2.5 per cent of Australian workers. In 2012, the Independent Inquiry into Insecure Work in Australia (Independent Inquiry into Insecure Work), commissioned by the Australian Council of Trade Unions (ACTU), estimated the number of labour hire workers to be between 2 and 4 per cent of the workforce. Applying these percentages to the current number of employed persons nationally equates to between 235,330 and 470,600 workers. Regardless of the

precise figure, it is clear that labour hire as a form of work has stabilised as a significant feature of working arrangements in Australia.

- 3.1 Definition and prevalence and nature of labour hire arrangements - Labour hire arrangements typically involve a 'triangular relations' in which a labour hire business (the supplier) supplies the labour of a worker (the worker) to a third party (the host) in exchange for a fee. In a labour hire arrangement, there is no direct employment or contractual relationship between the host and the worker.
- A recent IBISWorld report shows 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 growth level through to 2020 – 2.
- 3.2 – Impact of labour hire arrangements for workers, businesses and the community
- Potential benefits of labour hire arrangements for workers, businesses, the community and the economy include:
 - greater operational flexibility for hosts in managing workforce options, providing the capacity to temporarily increase labour during times of high demand, without affecting ongoing workforce numbers.
 - may provide greater flexibility in worker hours to assist in accommodating family responsibilities, study or other commitments.
 - allows hosts to reduce some operating costs, such as payroll tax, costs of compliance with labour regulations and internal human resources costs.
 - may provide a path to other employment, and/or ongoing employment. They provide employees with the opportunity to gain skills and experience in an industry where they may not otherwise have been able to secure employment.
 - The labour hire industry has become a significant sector of the Australian economy in its own right, providing services and work opportunities across a wide range of unskilled, semi-skilled, labour-intensive and professional fields.
- Potential disadvantages and risks for workers which result from a labour hire model include:
 - Some research suggests that labour hire workers are more likely to be in insecure work, leading to a lack of certainty around continuity in employment and income. This is supported by ABS data from 2008 which indicates that labour hire workers were more likely to be without paid holiday or sick leave entitlements (79 per cent compared with 23 per cent) and employed on a fixed term contract basis (15 per cent compared to 3 per cent of employees generally). Further, 60 per cent of labour hire workers had been with their current employer for less than one year, compared with 23 per cent of all employees.
 - Labour hire may be used to replace rather than supplement an ongoing workforce.
 - Labour hire workers may not receive the same rates of pay and other beneficial conditions as direct employees of a host, for example because a collective agreement covering the enterprise does not extend to labour hire staff.
 - 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', may find it harder to join a union and may be excluded from collective bargaining about their work conditions.
 - Barriers to entry into the labour hire sector are low, meaning opportunistic operators can easily enter and work in the industry. Some labour hire

suppliers are driven by price considerations, and are even systematically breaching compliance with workplace, tax and migration laws.

Chapter 4 - Insecure work, vulnerable workers and the role of business structures and practices

- 4.1 – Other Forms of insecure work - The increase of insecure work in Australia and most industrialised countries since the 1980s is of concern due to the ‘poor quality work that provides workers with little economic security and little control over their working lives’ (their definition). While independent contractors whose skills are in high demand, or a casual employee with genuine control over his or her hours, may have more secure work than an ongoing employee of a failing business. However, some features of particular working arrangements such as casual or fixed term employment, independent contracting and seasonal work, may contribute to a lack of security for workers.
- The key consequence of an independent contracting arrangement is that most employment-related protections, such as minimum wages, paid leave entitlements, regularity of engagement and notice of termination, do not apply. This is appropriate for those genuinely conducting their own enterprise and contracting out their services – self-reliant business people or entrepreneurs – and need not negatively impact their security of work. However, it gives rise to the potential for an employment relationship to be mischaracterised or disguised as an independent contracting arrangement for the purpose of avoiding the obligations associated with employment, often referred to as ‘sham contracting’
- Recent research suggests possible misclassification of employees as independent contractors in 23 per cent of enterprises in industries with a known prevalence of independent contracting. However it can be difficult to determine whether an arrangement is legitimate or a sham.
- 4.2 – Vulnerable Workers – The terms of Reference does not require an inquiry into 457 visas, or working visas generally. Instead, they are directed towards an examination of the use of working visas in Victoria in insecure, low-paid, or semi or unskilled jobs; the exploitation of working visa holders; the impact on employment security for local workers, and the impact on communities.
- Employers are required to afford 457 visa holders terms and conditions of employment that are no less favourable than the terms and conditions that are, or would be, provided to a domestic worker for performing equivalent work at the same location. However, concerns have been raised that these requirements can be circumvented, including due to the ‘underlying precarious labour market status’ of many 457 visa holders. There is recent evidence of non-compliance amongst some sponsors of work visa holders. In a two year program March 2013 – 15, the Department of immigration and border protection monitored nearly 4,000 temporary work sponsors, the majority of which were 457 sponsors. Almost one third of sponsors monitored were found to be in breach of their obligations under workplace laws. FWO have carried out similar investigations and found concerns in 18 per cent of the 3,000 457 visa holders. Similar issues are arising for international students.
- 4.3 – Phoenix activity and definition – Phoenix activity is the deliberate and systemic liquidation of a corporate trading entity which occurs with the fraudulent or illegal intention to avoid tax and other liabilities such as employee entitlements, continue the operation and profit taking of the business through another trading entity.
- Phoenix activity contributes to insecurity in employment, and places workers in a vulnerable position. The 2012 PwC report estimates the total impact of phoenix

activity between 1.78 – 3.19 billion per annum on employees, business and the government combined

- 4.4 – Business structures - Complex labour supply chains and outsourcing are common features of modern business arrangements. While these arrangements can be beneficial for all parties, there are features of complex labour supply chains and outsourcing of work in some Australian industries which have demonstrably resulted in an erosion of working conditions, risks to workers' health and safety, and in some cases the exploitation of workers.
- The price for supply of the goods or services is set by the party at the apex of the chain, associated with production of goods or provisions of the services. Further, the price paid by the party at the apex of the chain is successively eroded as it passes through each intermediate party and ultimately to the worker at the bottom of the chain. This can have the result that workers are underpaid, exploited and forced to work in a manner which is unsafe. However the party at the apex of the chains is quarantined from this outcome.

Chapter 5 – The Current regulatory landscape and other regulatory approaches

- The principle source of employment rights and conditions for Victorian employees is the FW Act.
- The Victorian inquiry has taken the approach that labour hire companies are employers of the workers and therefore are regulated by the Commonwealth FW Act and by other laws that place obligations on employers.
- 5.2 – Victorian Legislation & 5.3 – Other relevant federal legislation - Several pieces of state legislation provide workplace rights and entitlements for Victorian workers. In particular – The *Long Service Leave Act 1992* (Vic), The *Occupational health and Safety Act 2004* (Vic), *The Equal Opportunity Act 2010* (Vic). There are several other relevant federal legislations that impact upon the engagement of workers in Victoria including, The *Competition and Consumer Act 2010* (Cth), The *Migration Act 1958* (Cth) and The *Independent Contractors Act 2006* (Cth)
- 5.4 – Labour hire reform proposals - The RCSA have adopted two initiatives to improve the standards of operators in sectors including the on-hire provisions of labour, the professional conduct standards for RCSA member companies including labour hire providers, and provides for dispute resolution processes. Additionally the proposed Employment Services Industry Code, which the organisation is seeking to have adopted through federal regulation. Furthermore the ACTU has called for changes to the FWA to impose responsibility for workers' employment entitlements on both host organisations and labour hire suppliers; and the establishment of a national licensing scheme for labour hire operators.
- 5.5 – Regulatory approaches in other Australian States and internationally - Some jurisdictions have legislation that reference labour hire in specific contexts.
- The ACT requires employment agents to be licensed, whilst some other jurisdictions retain employment agent-specific legislation but exclude labour-hire businesses, either by definition or by use of exemption provisions. For example, in South Australia, Western Australia and Queensland labour hire is excluded from regulation by the relevant employment agent legislation. NSW excludes employment placement services. Victoria has no specific legislation regulating employment agents.

- Labour hire providers are also subject to the FW Act, other federal legislation, and similar state/territory laws to those operating in Victoria regulating employment generally. For example, the Model Work Health and Safety laws can apply to persons conducting a business or undertaking involving the provision of labour hire workers.
- There are also many ILO conventions and recommendations relevant to the issues to be considered by the inquiry, including instruments aimed at promoting decent work and the prevention of insecure work.
- The paper outlines a number of regulatory approaches to labour hire by other nations. Of particular note because they provide protections additional to Australian regulation are:
 - The *Agency Workers Regulation 2010* (UK) which provides that after 12 weeks in the same job with the same hirer (i.e. host organisation), an agency worker becomes entitled to the same employment terms and conditions as any comparable employee of the hirer.
 - The UK Gangmaster's Licensing Authority which provides that organisations providing workers to employers in the forestry, agriculture, horticulture, shellfish-gathering or food processing/packaging sectors must register and obtain a licence through the Gangmasters Licensing Authority (GLA). Licence fees range from around A\$865-A\$5,630 depending on business turnover; inspection fees also apply. Criminal offences including fines and imprisonment can be imposed on gangmasters who operate without a GLA licence, and those who use their services. The licensing standards are aimed at protecting workers from poor treatment and exploitation, and cover the following eight areas - Fit and Proper Test, Pay and Tax matters, Prevention of Forced Labour and Mistreatment of workers, Accommodation, Working conditions, Health and Safety, Recruiting workers and Contractual Arrangements, and Sub-Contracting and Using Other Labour Providers.
 - The Background Paper lists a number of nations in which employment under labour hire arrangements is either statutorily illegal or permitted for limited duration.
 - The Background Paper also reports that although there is little statutory regulation of labour hire in the USA, some courts have recognised 'the concept of 'joint employment', whereby two employers who each exercise significant control over a worker and 'co-determine' their terms of employment may both be held to be the worker's employer.' However, this concept has not been accepted in Australian law.

Federal Government Inquiries

The Federal Government is also currently undertaking a number of inquiries and programmes to ensure visa compliance and to ensure visa programmes are utilised to their best ability:

- On 24 March 2015, the Senate referred its inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders to the Education and Employment References Committee for inquiry and report. The inquiry is to report on 25 February 2016.
- The Productivity Commission undertook a public inquiry into the greater use of charges relative to quotas and qualitative criteria to determine the intake of temporary and permanent entrants into Australia. An inquiry report is due to be handed to the Australia Government in mid-March 2016.
- The Productivity Commission also undertook a public inquiry to examine the performance of the workplace relations framework and identify improvements

to it. The report recommended that, amongst other things the FWO should be provided with additional resources to identify, investigate and carry out enforcement activities and that the Department of Border and Immigration should share information with the FWO where they suspect an employer has underpaid a migrant.

- The FWO is undertaking several relevant compliance programs:
 - A three-year 'Harvest Trail' campaign to assist employers and employees working in the fruit and vegetable industry to understand their rights and obligations at work;
 - A one-year review of the wages and conditions of 417 visa holders, in response to an increase in complaints from backpackers; and
 - A two-year program to ensure workplace compliance in the clothing industry.

The FWO has acknowledged that there is a problem with the treatment of visa-holders by labour-hire contractors. The Overseas Workers' Team established by the FWO in 2012, now provides a priority to these employees. The FWO has also emphasised that they are active in industries known to employ significant numbers of overseas workers. Statistics have shown that the FWO has dealt with over 6,000 requests for assistance from visa holders, recovered more than \$4 million in outstanding wages and entitlements, provided advice and assistance to over 5,000 overseas workers and visa-holders who have called the Fair Work Infoline. In the last financial year, the FWO recouped \$1.1 million for almost 700 visa-holders who had sought help over underpayments. The FWO has also commenced more than 50 litigations involving overseas workers.

10. Bibliography

- ABC News, (2015). *Baiada to pay half a million dollars to underpaid workers*, Available at: <http://www.abc.net.au/news/2015-10-26/baiada-to-pay-half-a-million-dollars-to-underpaid-workers/6884108>
- Australian Bureau of Statistics, (2010). *Australian Labour Market Statistics*, Available at: <http://www.abs.gov.au/ausstats/abs@.nsf/featurearticlesbytitle/BE74CE9DE2C7592ACA2576F7001533C5?OpenDocument>
- Australian Bureau of Statistics, (2015). *Characteristics of Employment, Austral, August 2014*, Available at: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6333.0>
- Department of Economic Development, (2015). *Victorian Inquiry into the Labour Hire Industry and Insecure Work*, Available at: <http://economicdevelopment.vic.gov.au/about-us/strategies-and-initiatives/inquiry-into-the-labour-hire-industry-and-insecure-work>
- Fair Work Ombudsman, (2010). *\$184,250 in fines for underpayment of Newcastle workers*, Available at: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2010-media-releases/november-2010/20101125-shrek-penalty>
- Fair Work Ombudsman, (2014). *Cleaners allegedly had \$130,000 unlawfully deducted from their wages*, Available at: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2014-media-releases/february-2014/20140214-oz-staff-litigation>
- Fair Work Ombudsman, (2015). *Businessman fined \$42k over underpayments*, Available at: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/december-2015/20151211-cardamone-penalty>
- Fair Work Ombudsman, (2016). *Sydney labour-hire operator allegedly underpaid 19 overseas workers more than \$45,000*, Available at: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/january-2016/20160129-global-express-litigation>
- Four Corners, (2015). *Slaving Away*, Available at: <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>
- Government of Western Australia, (2015). *Employment Agents Act review 2015*, pp. 6. Available at: <https://www.commerce.wa.gov.au/atom/4746>
- Graham, D. (2007). *Regulation of labour hire arrangements: A study of Queensland Labour hire agencies*, pp. 265. Available at: <http://espace.library.uq.edu.au/view/UQ:158794>
- Growcom, (2015). *Backpacker rip-offs come out into open*, Available at: <http://www.growcom.com.au/>
- Kaur, A. (2014). *Managing Labour Migration in Malaysia: Guest Worker Programs and the Regularisation of Irregular Labour Migrants as a Policy Instrument*, Asian Studies Review, Volume 38,

Laplagne, P., Glover, M., Fry, T. (2005). *The Growth of Labour Hire Employment in Australia*, Available at: <http://www.pc.gov.au/research/supporting/labour-hire>

Meier, C. (2014). *'Danger' in labour hire*, The Press, pp. 1.
New South Wales Government, (2016) Fair Trading Act 1987, Available at: http://www.fairtrading.nsw.gov.au/ftw/About_us/Legislation/List_of_legislation.page

RCSA, (2015). *Employment Services Industry - Public Exposure Draft*, pp. 62.
Available at <http://www.rcsa.com.au/iMIS15/RCSAweb/wc-RCSACode/ESIC.aspx>

South Australian Government, (2012) Employment Agents Registration Act 1993,
Available at: <https://www.legislation.sa.gov.au/LZ/C/A/Employment%20Agents%20Registration%20Act%201993.aspx>

Underhill, E. (2013). *A Review of Licensing Arrangements for Labour Hire Firms*,
Available at: <http://dro.deakin.edu.au/view/DU:30064950>

Western Australia Government, (2006) Employment Agents Act 1976, Available at: https://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_11401_homepage.html

Workplace Info, (2004). *Obligation to pay for service defines labour hire company as employer*, Available at: <http://workplaceinfo.com.au/payroll/tax/cases/obligation-to-pay-for-service-defines-labour-hire-company-as-employer#.VsESJ3I-9Co>

Workplace Info, (2013). *Labour-hire was employer — technical points rejected*,
Available at: <http://workplaceinfo.com.au/termination/documentation/cases/labour-hire-was-employer-fb-of-fwc-rejects-technical-legal-arguments#.VsESnHI-9Co>

HORTICULTURE WORKING INTERAGENCY GROUP (HWIG)

Queensland's Horticulture Industry and Links to Labour Hire

The horticulture industry is one of Queensland's largest agriculture sectors by farm gate value, with an estimated value of \$4.07 billion for 2015-16 (source AgTrends). Production is widespread occurring between the NSW border and the tropical north. The wide geographic and latitudinal ranges allow for great diversity in crops, farming systems and production seasons. Major vegetable production regions include the Locker Valley, Bundaberg - Wide Bay, and the Bowen-Gumflu region. Fruit and nut production is concentrated in south east Queensland, Bundaberg - Wide Bay, central Burnett, Bowen-Gumflu, and the coastal wet tropics.

Horticultural production employs 14 100 people, or about 24% all people employed in Queensland agriculture (ABS and Australian Food Statistics 2012-13). However, these figures do not include casual employees which are a significant proportion of the workforce. A reliance on seasonal, temporary employees in regional Queensland leads to close ties with regional tourism.

Limits on local casual labour supply, the seasonal nature of the work and the need to harvest perishable crops quickly drive the Queensland's horticulture industry's widespread employment of casual workers, including temporary migrant workers (TMW). Many growers rely on the services of labour hire companies to provide an integrated recruitment and employment service. Reports from government agencies, local councils, the industry and media evidence that horticulture labour hire companies are often central to other aspects of the TMWs travelling and work experience, such as provision of accommodation and their transport.

Several characteristics make the TMWs vulnerable to exploitation:

- non-English speaking backgrounds
- uninformed about their rights and responsibilities including how to seek advice or lodge a complaint
- culturally differences including an reluctance to complain to authority
- inexperience in the labour market and lack of knowledge about laws and standards
- far from their home and support networks;
- dependent on staying with their employer to secure a visa extension
- risk homelessness if not complaint
- some are undocumented or illegal, including visa over-stayers.

Concerns about the exploitation of TMWs working in the horticulture industry stretch back several years. In 2008, the then Queensland Workplace Rights Ombudsman, Commissioner Don Brown commenced an investigation into employment conditions within the fruit and vegetable picking industry in Bundaberg. The investigation revealed numerous issues including 'sham' subcontracting arrangements, the non-payment of superannuation and underpayment of wages. During this investigation numerous occupational health and safety issues were raised by backpackers. The federal Member for Hinkler, Keith Pitt MP, and more recently Senator Barry O'Sullivan, have raised issues in the Australian Parliament and sought a more coordinated enforcement approach from government.

In 2013, the Fair Work Ombudsman's (FWO) commenced a national 3 year Harvest Trail Campaign focussing on minimum wages and conditions, record keeping and payslips, and labour hire and

supply chain issues. At a state-level, the Anti-Discrimination Commission of Queensland has been actively working with horticulture communities, such as Lockyer Valley and Southern Downs, to develop solutions. Whilst locally, councils recognise the value TMW bring to their regional economies both in terms of their labour and tourism value. However the associated sub-standard living conditions, public health risks, and criminal activities pose risks to regional and rural Queensland's reputation as a safe and desirable community to visit.

In May 2015, the ABC television program Four Corners' claims of extreme labour exploitation, slave like conditions and black market labour gangs on farms and in factories supplying Australia's biggest supermarkets and fast food chains, shone a national spotlight on the problem.

Establishment and Purpose of HWIG

In July 2015, the Deputy Director-General, Office of Industrial Relations (OIR) approved the establishment of an interagency group to progress the safety, rights and well-being of travelling migrant workers working in the horticultural industry.

The Horticulture Workers Interagency Group (HWIG) is chaired by Workplace Health and Safety Queensland (WHSQ) and has representatives from a broad range of local, Queensland, and Commonwealth government agencies.

The terms of reference are at Attachment One.

Recognising the 'whole-of-life' experience for the TMW when working in the horticultural industry, the HWIG established working groups around four streams:

- Information about rights and responsibilities on arrival
- Safe and compliant work
- Safe and fit accommodation
- Building supportive communities (this work area is ongoing)

Findings and Actions

Information about the rights and responsibilities on arrival

The Department of immigration and Border Protection (DIBP) administers working holiday visas that allow TMWs to work under certain conditions. The Working Holiday Temporary (417 visa) is particularly common amongst TMWs in horticultural industry. Each working holiday visa holder receives arrival information, currently in the form of information sheets or leaflets, with their visa. Given the age demographic, advances in information technology and contemporary community expectations about government interactions, the DIBP are currently investigating more appropriate way to engage with working holiday visa holders.

There is an opportunity for agencies to contribute content about rights and responsibilities in relation to employment, accommodation, and personal safety into this development process with the intent of providing a single encompassing product for the user. The Department of Immigration and Border Protection will be coordinating this work.

Safe and Compliant Work

Sadly many TMWs have suffered serious injury and illness as a result of unsafe horticulture work, including German backpacker Jessica Perra who died from suspected heat stress while working on a farm in the Bundaberg area.

In 2013, Workplace Health and Safety Queensland commenced an ongoing program which monitors compliance in the horticulture industry. The audit program focuses on safe systems of work including consultation between employers, contractors and workers, plant and machinery, quad bikes, rural chemicals, and remote work. Delivery is through a mobile service delivery model where inspectors concentrate in a particular geographical area, aligned with the harvesting season. Hostels, farms and contractor agencies, including labour hire, are involved in the campaign. Information sessions, assessments and advisory activities are conducted with a follow up enforcement campaign. To date WHSQ has primarily partnered with the Fair Work Ombudsman (wages and employment records), Queensland Police Service (cultural liaison and outreach; personal safety) and Industrial Relations Compliance (private employment agents).

However, the HWIG identified several other regulated aspects of work related to the safety, well-being and rights of the TWM or compliance with state/federal laws not encompassed by the current approach including:

- Transportation – the Department of Transport and Main Roads has concerns about labour hire and hostels charging the TWM a transport levy for so-called ‘courtesy’ buses which transport them from accommodation to the farms. It is illegal to operate a passenger service without appropriate accreditation. Courtesy services which are provided free of charge by an entity using a vehicle owned or leased by the entity for customers of the entity are exempt. The safety and roadworthiness of pick-up vehicles has also been raised by stakeholders.
- Workers’ compensation – TWM are entitled to workers’ compensation even if they don’t have a valid visa or their employer does not hold a valid policy. Past WorkCover Queensland audits of labour hire and field visits in horticulture areas found uninsured or under-insured entities i.e. under-declared wages. WCQ also report that TWMs are often too scared by threats and intimidation from rogue labour hire companies to lodge claims for injuries.
- Payroll tax Where weekly taxable wages exceed \$21,153, employers are obliged to register with the Office of State Revenue for payroll tax. The OSR advises that labour hire is not presenting as a priority in terms of payroll tax non-compliance based on its intelligence and data matching information.

Safe and Fit Accommodation

At a forum of over 50 representatives of local, state and federal agencies convened by the ADCQ in August 2015 participants identified many issues relating to the standards of accommodation including limited affordable accommodation during intensive production peaks; fire, public health and environmental risks; and overcrowding and substandard accommodation. The control of labour hire contractors in the accommodation supply chain was also explored. The meeting reported instances of unscrupulous labour hire contractors exploiting workers by forcing them into inadequate, unsafe accommodation, and/or acting as ‘rent masters’ where they control the number of residents and all costs, including rent, services and food.

A Working Group of the HWIG revisited the findings and recommendations of May 2010 Interdepartmental Working Group Budget Accommodation Buildings- Maintaining Compliance and

Safety (led by Department of Community Safety) and the summary of issues and ideas presented at the ADCQ forum. Salient matters raised by stakeholders include:

- Need to foster more collaboration and information sharing across government and the community about unregistered budget accommodation buildings (BABs)
- Holiday makers' are not considered 'tenants' under the *Residential Tenancies and Rooming Act 2008* or the *Residential Services (Accreditation) Act 2002* and therefore not provided protections under those regulatory frameworks
- Some local councils are concerned about restrictions on their ability to enter a suspected BAB and are seeking more immediate access to prevent loss of evidence
- Planning schemes are placing restrictions on the provision of affordable accommodation

Work is ongoing and the HWIG sub-committee members (ADCQ, QFES, QPS, LGAQ, RTA, DHPW, DILGP) will continue to progress in 2016.

Conclusion

The HWIG demonstrates the benefit of a collaborative effort across all three layers of government. By getting to know each other's roles, responsibilities and priorities, government will be better placed to create a more holistic, streamlined approach which benefits workers and industry.

However barriers to collaboration are evident.

Agencies typically have strict protocols, some enshrined in legislation, around confidentiality of information. For instance, s.271 *Work Health and Safety Act 2011*, places certain requirements on the regulator before they can share information they reasonably believe is necessary for the administration or enforcement of another Act. Although there is the power to delegate this function a balance needs to be struck between the exercise of power and responsive government.

The timely sharing of information is essential for an effective response to high risk issues. For instance, WHSQ Inspectors may come across unsafe vehicles that are used to transport workers on public roads. Or, during the course of a site visit it becomes clear that workers are not being paid the correct wages or living in share houses in unsafe conditions. Being able to share particulars with the relevant agency quickly would improve efficiencies and outcomes.

Horticulture Worker Interagency Group

Terms of Reference

Purpose

The Horticulture Workers Interagency Group (HWIG) has been established to inform the whole of government approach to temporary migrant workers in the horticulture industry.

The HWIG will develop a state-wide plan and provide a co-ordinated, culturally appropriate response to safety, well-being and rights of temporary migrant workers employed in the horticulture industry.

The HWIG's role includes:

- developing a robust and evidenced based state-wide plan including an implementation plan sharing technical and policy advice across agencies
- promoting and exchanging information on agency specific horticulture related projects to assist with the development of whole of government solutions
- identifying external stakeholders who will contribute to and support the state-wide plan
- coordinating government operational activities and interventions relating to temporary migrant workers in horticulture
- developing a communication strategy to raise awareness of safety and well-being issues for temporary migrant workers in horticulture and to assist with implementation of the state-wide plan initiatives
- establishing a reporting and evaluation framework for implementation of key initiatives, and
- ensuring the state-wide plan and supporting strategies/activities are culturally appropriate and tailored to specific groups given the cultural and linguistic diversity of the temporary migrant worker cohort.

In developing the state-wide plan, the HWIG will consider:

- data and research findings to clearly identify the nature, scale and scope of safety and well-being concerns for temporary migrant workers in horticulture
- identify target demographics for temporary migrant workers' safety initiatives and inform development of priority areas for action
- the current initiatives / programs in each agency
- Government's role in promoting community leadership around temporary migrant workers welfare.

Membership

The following agencies will be represented on the HWIG by a senior officer:

- Office of Industrial Relations (Workplace Health and Safety Queensland, Industrial Relations, WHS and Electrical Safety Policy, Workers' Compensation Regulator)

- Office of Fair Trading
- Agriculture and Fisheries
- Queensland Fire and Emergency Services
- Queensland Police Service
- Transport and Main Roads
- Communities, Child Safety and Disability Services
- Anti-Discrimination Commission Queensland
- Tourism, Major Events, Small Business and Commonwealth Games
- Infrastructure, Local Government and Planning
- Office of State Revenue
- Housing and Public Works
- Residential Tenancies Authority
- Premier and Cabinet
- Department of Immigration and Border Protection
- Fair Work Ombudsman
- Safe Work Australia
- Local Government Association of Queensland

The HWIG will also undertake consultation with other relevant stakeholders on an as needed basis to inform the development of initiatives in relation to temporary migrant workers' safety and well-being in the horticulture industry.

Meetings

- Meetings will be held monthly and then as determined.
- Location of meetings: State Law Building or via teleconference where necessary.
- Agencies may send a proxy or observer to attend meetings and advise the Secretariat prior to the meeting.

Secretariat

Workplace Health and Safety Queensland (WHSQ) will provide the secretariat function for the HWIG. WHSQ will be responsible for arranging meetings, preparation and circulation of the agenda, meeting papers, preparation of minutes, maintaining records and maintaining a membership list with relevant contact details.

WORKPLACE RESEARCH CENTRE

THE UNIVERSITY OF SYDNEY
BUSINESS SCHOOL



THE UNIVERSITY OF
SYDNEY

CONTRACTING ARRANGEMENTS IN THE QLD CONSTRUCTION INDUSTRY

EXPLORING FACTORS THAT MAY GIVE RISE TO 'SHAM CONTRACTING'

By Mike Rafferty, Sally Wright, Sharni Chan, Toby Fattore and Hanna Schutz

This report was published by the Workplace Research Centre at the University of Sydney, August 2011.

Workplace Research Centre
Storie Dixson Wing H10
The University of Sydney NSW 2006
Ph: 02 9351 5626

Disclaimer: Though all due care has been taken in its preparation and the information is believed to be correct at the date of publication, it is intended to be a guide only. The report is not to be taken as constituting independent legal advice. Responsibility or liability cannot be accepted for any loss or damage which may arise as a result of accessing or using the content.

Executive Summary

The workplace Research Centre (WRC) was commissioned by Workplace Health and Safety Queensland to research 'sham contracting' in the construction industry in Queensland. Analysis of qualitative and quantitative data has been used to generate an original, empirically-based understanding of the nature of the employee/contractor arrangements in the Queensland Construction Industry. This research provides an evidence base to inform OH&S strategy for construction in Queensland.

The issue of 'sham contracting' has received considerable public attention over the past few years, and continues to be a controversial topic. At the core of all approaches to 'sham contracting' is the basic idea that legal forms are manipulated to create situations where parties substantively engaged in an employer-employee relationship have their situation contrived so as to take on the formal appearance of 'contractor' selling a service to a 'purchaser', who can be either a builder, head contractor, or sub-contractor. In some instances, 'sham contracting' is done to disguise, evade, or shift the legal obligations and responsibilities associated with workers who would otherwise have 'employee' status. 'Sham contracting' is particularly egregious where the cost of the transfer of risk and entitlements are not compensated.

There is a need to relax the assumption that there is a clear 'unity' in the contract of employment, and that the fundamental 'dichotomy' distinguishing contracts of employment is that between 'contracts of' and 'contracts for' service. Put simply, where work is involved, we need to consider a whole host of employment situations. To assume from the outset that the most basic distinction is between contracts 'of' and 'for' service obstructs our understanding of reality. Based on this insight, we have let the data drive the analysis on the current project.

Related to this, there is a need to relax the assumption that the coordination of economic reality is primarily build around bi-lateral contracts involving two un-related parties. It is, however, widely recognised that a host of parties can be involved in employment situations. This is particularly the case in construction. For example, the employer function may involve some or all of the following: sourcing labour, engaging labour, paying labour, deploying labour and/or developing labour.

While the revised ABS Forms of Employment Survey provides an improved basis for obtaining estimates of different forms of employment in the sector, the ABS does not publish estimates of the level of 'dependent contractors' or potentially 'sham contractors'. On the basis of the information provided, however, it can be concluded that they are most likely to be located amongst workers classified as either 'employees with no paid leave' and 'independent contractor'. Over the three years of these surveys, these two groups comprised just under half of the construction workforce (43.6, 47.5 per and 43.9 per cent respectively in 2008, 2009 and 2010).

While the single largest group of contractors are trades level workers, the second largest group is labourers. This suggests that the growth of labour-only sub-contracting is being significantly driven by attempts to avoid the responsibilities of the employment relationship. Exactly what specialist services unskilled contractors provide on a 'task' as opposed to a 'time served' basis remains unresolved, and how they contract on equal terms with other actors in the industry is an open question. It is clearly one potential space where 'sham contracting' is most likely to exist.

It is difficult to ascertain a precise estimate of the incidence of Australian workers involved in 'sham contracting'. Even though a category of 'dependent contractor' has been advanced as a way of acknowledging the reality of de facto employees, it has no legal status. There are also problems in the way individuals classify their employment status, and how they describe the way their business operates. Not all 'dependent contractors' will be 'sham contractors', and equally, not all 'independent contractors' will be bona fide businesses. In addition, a proportion of the workers who identify as 'casual employees' may in fact be working with ABNs under 'sham' arrangements and a proportion of the self-employed contractors may view themselves as wage and salary earners because they draw wages from their business. There are clear sectoral differences at work, and once again our attention has been drawn to the commercial sector as undergoing the most rapid change in these arrangements.

With the above caveats in mind, an estimate of around one-in-ten of the construction workers in the *Australia at Work* sample appear to be working under arrangements that are more akin to an employee than rather an independent contractor status. This equates to approximately one-quarter (23.8 per cent) of all contractors being 'dependent contractors'. Taking into account additional indicia relevant to the situation, such as whether workers have authority over their own work and control over their own hours, our estimate of dependent contractors is best viewed as a lower-bound estimate.

As this project was primarily commissioned to generate new information on how employment and contractor arrangements are experienced by workers in the Queensland construction industry, an analysis of findings from the in-depth interviews undertaken with 28 workers and 13 key informants from the Queensland Construction Industry form the main substance of this report. A thematic discussion focuses on four key themes:

- The sectoral factors present in the Construction Industry;
- the competitive pressures faced by industry parties and the influence of the production process on contracting arrangements
- how the different forms of contracting and employment arrangements play out in the industry
- and the impact of 'sham contracting' arrangements on workers' compensation arrangements (including preliminary observations in relation to whether 'sham contracting arrangements' have led to an increase in work-related injury or disease).

Although our analysis has made some estimate of the potential range of 'sham contracting', and compared these to existing estimates, it was our conclusion that for at least two reasons, any such measures are fraught. It is difficult to find an unambiguously clear set of criteria that will apply across all industries, or even in the case of construction, between say residential and commercial construction. Also, there are many potential aspects in the way work is undertaken in the construction industry that may have elements of 'sham contracting'. Despite the existing estimates producing quite a wide range of potential 'sham contracting', it is clear that there is a problem. It is also clear that this problem needs attention.

We made the case that the changing forms of engagement of workers and their implications for occupational health and safety (OH&S) are associated with the broader structural issues within the

construction industry. It is these broader processes and structures which are driving trends in 'sham contracting' and may be undermining health and safety on construction sites.

We hope that the information provided in this report will assist the IRG to understand the factors within the Construction Industry that may give rise to 'sham contracting', and to assess whether 'sham contracting' has led to an increase in work-related injury or disease. A clearer understanding of the forces shaping the current situation should provide the parties with a powerful basis for discussing the problem of 'sham contracting' and for devising initiatives that will improve workplace safety for all workers in the industry, regardless of their legal status.

Table of Contents

Executive Summary	i
Acknowledgements	1
Introduction	2
Defining 'sham contracting'	4
The need for open categories to understand reality.....	6
Incidence of Contractors.....	12
Growth in Contracting	13
Independent Contractors in the Construction Industry	14
What is the occupational profile of these construction contractors?.....	15
A preliminary estimate of the incidence of 'sham contracting' in the Construction Industry.....	15
Is it possible then to get a reasonable estimate of 'dependent contractors'?	16
Conclusion.....	19
Theme 1: Sectoral factors.....	22
Introduction	22
Residential construction	22
Civil construction.....	23
Commercial construction.....	24
Intra sectoral factors	24
Conclusion.....	28
Theme 2: Production Process	29
Introduction	29
Joint production	29
Pyramid contracting	30
Financing by task rather than time.....	31
Fragmentation in the division of labour	33
Site Governance	34
Worker Voice.....	35
Conclusion.....	37
Theme 3 Competitive Pressures	38
Introduction	38
Sub-contracting as a cost and risk management system.....	38
Competition and Client and Head Contractor Arrangements.....	41

A culture of ‘corner-cutting’	45
Rights for Workers to Identify and Act on Safety Issues	45
Size of the Construction Project	45
Regulating Risk and Compliance in a Fragmented and Hierarchical Production System	46
Volatility in Industry Activity	47
Conclusion.....	48
THEME 4 - FORMS OF CONTRACTING/EMPLOYMENT ARRANGEMENTS.....	50
Introduction	50
Evidence of Pervasive Contracting	50
Supply Side Factors.....	51
Demand side factors.....	52
Perceived benefits of contracting often not realised	55
Perceived benefits of employee status	58
Changing employment arrangements driving ‘sham contracting’	61
Conclusion.....	65
Safety Implications	69
Introduction	69
Regulation	69
The Production Process and Increased Risk of Injury.....	70
Public and private sector differences in practice	75
Site coordination	76
Individualising risk: competition, ‘common sense’ and implications for OH&S outcomes and processes	78
Participation and Voice.....	82
Return to Work after Injury	84
Conclusion.....	87
Conclusion.....	89
Sectoral and Intra-sectoral characteristics	90
The production process	91
Contractual and employment relationships	96
What are the characteristics of Queensland construction contractors and Queensland construction employees?	98
Are contractors dependent on a single or small number of employers?.....	98
What are the perceived advantages and disadvantages of working as either contractors or employees?	99

Do workers in Queensland construction transition between employment as a contractor and as an employee? If so, how often and why does this occur?	100
Do workers perceive a difference in the OH&S risk exposure of employees as opposed to contractors?	101
Do contractors take out workers' compensation policy, income protection insurance or other forms of insurance to protect their income during absence from work due to illness or injury? .	102
What superannuation arrangements do construction workers in Queensland have?	103
Changing employment arrangements driving 'sham contracting'	103
Implications for 'Sham Contracting' and Health and Safety	104
References	106
Appendix One Methodology.....	113
Quantitative research.....	113
Qualitative research	113
Key informant interviews and protocol development.....	114
Construction worker interviews.....	114
Data Analysis	115
Appendix Two ABS Forms of Employment Data	121
Appendix Three Australia at Work Data.....	125
Appendix Four QLD Construction Safety Plans	127

Acknowledgements

The authors appreciate the assistance provided by the client, Workplace Health and Safety Queensland, Department of Justice and Attorney-General. In particular, the guidance provided by departmental officers, Simon Blackwood, Cameron Allan and Sebastian Bielen. The Industry Reference Group (IRG) provided comments and advice on our preliminary findings and these were extremely helpful for the drafting of this report.

We also wish to thank the thirteen key informants from the Queensland construction industry for the candid insights into the construction industry in Queensland.

We thank the assistance of our colleagues at the Workplace Research Centre (WRC). In particular, John Buchanan, Director of the Workplace Research Centre (WRC) the advice he provided the research team during the course of the project. We would also like to thank Caroline Tomiczek and Robyn Chiles for their assistance with editing, proof-reading and formatting of the report; especially given the tight timeframe. Thanks also to Serena Yu and Sarah Kennedy-Bates for assistance with preparation of charts and other background research.

We would also like to thank Phil Toner and Stewart Rosewarne for providing advice and assistance.

The authors acknowledge the assistance of the Australian Research Council (ARC) and Unions NSW as funding providers for the ARC-linkage project, Australia at Work.

The project would not have been possible, however, without the co-operation of the 28 construction workers who took part in the research. We are extremely grateful to them for taking time to be interviewed and for their participation in the larger Australia at Work survey.

Introduction

This report presents the results of research into the occupational and health implications of 'sham' contracting in the construction industry in Queensland. The construction industry has long been characterised by extensive sub-contracting as a way of organising the diverse work associated with construction projects. However, over the last two decades there has been a growth in the extent of sub-contracting and a casualisation in the industry and more generally (Waite and Will, 2001; Buchanan and Allan, 2002; Pocock et al, 2004; Toner, 2005). This has aroused concern about the factors driving these developments and "...whether government revenue is being reduced, and whether the welfare of workers who are essentially employees is being eroded" (Commonwealth of Australia, 2002b:13). In other words, there is an issue about whether legal forms of engaging people to undertake work are being manipulated to reduce costs and outsource risks by employers.

This research addressed the particular issue of whether intensified contracting and sham contracting as the most extreme manifestation of that momentum is affecting the welfare (especially the health and safety) of construction workers. The analysis of the quantitative and qualitative data presented in the report has been used to generate an original, empirically based understanding of the changing nature of the employee/contractor arrangements in the industry, and possible health and safety implications. The report also integrated these results with existing national and international industry research, although this was more formative than definitive and more could be potentially done to expand those links.

The research aims to provide an evidence base to inform the implementation of the Queensland Workplace Health and Safety Strategy Construction Industry Plan that is part of a wider strategy of the Queensland government that aims to reduce the incidence of work-related injuries by 40 per cent and the incidence of work-related fatalities by 20 per cent (QWHS, 2008). The Construction Industry Action Plan identifies a range of initiatives for improving workplace health and safety performance in the industry, by among other things:

- building a culture that makes workplace health and safety an integral part of normal business operation, and
- establishing a collaborative process with industry and key stakeholders to formulate practical safety solutions to emerging safety issues (QWHS, 2008:7-9).

As part of the OH&S strategy, an Industry Reference Group (IRG) was recently established in order to review the extent and impact of 'sham contracting' in Queensland's construction industry. The terms of reference for the IRG include:

- Factors within the construction industry that may give rise to 'sham contracting' arrangements;
- a quantitative assessment of the incidence of 'sham contracting' in the construction industry;
- the impact of 'sham contracting' arrangements on workers' compensation premiums and premium avoidance; and
- the impact of 'sham contracting' arrangements of worker safety in the construction industry, including whether 'sham contracting' arrangements have led to a quantifiable increase in work related injury or disease.

The IRG was able to illicit the co-operation of key industry leaders and stakeholders, and the research team benefited greatly from being able to conduct the interviews with many IRG members. The main strength of this research, however, is the new evidence assembled based on detailed interviews with workers and managers in the industry.

There is a large body of international and Australian research on contracting arrangements and health and safety in the construction industry. The positions of key industry stakeholders on the issue of sham contracting are also well established. This report presents an analysis on the potential extent of sham contracting in the industry, and one of its findings is that there are inherent difficulties in developing generally accepted aggregate measures of sham contracting. In part, this is because there is no single criterion for differentiating between the two, so there is many shades of grey in-between an employment relationship and arm's length contracting. Typically, a range of factors/attributes is deployed to attempt determine the real economic content of the employment/contractor relationship. Depending on those attributes and the way they are measured and assembled, quite different measures of the balance between the two relationships can be found.¹ There are also particularities to the construction industry (especially its project-specific joint production nature) mean that special care is needed when deploying categories and indicia developed for general application.

While the size of and trends in sham contracting remains an important issue, and is one the research engaged with directly, it remains an open and inherently controversial issue. While we offer some additional material to the issue of how much sham contracting is occurring, the measurement issue is unlikely to be resolved by this research, or indeed other research. However, it is possible to say with clarity that even if we accept the lower estimates of the scale of sham contracting, it is significant, especially in some sectors of the industry. Also, where it occurs it is directly and indirectly undermining the welfare of construction workers. That momentum deserves research and regulatory attention at a number of levels.

Importantly, this research found that the changing forms of engagement of workers are associated with broader structural factors and momentums in the industry, especially structural changes that have changed the balance of power in the industry and are driving cost pressures downwards through the contracting chain to individual site and worker levels. We formed the view that sham contracting is one of the manifestations of these structures and processes. Based on this, the research focussed a considerable amount of time on the factors driving the development of sham contracting, and these are developed in the report.

Before presenting those findings of the main factors driving sham contracting, the issue of sham contracting is now discussed in order to consolidate existing research and establish the particular problems of sham contracting in the construction industry.

¹ The IRG secretariat provided a review of existing measures and these showed that the proportion of contractors that are estimated to be dependent contractors is as low as 12 and as high as 46 percent.

Defining 'sham contracting'

While the WRC has not been commissioned to provide an authoritative definition of 'sham contracting', a brief review of the debate around this term has been included in the current section. It was concluded that in order to identify factors within the construction industry that may give rise to 'sham contracting', some agreement of the terminology was required. The issue of 'sham contracting' has received considerable public attention over the past few years, and continues to be a controversial topic. Despite this, there is no universally agreed definition of 'sham contracting'. A summary of recent deliberations on the topic are provided in the Text Box 1 (on common law definitions of employees and independent contractors) and Text Box 2 (on statutory definitions of employees and independent contractors). This summary deals primarily with the varied definitions of 'employee' and 'contractor' – the key categories for defining 'sham contracting'. Particular attention has been devoted to key developments in the common law, current statutes, and material prepared by industry stakeholders.

At the core of all approaches to 'sham contracting' is the basic idea that legal forms are manipulated to create situations where parties substantively engaged in an employer-employee relationship have their situation contrived so as to take on the formal appearance of 'contractor' selling a service to a 'purchaser', who can be either a builder, head contractor, or sub-contractor. In some instances, 'sham contracting' is done to disguise, evade, or shift the legal obligations and responsibilities associated with workers who would otherwise have 'employee' status. 'Sham contracting' is particularly egregious where the cost of the transfer of risk and entitlements are not compensated.

Over the last several decades, there have been considerable efforts to find a workable dichotomy between contractor and employee. This desire continues for entirely understandable reasons, however, the changing nature of work has meant that additional indicia have emerged. That being said, the tradition of distinguishing between 'contracts of' and 'contracts for' service continues. The former involves an employer-employee relationship while the latter involves contractors providing specified output to an external third party. The ability to clearly distinguish between the two forms contracts remains difficult. As Bromberg J recently observed in his decision in the *On Call Interpreter Case*:

*"It is troubling that in circumstances of the bicycle couriers dealt with in Hollis, the parties involved need to travel to the High Court to obtain a clear exposition of the legal status of the couriers."*²

Further:

"Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:

Viewed as a 'practical matter':

- (i) Is the person performing the work an entrepreneur who owns and operates a business?; and*

² *On Call Interpreters And Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* FCA 366 (13 April 2011), at para 206 citing *Hollis* [2001]

(ii) *In performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?*

If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.”³

This case also reaffirmed key indicia for distinguishing between an employee and a contractor including:

- Degree of control over work (autonomous or subservient in its decision-making);
- Intention of the parties;
- To what extent is the person providing the economic activity integrated with the business receiving the activity;
- Exclusivity in relationship;
- Business integration;
- Ability to subcontract;
- Formal employment arrangements;
- Provision of equipment and if providing their own equipment, to what extent can the person be directed in the management and control of that equipment; and
- Taxation arrangements.

Recent statutory changes, including to the *Superannuation Guarantee Act*, the *Fair Work Act* and the *Independent Contractor Act*, have not overcome ambiguities inherent in the common law. In some ways, regulatory changes are playing catch-up to address a changing reality. In other cases, such as via the taxation system, statutory changes may actually contribute to ongoing ambiguity in forms of employment.

Relevant industry stakeholders have recently provided their own definitions of 'sham contracting'. For example, within the construction industry, the views of the Housing Industry of Australia (HIA), the Masters' Builders' Australia (MBA), the Australian Chamber of Commerce and Industry (ACCI), the National Electrical and Communications Association (NECA) and the Civil Contractors Federation (CCF) are set out in their respective submissions to the Office of the Australian Building and Construction Commissioner (ABCC) Inquiry into Sham Arrangements and the use of Labour Hire in the Building and Construction Industry (see Text Box 3). The CFMEU set their views out in a report entitled 'Race to the Bottom' (see Text Box 4).

There are common elements among the various definitions of 'sham contracting'. For example none of the parties support the artificial use of the law to coerce people into situations that disguise genuine employment relationships or result in reduced wages and/or inferior employment conditions. The definitions differ, however, on matters such as the level of discretion that should be given to government agencies to deem one set of arrangements as involving those of a 'contract of' as opposed to a 'contract for' service.

³ Ibid, at para 208.

The need for open categories to understand reality

Definitional imprecision lies in the constantly evolving nature of the labour process as an economic input and the associated forms of business entity that engage and deploy labour during the production process (Polanyi, 1944; Biernacki, 1995; Deakin and Wilkinson, 2005).

The introduction of limited liability legislation created the 'firm' as a fictional legal person. This in turn creates the potential for the transformation of an employment relationship into a corporate relationship.

The common law and many statutes assume 'labour' is a commodity that can be bought and sold by 'a business' and governed by principles of 'contract'. The reality, however, is not that simple, and the complexity of the distinction is perhaps more apparent in construction than in any other industry. Given the research brief, far more open categories than those customarily used in labour law and public policy have been adopted to guide our analysis. The reasons for broadening the categories are summarised below.

Firstly, there is a need to relax the assumption that there is a clear 'unity' in the contract of employment, and that the fundamental 'dichotomy' distinguishing contracts of employment is that between 'contracts of' and 'contracts for' service. Contracts of services cover a very wide ambit of activity. One of the most fundamental is that people can be engaged as employees on a 'time served' and 'task performed' basis (Collins, 1990). The casual hired on an hourly basis in a milk bar, the shearer on piece-rates, and the salaried lawyer are all employed to do their work 'until the job is done'. Despite the similarity of them all having in common a 'contract of service', they differ in many other ways. This is made more complex when it assumed all these workers must be distinguished from 'contractors'; many of who have continuing engagement and are often paid by the unit of time by those engaging them in work. Freedland (2003), having conducted a thorough analyses of the extensive case law in this area, argues that instead of trying to fit people into arbitrary categories like 'contract of' and 'contract for' service, we need instead to grasp the commonality across and difference within a more encompassing notion of 'personal employment contracts'. Put simply, where work is involved, we need to consider a whole host of employment situations. To assume from the outset that the most basic distinction is between contracts 'of' and 'for' service obstructs our understanding of reality. Based on this insight, we have let the data drive the analysis on the current project.

Related to this, there is a need to relax the assumption that the coordination of economic reality is primarily build around bi-lateral contracts involving two un-related parties. That is, common to both the traditional categories of 'contracts of' and 'contracts for' service is the assumption that there are two parties: a seller and a buyer. The only difference assumed is what is to be traded for money: labour services or output. It is, however, widely recognised that a host of parties can be involved in employment situations. For example, the employer function may involve some or all of the following: sourcing labour, engaging labour, paying labour, deploying labour and/or developing labour.

Much public policy and the foundation categories of employment law assume that for someone to have 'employer status', they must perform all of the functions listed above. As a result, if no one entity can be found with this status the workers operating in such situations can, by default, find themselves workers without an employer and thereby be deemed 'contractors' (Gonos, 1997; Freedland, 2003). In reality, however, in many of these situations the employer function is shared or distributed rather than being non-existent. This creates particular problems if we endeavour to conceptualise an employment situation as if it is limited to the involvement of two separate and distinct parties to a bi-lateral 'contract'. The reality of co-ordination in economic affairs, particularly in the Construction Industry, is that it often involves joint production with a series of discrete bi-lateral contracts. Contracting arrangements often involved 'connected contracts' (Collins cited in Teuber, 2011). In conducting our analysis, we have endeavoured to grasp the reality of employment situations and not to fit them into pre-existing categories that only recognise two parties to any employment situation.

Drawing on previous research, Waite and Will (2001:3-4) discuss the diversity in self-employed contracting in Construction:

Self-employed contracting is common in the construction industry, although considerably more so in housing than commercial construction (Productivity Commission, 1999; Underhill 1991, Underhill et al 2000). A range of characteristics of the industry contribute to the use of contract labour (Underhill, 1991).

The production process in construction comprises a diverse range of tasks (for example, excavation, scaffolding, concrete laying and painting) that require very different skill sets and occur at different points in the process. In addition, completion of tasks and quality is often easily monitored. Many workers are only required at one point in a project. Production therefore tends to be carried out by a collection of subcontractors under the supervision of a head contractor or builder (Productivity Commission, 1999).

Demand for housing and commercial buildings is highly sensitive to the economic cycle. The industry contains many small firms that are vulnerable to fluctuations in activity. In addition, competition among these firms can be very strong. These factors contribute to an uncertain demand environment for many producers and encourage the use of contract labour. Small establishment costs for contractors (often only transport and tools) contribute to the supply of contract labour. Fluctuations in employment mean workers enter from other industries during periods of high labour demand. They are 'less committed to employment security, unionism and the maintenance of industry standards than core workers. They are more susceptible to offers of contract work (Underhill, 1991:121). High turnover associated with the cessation of subcontractors' contracts at the completion of a project means that 'building workers tend to place a higher value on short-term remuneration' and therefore opt for contract employment (Underhill, 1991:122).

*Self-employed contracting in this industry takes several forms. Some **individuals 'contract their labour with tools of the trade to builders and building subcontractors'** (Underhill, 1991:116). Other contractors are supplied by manufacturers with materials like doors and tiles. A less common arrangement involves workers who also supply plant and equipment.*

*The supply of contractors is **sometimes brokered through labour hire companies** (Productivity Commission, 1999).*

As this project evolved, and drawing upon the above summary of previous research, we found that making sense of the employment and contracting arrangements required sensitivity to four issues in particular:

- The changing nature of the various sectors within the Industry (i.e. cottage, commercial and civil construction sectors);
- the changing conditions of the production process and especially the division of labour.
- the competitive pressures and cyclical nature of the trade cycle in particular local labour markets as well as in the sector at large; and
- how workers themselves define the status of their work (i.e. employee, contractor, sub-contractor, self-employed).

As mentioned above, the aim of this project has not been to nominate an agreed definition of 'sham contracting' or to provide a solution to the problem. This does not mean that the researchers have been indifferent to the matter. Instead, our primary emphasis has been focussed on capturing how labour is currently engaged and deployed on construction sites in Queensland. We hope that the information provided will assist the IRG to understand the factors within the Construction Industry that may give rise to 'sham contracting', and to assess whether 'sham contracting' has led to an increase in work-related injury or disease. A clearer understanding of the forces shaping the current situation should provide the parties with a powerful basis for discussing the problem of 'sham contracting' and for devising initiatives that will improve workplace safety for all workers in the industry, regardless of their legal status.

As this project was primarily commissioned to generate new information on how employment and contractor arrangements are experienced by workers in the Queensland construction industry, an analysis of findings from the in-depth interviews undertaken with 28 workers and 13 key informants from the Queensland Construction Industry form the main substance of this report. An emphasis is placed on the supply-side factors influencing the extent and impact of 'sham contracting' arrangements.

A thematic discussion focussing on the following four key themes has been included:

- The sectoral factors present in the Construction Industry;
- the competitive pressures faced by industry parties and the influence of the production process on contracting arrangements
- how the different forms of contracting and employment arrangements play out in the industry
- and the impact of 'sham contracting' arrangements on workers' compensation arrangements (including preliminary observations in relation to whether 'sham contracting arrangements' have led to an increase in work-related injury or disease).

Prior to the discussion of the qualitative findings, ABS data and data from the WRC's *Australia at Work* study have been included to estimate the incidence of 'sham contracting' in the Australia construction industry.

The methodology for both the quantitative and qualitative aspects of the research is outlined Appendix One of the report.

Text Box 1 Common law definitions of employees and independent contractors

The common law principles for determining whether an individual is an employee or contractor have been set out in cases such as *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21. Although there are High Court cases which have attempted to define a contract for service versus a contract of service, there continues to remain definition ambiguity around what is an employee versus a contractor.

The fact that there is no simple or clear cut rule was highlighted in a recent case by Bromberg J who said it was “problematic” that there was “no clear definition that explains the distinction between an employee and an independent contractor”. Further, that it was “troubling” that the parties in the *Hollis* case (involving bicycle couriers) “needed to travel to the High Court to obtain a clear exposition of the legal status of the couriers” [at para 206].

In the *On Call Interpreters case*, Justice Bromberg put forward a test that has helped to clarify the common law position. He posed the following two limbed test for whether a person is an independent contractor:

1. is the person performing the work of an entrepreneur who owns and operates a business; and
2. in performing the work, is that person working in and for that person’s business as a representative of that business and not of the business receiving the work?”

The court held that “if the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee”. The case affirms the approach adopted in *Hollis v Vabu*, where the court will examine the “totality of the relationship” and applies the “real substance” or “reality” approach. The court is not guided by the name of form given to it by the parties but by the facts. In analysing the first question, Justice Bromberg set out several indicia, including whether risk-taking is involved in the pursuit of profits and whether goodwill is being created by the economic activities of the business.

For the purpose of the second question, Justice Bromberg set out a separate set of indicia, including questions on whether the capacity of control and direction of the business was present and which business was being represented. Justice Bromberg determined the case in reference to an objective assessment of the nature of the relationship that the person has with the entity that takes the benefit of that person’s work.

In the recent case of *Vella v Integral Energy* [2011] FMCA 6, the Federal Magistrate’s Court held that Mr Vella was not an employee and that the issue should not be viewed as a “mathematical assessment” of the various indicia” of the facts but:

“the correct approach is to look at the form and substance of the relationship between the parties and the general weight of evidence..... I take into account that working arrangements have been significantly liberalised in recent years and, in the more flexible working environment that now exists, it ought to be open to the parties to determine whether the relationship is one of employment or independent contract.” [at para 9]

Text Box 2: Statutory definitions of employees and independent contractors

Statutory law does not assist in clarifying the common law position. There are no statutory definitions of employment in legislations but rather statutes use terms such as ‘employee’, ‘employer’, ‘contract of service’ and so on without any meaningful elaboration (Stewart, 2011:47). Instead, the question of a worker’s status is often determined by reference to common law principles.

An allied problem is that there are differences in the legal principles set out in various pieces of legislation for determining whether a worker is an employee or a contractor. Various definitions are set out in state pay roll statutes, the Superannuation Guarantee (Administration) Act 1992 and the personal services income legislation. For example, independent contractors are defined to be employees in State pay roll tax statutes even when they are working under their own ABN, when they perform all the work personally and do not have employees to assist them. Stewart has also identified a difference under the Superannuation Guarantee (Administration) Act which provides that employers must pay the super for any individual working under a contract that is remunerated either wholly or principally for their personal labour (Stewart, 2011: 8).

The Fair Work Act 2009 [Cth] provisions relating to ‘sham contracting’ are covered in sections 357, 358 and 359. Appendix one sets out these provisions. These sections deal with misrepresentation of employment as an independent contracting arrangement and the prohibition on dismissing an employee to engage them as independent contractors. Civil remedy provisions apply for breach of these provisions of the Act. Under section 550 of the Fair Work Act there is also a personal risk of liability for officers and directors who breach the Act.¹ The onus of proof in relation to sham contracting is on employers. However, there is a significant loophole in that there is no contravention of the Act if the employer proves on the balance of probabilities that at the time the person made the representations regarding the contract agreement, the employer did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services.

Contractors are regarded as “persons” under the FWA and therefore have access to the general protections provisions under section 342.

Incidence of Contractors

This section summarises data available on the incidence of different forms of employment. Please note that the categories informing this section are imperfect, and should be interpreted with caution.

Traditionally, the ABS, like most statistical bureaus around the world, collect limited information on trends in 'employees' and workers engaged in what it called 'self-employment'. During the 2000s, however, the ABS devoted considerable effort towards devising and refining the Surveys of Employment Arrangements and Forms of Employment in an attempt to rectify this situation. The 'forms of employment' framework classifies jobholders on the basis of their main job, that is, the job in which the most hours are usually worked. The core categories are:

- Employees;
- Independent contractors; and
- Other business operators (ABS, 2011:3).

The ABS defines employees as 'people who work for a public or private employer and receive remuneration in wages or salary. Employees are engaged under a contract *of* service (an employment contract) and take directions from their employer/supervisor/manager/foreman on how the work is performed' (ABS, 2011:3).

Independent contractors are defined by the ABS as 'people who operate their own business and who contract to perform services for others without having the legal status of an employee, i.e. people who are engaged by a client, rather than an employer. Independent contractors are engaged under a contract *for* services (a commercial contract).' The ABS further states that independent contractors' employment 'may take a variety of forms, for example, they may have a direct relationship with a client or work through an intermediary. Independent contractors may have employees however they spend most of their time directly engaged with clients or on client tasks, rather than managing their staff.' (ABS, 2011:3-4).

Finally, other business operators are defined by the ABS as 'people who operate their own business, with or without employees, but who are not operating as independent contractors'. The ABS distinguishes other business operators from independent contractors in that 'they generally generate their income from managing their staff or from selling goods or services to the public, rather than providing a labour service directly to a client. Other business operators spend little time working on client tasks, with most of their time spent on managing their employees and/or business' (ABS, 2011:4).

In November 2008, the ABS Forms of Employment Survey was further refined to better capture information on independent contractors, other business operators and employees.⁴ It is important to note that while the ABS data for independent contractors are cited below, this should not be taken as an acceptance that all persons counted by the ABS as being in the category of 'independent contractors' would in fact be independent contractors for purposes of the law.

⁴ The change has resulted in a break in series for employees and users need to exercise caution when comparing data about employees in the 2008 publication with previous releases as data about this population group have changed.

Growth in Contracting

Waite and Will, authors of a research paper for the Productivity Commission published in 2001 titled 'Self-Employed Contractors in Australia: Incidence and Characteristics', concluded that the share of self-employed contractors in total employment in Australia grew by at least 15 per cent over the two decades to 1998. In August 1998, 844,000 or 10.1 per cent of the total employment in Australia worked as self-employed contractors (Waite & Will, 2001). Of these, around 215,000 citizens, or 2.6% of total employment in Australia, were deemed 'dependent' contractors. Waite and Will (2001) adopted the approach of VandenHeuvel and Wooden (1994) in defining dependent contractors as "self-employed contractors whose work arrangements were similar to those of employees" (in Waite & Will, 2001:2). This paradoxical category of workers who are nominally self-employed but whose work arrangements are similar to employees is instructive for how the labour market is evolving.

Trends in more recent years are shown Table 1. Across Australia the proportion of independent contractors grew from 9.1 per cent (or 967,100) of all employed persons in November 2008 to 9.8 per cent (or 1,105,000) in November 2010.

Table 1, Employed Persons by Form of Employment, All Industries, Australia, November 2008, 2009 and 2010, thousands and per cent

	<i>Employees (‘000s)</i>	Independent contractors (‘000s)	Other business operators (‘000s)	All employed persons (‘000s)
2008	8,619.6 (80.9%)	967.1 (9.1%)	1,064.4 (10.0%)	10,651.1 (100.0%)
2009	8,660.9 (81.2%)	1,029.0 (9.6%)	975.0 (9.1%)	10,664.9 (100.0%)
2010	9,165.7 (80.9%)	1,105.0 (9.8%)	1,047.0 (9.2%)	11,323.2 (100.0%)

Source: ABS Forms of Employment, ABS Catalogue 6359.0, Australia, November 2008, 2009 & 2010

The majority (74 per cent) of independent contractors were males and almost half (47 per cent) worked 40 hours or more in their main job (56 per cent of males and 22 per cent of females; ABS, 2011:6). Around half of all independent contractors (49 per cent of males and 54 per cent of females) were in the 35 to 54 year age groups (ABS, 2011:6). Further, as age increases, generally the proportion of employees decreases. Being an employee, however, remains the most likely form of employment for employed persons of all age ranges (ABS, 2011:9, 12-14). There is no noticeable difference in the proportion of independent contractors vis-à-vis employees and other business operators in Queensland relative to the other States (i.e. NSW, Victoria, South Australia, Western Australia and Tasmania). The ACT and the NT generally have high proportions of civil servants and therefore higher rates of employees than in the States (see Tables A2.1, A2.2, A2.3 and A2.4 in Appendix Two for the relevant tables of ABS statistics).

It should be noted that independent contractors were most likely to work in the Construction Industry Division (31 per cent) followed by the Professional, Scientific and Technical Services Industry (14 per cent). Male independent contractors, in particular, were more likely to work in the Construction Industry Division (39 per cent compared to 13% in the Professional, Scientific and Technical Services Industry; ABS, 2011: 6).

Other characteristics of independent contractors in November 2010 include:

- 77% usually able to work on more than one active contract, however just under half (47 per cent) had more than one active contract in the reference week;
- 60 % had authority over their own work (61 per cent of males and 59 per cent of females);
- 68% were able to (sub) contract their own work (71 per cent males and 60 per cent females);
- 79% had no employees (78 per cent of males and 84 per cent of females);
- 14% had been with the current business for less than 1 year, while 38 per cent had been with their current business for 10 years or more;
- 85% had some say over their start and finish times; and
- 61% worked weekdays only in their jobs, while a further 39 per cent worked on both weekdays and weekends (ABS, 2011:7).

Independent Contractors in the Construction Industry

Table 2 demonstrates how forms of employment have changed in the construction industry from 2008 to 2010. This was a period of considerable volatility. From 2008 to 2009, total employment in the sector fell by 4.9 per cent (or just under 50,000). The following year total employment rose by 10.8 per cent (or just over 100,000 jobs).

Table 2, Employed Persons by Form of Employment, Construction Industry, Australia, November 2008, 2009 and 2010, per cent

	2008 (%)	2009 (%)	2010 (%)
Employees			
With paid leave entitlement	43.5	42.5	47.1
Without paid leave entitlement	12.0	11.8	11.2
Independent contractors	31.6	35.7	32.7
Other business operators	13.0	10.0	8.9
Total	100.0	100.0	100.0
Change on previous year		-4.9	8.9

Source: ABS Forms of Employment, ABS Catalogue 6359.0, Australia, November 2008, 2009 & 2010

The changing proportions of different forms of employment in the construction during the period from 2008 and 2010 were particularly striking. The strongest trend has been a fall in the proportion of 'other business operators' – down from 13.0% to 8.9% of the workforce. The proportion of casuals (i.e. employees who are not entitled to paid leave) has also decreased, albeit much more modestly, from 12.0% to 11.2%.

The most cyclically sensitive forms of employment are employees entitled to paid leave and independent contractors. The proportion of 'standard' permanent employees fell in the downturn (down from 43.5 to 42.5 per cent) and then rose in the recovery (up from 42.5 to 47.5 per cent). The situation for independent contractors moved in the opposite direction. As total employment in the sector fell, the proportion of independent contractors in the Industry rose (up from 31.6 to 35.7 per cent) and then in the recovery their proportion declined (back to 32.7 per cent).

Table A2.4 in Appendix Two shows the number of people employed and change in employment (i.e. job growth or decline) by form of employment in the Construction Industry compared to all industries for November 2008, 2009 and 2010.

What is the occupational profile of these construction contractors?

While the ABS does not release this information on the occupational profile of construction contractors its general catalogues, unpublished data on this topic was recently purchased and published by the CFMEU. This data is summarised in Table 3, below. While the single largest group of contractors are trades level workers, the second largest group is labourers. This suggests that the growth of labour-only sub-contracting is being significantly driven by attempts to avoid the responsibilities of the employment relationship. Exactly what specialist services unskilled contractors provide on a 'task' as opposed to a 'time served' basis remains unresolved, and how they contract on equal terms with other actors in the industry is an open question. It is clearly one potential space where 'sham contracting' is most likely to exist, and is, as a consequence, explored in further detail in the qualitative analysis contained in a later section of this report.

Table 3, Independent Contractors by Occupation, Construction Industry, Australia, November 2008 and 2009, thousands and percentage change

Occupation/ANZSCO	2008	2009	Change 2008 to 10	
	('000)	('000)	('000)	(%)
Managers	38.2	41.5	3.3	8.6
Professionals	3.7	4.5	0.8	21.6
Technical & Trade Workers	187.0	208.6	21.6	11.6
Community & Personal Service workers	0.6	0.5	-0.1	-16.7
Clerical & Administrative Workers	12.1	13.2	1.1	9.1
Sales Workers	1.0	1.3	0.3	30.0
Machinery Operators & Drivers	17.9	17.2	-0.7	-3.9
Labourers	51.6	49.0	-2.6	-5.0
Total	312.0	335.8	23.8	7.6
Total employed persons, construction	988.7	940.5	-48.2	-4.9
Independent contractors as % of Total	31.6	35.7		

Source: CFMEU (2011:16) from ABS Forms of Employment, ABS Catalogue 6359.0, Australia, November 2008 & 2009

A preliminary estimate of the incidence of 'sham contracting' in the Construction Industry

While the revised ABS Forms of Employment Survey provides an improved basis for obtaining estimates of different forms of employment in the sector, the ABS does not publish estimates of the level of 'dependent contractors' or potentially 'sham contractors'. On the basis of the information provided, however, it can be concluded that they are most likely to be located amongst workers classified as either 'employees with no paid leave' and 'independent contractor'. Over the three years of these surveys, these two groups comprised just under half of the construction workforce (43.6, 47.5 per and 43.9 per cent respectively in 2008, 2009 and 2010).

Some commentators have called for the creation of a new category of working relationship located somewhere between the traditional employment and independent contractor. It has been suggested that this category, sometimes termed 'dependent contractor', attempts to reflect the relation of dependency between the person providing the service and the person acquiring the service (CFMEU, 2011:55).

Is it possible then to get a reasonable estimate of ‘dependent contractors’?

Since 2007, the WRC has been tracking 8,300 workers and gathering information on how their form of employment has been changing as part of the *Australia at Work* study. Table 4 summarises key information on that part of the sample that covers construction workers for the latest year of the survey for which data are available – 2010.⁵

Table 4 shows that of the 312 participants in the sample who were employed in the construction industry in 2010, 48.7 per cent identified as ‘employees’ with the remaining 51.3 per cent identifying as ‘self-employed’ (including contractors). Table 4 also shows that the proportion of self-employed in Construction is considerably higher than the corresponding figure for all industries (at 51.3 and 16.2 per cent respectively).

Table 4, Employment status, Construction Industry, Australia, Main job, 2010

	Sample (n)	Weighted Population (N)	Weighted %	All industries Weighted %
Employee	164	252,828	48.7	83.8
<i>With paid leave</i>	129	205,004	39.5	70.1
<i>Without paid leave</i>	35	47,824	9.2	13.7
Self-employed	148	266,228	51.3	16.2
Total	312	519,055	100.0	100.0

Population: ANZSIC Construction Industry workers (all workers all industries)

Weight: Weights10

Source: Australia at Work Wave 4 (2010)

One of the key matters of interest for the Australia at Work study is the collection of data on indicia concerning whether contractors could be classified as ‘independent’ or ‘dependent’. The key indicia captured and their incidence amongst construction contractors and those in all industries are summarised in Table 5.

Table 5, Indicia of dependence, Self-employed workers, Construction Industry and All Industries, Main job, 2010

	Sample (n)	Weighted Population (N)	Weighted %	All industries Weighted %
Does not contract to do work for another business/es	32	54,726	20.6	38.9
Dependent on one client where income from one client comprised 80 per cent or more of income in previous financial year	35	64,339	24.2	22.7

Population: ANZSIC Self-employed Construction Industry workers (Self employed all industries)

Weight: Weights10

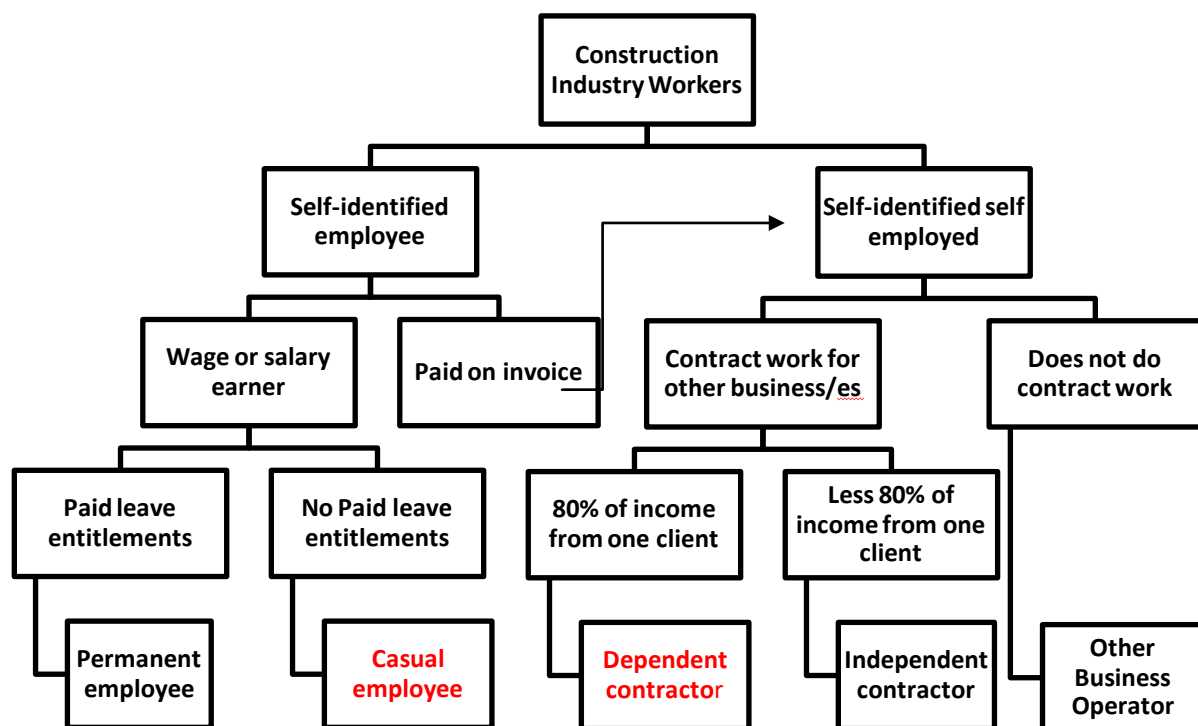
Source: Australia at Work Wave 4 (2010)

⁵ Differences are to be expected between ABS data and data from the *Australia at Work* study. This is because the *Australia at Work* study is longitudinal in nature; in that it tracks the same sample of people who were either working or looking for working in March 2006. Whereas the ABS Forms of Employment Survey is cross-sectional; drawing a new sample each year the survey is conducted.

Table 5 shows, firstly, that just under four-fifths (79.4 per cent) contract to do work for other businesses; this proportion being considerably higher than the rate for all industries (at just over three-fifths, 61.1 per cent). Secondly, in the last financial year, fewer than a quarter (24.7 per cent) of self-employed construction workers received the bulk of their income (i.e. 80 per cent or more) from one client. Tables A3.1 and A3.2 in Appendix Three set the above data out in further detail.

Based on responses to these two questions, a new derived variable was created to generate an estimate of the proportion of independent and dependent contractors among the Construction Industry workers in the *Australia at Work* sample. Figure 1 shows the way the variable was constructed.

Figure 1, Methodology for Constructing Contractor Variable



As noted earlier, it is likely that the main ground for ‘sham contracting’ is likely to exist amongst workers in the two categories of ‘casual employees’ and ‘dependent contractors’. This does not, however, mean that ‘sham arrangements’ are confined to workers in these two categories. The survey relies on self-report of employment status, and therefore may have been reported incorrectly by respondents. That said, results from the *Australia at Work* survey have been used to generate an indicative estimate of the number and proportion of dependent contractors. These figures should be interpreted with caution.

Using the above information, construction workers who self-identified as employees were divided into those with and without paid leave entitlements (as proxies for permanent and casual employees). Two of the self-identified employees said that they were ‘paid on invoice/worked as contractors’ so they were moved from employee to self-employed status. This left 144 employees and 148 self-employed Construction workers.

Of the 148 self-employed workers:

- 116 contract to do work for other businesses and 32 do not do contract work;
- 35 say one client provided 80 per cent or more of their income in the previous financial year, 112 said this was not the case and 1 was unsure;
- 7 of the 35 workers who said that one client provided 80 per cent or more of their income in the previous year also said that they did not contract to do business;
- 88 self-employed workers contract to do work and did not have one client who provided 80 per cent or more of their work in the previous financial year. This group was coded as 'independent contractors';
- 28 self-employed workers contract to do work with one client provided 80 per cent or more of their work in the previous financial year. This group was coded as 'dependent contractors'; and
- 32 self-employed people said they did not contract to do work for other business. This group was coded as 'other business operators'.

Table 6 shows that just under one third (31.0 per cent) of the self-employed contractors could be classified as 'independent contractors', a further one-in-ten (9.7 per cent) as 'dependent contractors' and the remaining one-in-ten (10.5 per cent) as 'other business operators'.

Table 6, 'Dependent Contractor' Status, All employed persons, Construction Industry and All Industries, Australia, Main job, 2010, per cent

	Sample (n)	Weighted Population (N)	Weighted % %	All industries Weighted %
Employee	164	252,828	48.7	82.1
<i>With paid leave</i>	129	205,004	39.5	69.1
<i>Without paid leave</i>	35	47,824	9.2	13.0
Independent Contractor	88	161,158	31.0	7.8
Dependent Contractor	28	50,344	9.7	3.1
Other business operator	32	54,726	10.5	7.0
Total	312	519,055	100.0	100.0

Population: ANZSIC Construction Industry workers (all workers all industries)

Weight: Weights10

Source: Australia at Work Wave 4 (2010)

Table 6 also shows that the level of 'independent' and 'dependent' contractors in Construction is considerably higher than it is in the general workforce (31.0 per cent compared to 7.8 per cent; and 9.7 per cent compared to 3.1 per cent, respectively).

Contractor variables were also constructed using the 2007, 2008, and 2009 data. These variables produced similar results to those obtained using the 2010 data. For example, the incidence of 'dependent contractors' varied only slightly representing 9.7 per cent in 2010, 10.9 per cent in 2009, 11.2 per cent in 2008 and 10.0 per cent in 2007. This year-to-year variation was not statistically significant ($p > .05$).

The CFMEU recently undertook research to derive an estimate of 'sham contracting' in the Construction Industry. This research considered additional indicia such as whether contractors, and in particular contract labourers, have authority over their own work, employ others and have control over their hours of work (CFMEU, 2011:23-28). Based on their research, the CFMEU arrived at lower

and upper-bound estimates of between 29 and 48 per cent of all contractors working in construction as working in ‘sham arrangements’.

On this basis, several further indicia were considered using the *Australia at Work* data.

In summary, we found:

- Just over two-thirds (60.5 per cent) of self-employed Construction workers do not operate under incorporated businesses, with just over half (54.8 per cent) of independent contractors and just over two-thirds (69.3 per cent) of dependent contractors working in unincorporated business entities, Table 7.
- The vast majority (93.7 per cent) of self-employed construction workers complete Business Activity Statements (BAS) or Income Activity Statements (IAS). A slightly higher proportion of independent contractors (95.6 per cent) complete BAS/IAS than do dependent contractors (89.9 per cent) and other business operators (91.8 per cent).
- Slightly more than two-fifths (42.7 per cent) of self-employed construction workers employ others and around one-fifth (19.7 per cent) of construction workers report between 2 and 4 employees in their ‘workplace’. Given that spouses are sometimes employed in their husbands’ businesses, either for tax-sharing purposes and/or to undertake administrative work, it is likely that many of the businesses with 2 employees are likely to be comprised of construction workers and their spouses.
- Just under three-fifths (63.0 per cent) of construction workers felt they had control over the number of hours they worked and two-thirds (67.7 per cent) felt they had control over when they worked.
- Higher proportions of employees feel insecure in their jobs, with dependent and independent contractors holding the perception that they have greater job security.

Taking into account the additional indicia above, our estimate of dependent contractors is best viewed as a lower-bound estimate. Tables A3.3 to A3.7 in Appendix Three set out the results for the above additional indicia.

Conclusion

It is difficult to ascertain a precise estimate of the incidence of Australian workers involved in ‘sham contracting’. Even though a category of ‘dependent contractor’ has been advanced as a way of acknowledging the reality of de facto employees, it has no legal status. There are also problems in the way individuals classify their employment status, and how they describe the way their business operates. Not all ‘dependent contractors’ will be ‘sham contractors’, and equally, not all ‘independent contractors’ will be bona fide businesses. In addition, a proportion of the workers who identify as ‘casual employees’ may in fact be working with ABNs under ‘sham’ arrangements and a proportion of the self-employed contractors may view themselves as wage and salary earners because they draw wages from their business. There are clear sectoral differences at work, and once again our attention has been drawn to the commercial sector as undergoing the most rapid change in these arrangements. With the above caveats in mind, an estimate of around one-in-ten of the construction workers in the *Australia at Work* sample appear to be working under arrangements that are more akin to an employee than rather an independent contractor status. This equates to approximately one-quarter (23.8 per cent) of all contractors being ‘dependent contractors’.

Text Box 3: Industry Stakeholder Views on ‘Sham Contracting’

In 2010, the Australian Building and Construction Commission (ABCC) conducted an inquiry into sham contracting, in which stakeholders were given the opportunity to present their views on the topic. In response to the inquiry, the CFMEU opted to report its view in a publication ‘Race to the Bottom’ rather than participate in the inquiry. The diverging views amongst employer associations and unions reflect that the controversial nature of the topic of sham contracting. This section of the report will briefly outline stakeholders’ differing views on the topic of sham contracting including its definition and the role of law to respond to it.

The submission of the Housing Industry Association (HIA) to the ABCC inquiry exemplifies the response from business interests in the construction industry. The HIA (HIA, 2011:4) defines sham contracting as a state in which ‘employees, at fact and law, are forced into service contracts or deliberately mislabelled as contractors.’ This is the “deliberate” or “reckless” misrepresentation of employment as something else. Whilst acknowledging that such practices are unfair and problematic, the HIA contends that sham contracting is not “rife” or “rampant” in the construction industry. The difference between “sham” contracting and legitimate arrangements through small businesses, including “labour only sub-contracting”, “independent contracting” and “dependent contracting”, is therefore emphasised:

... the fact that a contracting arrangement may be subject to a law that deems certain workers to be employees for some purposes does not make it a sham. (HIA, 2011:4).

The HIA asserts that the ABCC and public discourse has conflated “sham” practices with legitimate commercial arrangements, and is prejudicial towards contracting, seeing it as an aberration, with employment continuing to be the norm. In rejecting calls for more regulation in the industry, the HIA maintain provisions in the *Fair Work Act* are:

adequate to deter those who deliberately misrepresent the nature of their work relationship, or try to force others to alter an existing relationship against their will (HIA, 2011:34).

The key argument promoted in the Australian Industry Group (AIG) and Australian Constructors Association’s (ACA) joint submission was that the common law principles and tests are sufficient in their current form. They claim that it would be unwise to extend provisions such as that found in the New South Wales legislation to federal law, as this would, in their opinion, have the effect of deeming certain independent contractors to be employees. In addition, the submission warns of problems with current legislation that allow clauses in enterprise agreements to restrict the engagement of contractors and on-hire employees as permitted matters in bargaining. Thus, similar to the HIA, they also reject the need for more regulation of labour practices in the industry.

An analogous set of arguments were promoted by the Australian Chamber of Commerce and Industry (ACCI), which also takes the view that the *contract for services* test provided at common law is sufficient. While ACCI is not opposed to amending legislation to provide for additional certainty, it asserts that any changes should not prejudice common law rights. In addition, ACCI expressed concern that the current sham contracting provisions in the *Fair Work Act* are sufficiently oppressive to deal with sham contracting. The Chamber of Commerce and Industry WA (ACCI WA), in its separate submission, also contends that the National Code of Practice for the Construction Industry is currently satisfactory (in combination with the applicable legislation) to deal with sham contracting.

Text Box 4: Industry Stakeholder Views on 'Sham Contracting'

Rather than making a submission to the ABCC inquiry, the CFMEU, for reasons articulated in their report, opted to publish their own separate report 'Race to the Bottom'.

The CFMEU (2001:17) define 'sham contracting' as:

a device that attempts to disguise an employment relationship as one of client and independent contractor". That is, "a variety of arrangements designed to give the appearance of a commercial contract for services between two parties when in substance and at law, the true nature of the relationship is one of employer and employee.

The CFMEU (2011:7) contends that sham contracting will:

generally involve payment at some "agreed rate" without regard to any applicable industrial award or agreement. For taxation purposes, the payments made are treated as though they were paid as part of an 'arm's length', commercial transaction between independent parties.

Increasingly, contends the CFMEU, 'sham contracting' is carried out through the vehicle of an interposed entity in the form of a company, partnership or even a trust, in order to put some artificial distance between the individual providing the service and the service acquirer (CFMEU, 2011:7).

Their research highlights how ABNs can be obtained merely by applying to the Australian Tax Office (ATO), where checks are generally not done to determine whether the applicant does in fact have a genuine business of their own.

Under the system of "all in hourly rates", the CFMEU argue that employers are able to avoid costs such as annual leave, sick leave, redundancy payments, payroll tax, workers' compensation insurance and superannuation.

Related to the issue of contracting is the prescribed payments taxation system (PPS). This is a form of withholding tax requiring tax instalments to be withheld from intra-industry payments under contracts involving the performance of particular work (CFMEU, 2011:8-9). The CFMEU argue that the introduction of the PPS has been largely responsible for "an exodus of workers leaving the PAYE system and joining the superficially more attractive PPS which imposed a lower initial withholding rate of between 10% and 25% (CFMEU, 2011:9).

The CFMEU asserts that a combination of factors such as "all-in" rates of pay and the PPS taxation regime have fuelled the growth of sham contracting. They suggest the result has been avoidance of award regulation and the payment of lawful employment entitlements as well as a disregard for workers compensation insurance, payroll tax, industrial legislation and other administrative incidents of the employment relationship (CFMEU, 2011:9).

In contrast to employer groups, the CFMEU has called for reforms to legislation and is advocating the need for stronger enforcement to tackle sham contracting.

Theme 1: Sectoral factors

Introduction

The nature of contracting arrangements needs to be considered in light of the way the construction industry is structured. The ABS distinguishes between three discrete but overlapping sectors of activity within the construction industry:

- residential building (e.g. houses, flats, etc.)
- non-residential building (e.g. offices, shops, hotels, etc.); and
- civil construction (e.g. roads, bridges, water, sewerage, as well as work associated with major resource construction etc.) .

Previous research has also found that self-employed contracting is more common in the residential building sector than it is in the non-residential building and engineering construction sectors (Productivity Commission 1999; Underhill, 1991, Underhill, et al, 2000). However, our interviews with workers in the industry suggest that sub-contracting is now widespread in all three sectors.

The following list outlines differences between (and sometimes within) the three main sectors of the construction industry:

- The types of construction work and tasks conducted;
- the machinery, tools, and technology used to perform work;
- occupational skill sets and work practices; and
- the level of unionisation and incidence of collective bargaining.

The perspectives on workplace safety elicited from workers reflect, at least in part, these differences. With this in mind, efforts have been made to sample as widely as possible.

In the following section we provide a brief overview of the key sectoral features as described by the research participants.

Residential construction

Residential Building involves the construction of dwelling units, including new houses, other new residential buildings (flats, apartments, villa units, townhouses, duplexes, etc) and dwellings created as part of alterations and additions to existing buildings (including conversions to dwelling units) (ABS Cat 1301.0). This sector is characterised by small-scale, low-rise housing construction. Within this sector, there are currently a large number of small sub-contractors, who typically work for private clients or builders. Few workers are present on these sites at any one time and workers in this sector are largely un-unionised.

Interviews with workers in the cottage industry revealed a 'low touch' regulatory environment. For example, safety inspections were reported to be at worst non-existent and at best extremely rare, with one research participant reporting that they had only seen an inspector four times in 40 years (Ron, Sub-contractor, Tiler & Block Layer, Cottage). Self-employment is the norm in this sector of the industry, and consequently responsibility for health and safety appears to fall mainly on individuals. OH&S was seen very directly within the context of a trade culture, with several research participants suggesting that it was related to the skill, judgement and experience of the worker.

Research participants suggested that compliance with over-regulated health and safety standards would directly impinge on profits, and undermine their ability to be competitive.

Your high end residential, it's borderline commercial, so it's really relaxed and there's not as much money in it again. That's a big thing because scaffold costs a lot of money, and takes time setting things up but they haven't actually allowed for it [scaffolding] in any of the quotes, so it's more – get in, do it, whatever you have got to do, and get out.

(Jason, Self-Employed Carpenter, Commercial & Residential)

One research participant, who works in civil construction, made the following observation about the stark contrast between the safety standards in the residential housing sector and the civil sector:

If you just come and drive around and have a look at some of the small building sites where they are doing housing - in our job we would be sacked for wandering around at heights with no harnesses on and not properly trained. They obviously feel threatened by their bosses.

(Paul, 55+ crane driver and rigger in civil construction)

Taken together, the findings outlined above suggest that (a) the responsibility for OH & S in residential construction industry rests primarily with the individuals and (b) adherence to professional standards is viewed as both unnecessary and costly. There is also limited evidence to suggest that safety standards in the civil construction industry are superior to those adopted in the residential construction industry.

Civil construction

The civil construction sector is characterised by large-scale projects such as infrastructure and mining construction. It includes the construction of roads, bridges, tunnels, water, sewerage, and other large construction projects such as high-rise apartments and office buildings. Public funding of many projects undertaken in this sector means they are typically subject to high levels of public scrutiny and accountability.

The civil construction sector is characterised by the use of joint governance structures. These can take the form of Master Agreements which bring owners and unions together to negotiate an agreement that covers a whole site. Such an agreement results in the whole site being compliant, regardless of employment contract. Mater Agreements ensure that the terms and conditions of workers on sites cannot be used to gain competitive advantage in the tendering process, and therefore workers are more likely to be engaged on standard employment contracts with full benefits (K11).

In contrast to workers in the cottage sector, workers in civil construction describe a more complex and capital intensive industry, which demands a more systematic approach to safety. Research participants working in civil construction reported that safety inductions are regular and that workers feel confident in reporting safety problems. It was also reported that sites are shut down promptly upon confirmation of a safety hazard. Workers in the civil construction industry were more likely to be engaged as employees, to say they felt 'looked after' when they were injured, had access to workers compensation, and were encouraged to take time off work to recover fully from an injury.

Commercial construction

This sector is characterised by medium and large-scale housing construction (typically three or more floors), offices, shopping complexes, hotels, and other projects such as fire stations and council amenity blocks. The results of the qualitative research suggest that some of the features of work in the residential building sector are found in the lower end of the commercial construction sector. Conversely, large commercial projects appear to be similar to projects in the civil sector.

Interviews with research participants in the commercial sector revealed that workers in this industry experience pressures and work tasks reported both in the residential and civil construction. As a result, the space for 'sham contracting' arrangements is, arguably, largest in this sector. This possibility is explored further in the section on commercial pressures.

Commercial construction can be similarly capital intensive to civil projects, however, sector specific production processes and managerial arrangements have opened up the space for risky occupational health and safety cultures which impact on both employees and contractors alike. The sector is dominated by very large companies that tender for projects as head contractors with few employees and a high reliance on sub-contracting of discrete parcels of work. Some research participants suggested that the largest companies have fewer than 10 listed employees, with the remainder engaged as sub-contractors and sub-sub contractors (K111).

The qualitative evidence suggests that employment arrangements and OH&S practices in the commercial sector are moving toward more unregulated and individualised risk management systems of the cottage sector. Most notably, research participants reported that the increasing number of unlicensed tradesman was negatively affecting both safety on sites and the ability for legitimate operations to win work.

... there's too many unlicensed tradesmen out there, well they're not even tradesmen, unlicensed contractors out there that are working with no insurance, no nothing and they're just going in and destroying the industry because they can do the job cheaper than we can so it's all boiled down to price now and people go oh you're too expensive we can't afford you we'll just get this guy here in to do it.

(David, Former Employee, Operations Manager, Commercial)

While workers and employers were reluctant to implicate themselves in competitive practices which undermined safety, they did however reveal these problems in the practices of others.

Some employers, and me not being one, they really don't care about their employees so if somebody injured themselves oh well we'll just find somebody else. Meanwhile that guy can't work for the rest of his life and he's ruined. He can't work, his family, it's tough, so yeah we're not into that at all.

(David, Former Employee, Operations Manager, Commercial)

Intra sectoral factors

The research findings outlined in the previous section suggest that there is significant variance in safety concerns and practices across the different sectors of the construction industry. Research participants also indicated that concerns and practices differed significantly depending of trade and client types. These findings are outlined in the current section.

Trades

Construction workers with a wide range of trade qualifications and/or tickets were interviewed for this research. In addition, workers from the following trades were interviewed: labourers, crane drivers and riggers, scaffolders, painters, plumbers, electricians, carpenters, builders, carpet layers, plasterers and tilers, project managers, and operations managers.

Evidence suggests that some trades are more likely than others to engage in 'sham contracting'. Specifically, union representatives and workers generally reported that 'sham contracting' was less prevalent in the structural trades, but epidemic amongst the finishing trades.

*The gyprock hangers, the tilers and the brick layers - they are rife with sham contracting.
(KII2)*

Some felt that workers in highly skilled occupations appeared to be more resistant to 'sham contracting' arrangements because they are generally better organised through trade associations, which help to mediate the most severe of competitive pressures. As one research participant commented:

...the smarter the trade is, the more they talk to each other (KII5)

In some trades, resistance to lower standards, 'corner-cutting', and 'sham contracting' may have traditionally been a result of a 'craft ethic' where training and safety were integrated in the understanding and practice of craft, and then subsequently reproduced in younger workers through the apprenticeship system. Closely linked with the craft ethic was occupation status and reputation, which also acted as buffers for people within those fields when faced with pressures to cut costs.

The deskilling of many trades, and outsourcing of others, appears to be challenging and even undermining many craft traditions. Indeed, research participants often mentioned that off-site manufacturing and the use of pre-fabricated material was increasing. This was seen particularly in the transition from the use of bricklayers on site to the use of tilt up and pre-cast panels and the shift from plastering to gyprocking.

For some workers (e.g. electricians), the demand for their skills was reported to be so high so that it was less attractive for companies to have their electricians on ABNs when they sought to keep an available workforce :

At the company I was at, when we were quiet, I would see groups of guys sitting around for two weeks and bosses knew and didn't sack them because in our industry it's pretty tough to try and find people. It was easier for our bosses to pay guys to sit on their bums for a month, than to fire 20 people and then have to try and rehire 20 people in a month when all the work came back in.

(Karl, Former Employee, Electrician, Sub-contractor, Commercial)

But this itself was vulnerable to the sub-contracting process whereby electrical work may be tendered for and won under EBA conditions, and then parts of the work be contracted out under further sub-contracting arrangements:

But certainly in the electrical side of things, it happens more where they win a contract under their EBA and then they sub-contract other parcels of that contract out and they will try and hide it as specialist work where it is not specialist work at all. (KII2)

The fragmentation of production processes and the gradual de-skilling of construction is discussed further in the next theme.

Clients

The owners of projects can exert a marked influence over contracting arrangements and OH&S in the construction industry. Both the private and public sectors undertake construction activity within Australia. There are two ways of looking at public and private sector involvement in building and construction projects: who owns the project, and who engages the labour force responsible for building the project (Cole Commission, Discussion Paper One, 2002:17). For example, in 2001/02, 39 per cent of the work undertaken by the private sector was on public sector owned projects. When these projects are included as public projects, the public sector accounted for 30 per cent of overall building and construction activity in 2001/02 (Cole Commission, Discussion Paper One, 2002:18).

As previously mentioned, the private sector operates in all three areas of activity, with a major role in residential and non-residential building activity. The public sector plays a major role in initiating and undertaking engineering construction. In addition, it has a role in non-residential building activity, in particular for the health and education industries by building hospitals and schools.

The nature of the client appeared to be a factor influencing the occupational health and safety culture on construction sites; however this was a contentious issue among research participants. For some sub-contractors, large government jobs were equated with a major focus on safety, compliance and auditing which helped to enforce safety standards down the chain. Workers such as Brett, an electrician, argued that having the government as a client made a bigger difference to site safety than the contracting arrangement or form of employment workers were being engaged on:

Look, it didn't really matter whether they were company employees or sub-contractors, there was a set of safety guidelines and requirements that had to be followed, so it didn't matter who it was or where they came from, whether they were direct employees or not, you had to follow those safety guidelines so it didn't matter who you were.

(Brett, former employee, Electrician, Commercial & Civil)

The Federal and QLD State government clients were viewed by some as raising safety standards in the industry by forcing contractors to meet a high level of safety accreditation in order to win tenders and, importantly, by factoring in the costs of compliance adequately. As one research participant, a project manager in the commercial sector explains, when governments put projects out to tender:

...their safety costs are factored in. Part of doing that project [building a school] was having to comply with Federal safety, which is why we had to have a project manager over the top, because there weren't very many companies who had the right safety level of accreditation. There were only about three companies in QLD that were able to actually tender on the project overall and then they had to employ the smaller contractors. The idea was to get the smaller contractors up to speed.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

Another research participant highlights the influence of government clients in the industry by discussing the changes he has observed his company undergo as a result of the accreditation process:

We can now tender for Federal Government work. We, only in the last 12 months received the accreditation for that, so since then, as a company, we're more conscious of the standards and the need to adhere to those standards. In that sense we're more conscious but it's only because we're in that game now...

(Sam, Employee, Salesperson, Building/Developer, Cottage)

Others interviewed, such as one key informant (KII5) who is closely involved in the contracting process, had a more critical perspective to contracting, suggesting that government oversight provided the conditions for 'sham contracting' to occur. Some argued that the government, despite putting 'incredibly onerous conditions' in contracts with head contractors, lacked the capacity to enforce these requirements:

The state government will write, in its contracts, those requirements, but it never checks it, and so they are hollow words, and there is no governance. (KII5)

This research participant went on to contrast this with some private sector clients who demand high performance from their head contractors, and have the governance mechanisms in place to hold them accountable:

So in the big heavy industrial resources stuff, following processes and having rigor and governance, is right at the top of the chain of understanding how to control a project. So when a [private company X] puts in a contract that all your sub-contractors shall follow these rules, they shall have an ABN, they shall be a bona-fide contractor who gets a price for an outcome, and they provide all their plant and equipment - they mean it. (KII5)

The sense that governments have become lax in monitoring the sub-contracting process in projects they fund should also be interpreted in the context of specific trends within the public sector which has undermined their capacity to supervise and enforce their contracts on their head contractors. Specifically, there has been a reduction in the technical competency of the public sector as government sheds skilled workers such as architects and engineers. Government is therefore

increasingly reliant on head contractors to provide both project management and technical expertise. Some research participants described this change in government construction jobs as a 'disconnect' and as a shifting of responsibility away from the public sector toward the larger construction companies who attract lower public scrutiny. For example, one research participant states:

They've passed that just down the line, and public works just sign off on it, and don't care. (KII5)

Conclusion

The interviews with construction workers and key informants in the construction industry confirmed the picture that there are specific sectoral and intra-sectoral factors which explain variations in attitudes to, and experiences of, OH&S in the construction industry. The identification of trends which now cut across different sectors, trades and clients creates a complex picture of the processes which give rise to 'sham contracting'. In the following sections, analysis is focussed specifically on the commercial and high rise residential construction sectors where the growth in 'sham contracting' appears to be most prevalent.

Theme 2: Production Process

Introduction

As noted in the Introduction, the historical assumption that production (in this case construction) is based either around a series of activities occurring within single firms, or on a series of discrete, bi-lateral activities and exchanges between two parties does not accurately reflect the reality of modern (or for that matter long-standing) processes of construction. This is, in part, a reflection of the ambiguous production process, which mostly involves a range of firms, often at the same location, in a process of co-operation, but structured around formal or 'at arm's length' contracts up and down the construction design, financing and production process.

The research conducted for this study, especially the in-depth interviews, suggested that understanding the production process in the industry, its historical structure and momentums of change, was vital to understanding the supply-side and demand-side factors driving contracting arrangements. Consequently, the production process in construction is explored in the current section.

Joint production

The production process in construction comprises a diverse range of tasks such as design, engineering, excavation, scaffolding, concrete-laying and painting. These tasks and activities often require

- different skills sets and occur at different points in the production process; and
- different groups of workers to be assembled at the same location at different points in the production/construction process.

In terms of on-site activity in construction, the focus of this study, many workers are only required at one point in a project and these workers are organised through firms that specialise in particular trades and activities, which contract to head contractors. As such, most actual construction work is carried out by a series of sub-contractors under the supervision of a head contractor or builder (Productivity Commission 2001:3).

This situation captures a particular type of joint production process that is structured around a series of contracts between firms and production entities (Morriss, 1973; Winch 1985; Vrijhoef and Koskela 2005). Understanding joint production has posed a challenge to conceptual and policy frameworks that tend to have two clear models of organising work: within individual firms, and between independent and discrete entities. Joint production does not fit neatly within either of these ideal types. It is this reality that makes contractual and governance arrangements to facilitate joint production so complex and difficult to untangle.

In attempting to grapple with the complex reality of the construction process, it is now established that construction projects are somewhere between a series of discrete arm's length market exchanges of distinct firms and hierarchical relationships within firms ⁶. One attempt to

⁶ Organisational, economic and legal theory are now wrestling with the growing reality of joint production through a diverse range of forms – partnerships, networks, alliances (see for instance Williamson 1975; Eccles 1981a; Eccles 1981b; Dubois and Torvatn, 2002).

conceptualise construction projects casts the parties involved in construction projects as temporary multi-organisations (TMOs) while others have suggested thinking about a construction project as a quasi-firm. However, Winch (1988) warns that such concepts tend to emphasise the technical co-ordination aspects of construction (with a focus on the personal competence and integrity of actors involved) and this does not help us understand that extensive sub-contracting of construction projects also involve 'temporary coalitions of firms with divergent economic and social interests', and therefore the extent to which conflict as well as co-operation are part of the construction system.

Another feature of construction production is the changing links between the construction industry, and the property and finance industries. Not only are major construction companies increasingly active on a global scale, the links between construction and the property and finance sectors have also been driving change in the industry. Increasingly, property markets are integrated into financial markets and linked globally. Financial decisions about property are made on calculations of global asset allocation, where the building is not for an owners' use but part of global property portfolios of financial institutions (including listed and unlisted property trusts). This puts global financial risk-return calculation at the centre of decisions around construction in Australia.

One of the clear implications of joint production and globalised arrangements in the industry is the challenges it poses for governance processes, both in the way the joint production activity is financed (sharing of risks and rewards) and in the way it is organised (especially at site level). The centrality of risk (including allocation and management) in the context of extensive sub-contracting has been stressed by several industry observers. For instance, Crittall (1997) noted more than a decade ago that:

The concept of profit within the building industry context is inextricably linked to the notion of risk (Crittall 1997 cited in Commonwealth of Australia (2002a:23))

The issue of the how workers are engaged in the construction sector, the shift toward greater labour only contracting (and the specific challenge of 'sham contracting') sits under this broad challenge. While it is possible, as employment law scholar Professor Andrew Stewart (see Stewart, 2005) suggests, to understand and clearly differentiate between an employee and an independent contractor, this distinction is challenged by the complex reality of joint production in construction led by a few large globally oriented head contracting firms that are themselves increasingly linked to financial markets and modes of calculation and that finance and co-ordinate work. This issue is discussed in detail, below. The next section, however, explores how the contractual arrangements facilitate joint production/construction.

Pyramid contracting

The way in which joint production occurs in construction is usually referred to as 'pyramid sub-contracting'. There are two main dimensions to pyramid contracting. The first relates to how 'contracts of' and 'contracts for' service are designed to address the division of labour of work being broken down into discrete activities by specialist workers at particular stages of the production process. The second relates to how competitive pressures are driving the cascading of 'contracts of' and 'contracts for' service through the construction process. While commercial pressures will be discussed in greater detail in the next section, in terms of the production process, these pressures

provide a potentially strong driver for contractors to use, and even exploit, the existing nature of pyramid contracting to maximise income and reduce costs. In this way, each contractor may attempt to transfer the risk associated with joint production on to other sub-contractors further up or down the chain. This process can occur at all levels of the pyramid.

The Department of Industrial Relations Queensland's submission (2005:16) to the House of Representatives Inquiry into Independent Contracting and Labour Hire Arrangements identifies the Construction Industry as a "specialist area where the production process, combined with a diverse range of discrete tasks" results in certain workers only being required at one point in a project. Pyramid contracting in the construction industry revolves around a Head Contractor who tenders for large-scale projects. According to our interviews with key informants and workers, this Head contractor may, as mentioned above, have as few as six employees. The Head Contractor, rather than providing workers or equipment on a construction project, initiates the process of tendering and re-tendering to other contractors who then in turn further divide construction tasks amongst sub-contractors down the chain.

Further, research participants suggested that the fragmentation in the division of labour has contributed the deskilling of trades and the loss of technical competencies in project management, marking a shift from supervision and joint responsibility to compliance management. This increases the gap between project managers and sub-contractors and facilitates a distancing of responsibility between each level of pyramid, passing risk on to workers rather than being concentrated at the top.

There was a general consensus among research participants that recent developments in pyramid contracting arrangements, especially in the commercial sector, are driving downward pressure on quality, on workers entitlements and ultimately on OH&S. This appears to be particularly apparent in the commercial construction sector. Importantly, experiences of pyramid contracting tended to be described differently by research participants involved in various stages in the production process. Industry Associations, for example, represent members directly drawn into participation in the process of tendering and re-tendering for work as contractors and larger sub-contractors. Workers on the other hand, had little direct experience of the tendering process itself and therefore tended to explain the difference in safety standards as driven by the personal characteristics of individual project managers on sites where they were working. The influence of personality and processes on contracting arrangements is discussed in more detail, below.

Financing by task rather than time

The myriad of contracts in place on any one construction site also leads to a financing model that costs and pays for tasks rather than time. Highlighting the structuring of contractual relations, in its submission to the 2005 House of Representatives Standing Committee on Workplace Relations and Participation, the Master Builders Association (MBA) noted that:

The volatility and fluctuating nature of the industry means that there is limited scope for any degree of permanent employer/employee relationships... the underlying volatility of the market means that many industry participants choose to gain continuity of engagement through the conduct of their own businesses and voluntarily enter into contractual arrangements. Other factors contributing to the subcontract system include increased labour costs and technological changes which encourage participants in the

industry to specialise in a specific aspect of the building and construction process ... (2005, p 4).

The MBA went on to elaborate on the competitive forces driving sub-contracting in the industry. These forces include the fact that contractors can enter the industry with very little capital outlay. The MBA suggest that the system is “administratively simple” and provides an opportunity for skilled tradespeople to “significantly increase their earnings”. Further, supervision costs are considerably reduced as the principal contractor does not incur administrative overheads associated with (directly) employing staff. In addition, a contractor quotes for a price for a job which reflects the situation in regard to work on hand and the market price reflects the level of demand. The results-based contracts are “generally more efficient” than time-based contracts. The MBA also contend that regional variations in prices paid to contractors “encourages mobility” of contractors and that the housing sector, which predominantly uses contractors, has, unlike all other sectors in the construction industry, not faced any major stoppages or strikes as contractors are bound by the work performed and therefore “has an incentive to get on with the job” (2005:6) .

One key informant (K115) explicitly compared the different balance of risks now borne by head and sub-contractors with arrangements in the past. While this research participant noted that in some ways risk shifting was occurring because clients were either incapable, or actively chose not to, police the head contractor, contractual terms were also being used to explicitly shift risks. He explained that in the past head contractors had contracts which had “a fairly balanced risk profile” for the sub-contractors. Modification of contracts was not allowed and there was an express obligation in the contract. More recently, head contractors were using contracts that he described as “incredibly onerous” on sub-contractors as they now pass the risk down the line.

It is also established in the literature that different types of engagement of labour affect the reward and incentive structures for participants. In general terms, contracting tends to encourage a greater focus on output while employment tends to encourage a greater focus on process (Quinlan et.al. 2002). As noted by Durham and his colleagues (2002: 8):

The economic environment drives a culture where the objective of many contractors working in the industry is to come to the site, start and finish the contracted work, and leave for the next job as quickly as possible. In this culture safe work practices are often regarded as likely to slow the work down and cost money. Any attempt to improve workplace health and safety outcomes must take account of this environment.

Under this production process, where workers are often paid by results and their aim is to ‘get in and out’ as quickly as possible, there is considerable potential for work intensification. One key informant (K113) discussed how the financing of tasks drives the work intensification process:

... even if you're on an hourly rate you've got to be able to run like you're on meterage to do the work or you're no good to the company because it's that tight it's meterage mate, you've got to produce, you've got to produce x amount of metres per day or they don't stack up as a worker, working for that company, so it means if you can't produce 150 metres a day, mate see you later. I'll get someone who can. (K113)

Fragmentation in the division of labour

As mentioned briefly above, the way production is organised and contracted fragments the division of labour and this has the potential to de-skill workers. As different tasks occur at discrete times in the production process, and are organised by specialist contracting firms workers come and go from worksites only as and when their specific set of skills is required. Particular workers may need to only acquire a narrow set of skills to meet their contractual obligations. Arguably, this production process may keep costs down in the short-term but leaves little incentive for workers or their employers to acquire new skills; either via formal training or experience gained on-the-job. One key informant from an employer association noted the example of plastering where the fragmentation of task is being taken to extremes such that there are now often three types of contractors for plastering:

- Plaster board installers;
- Plasterers who then fill in the gaps; and
- Installers of cornicing.

This list does not include the micro division of labour in plastering. As a consequence of this fragmentation, some of the tasks that were undertaken by tradespeople in the past are now being undertaken by semi-skilled workers or labourers, including temporary workers from outside the industry. The labourers may well be competent, but the way that work is organised could result in many labourers not being adequately trained or remunerated for their skills and/or those new to the industry not being given the opportunity to acquire formal trade qualifications. For example, one of the younger research participants (Troy, aged younger than 25 yrs old), who is currently employed as a labourer or trades assistant, reported that he undertakes a broad range of tasks including patching, machine operation, concreting and excavation work. Troy holds a number of tickets but does not hold trade qualifications, having predominantly gained his skills on-the-job. He recounted how labourers are initially recruited to projects via labour hire agencies whereby new workers are put on trial and those that prove themselves to be good workers are offered continuing work. The ability to demonstrate a broad range of skills and a 'can do' attitude appears to be a common way of securing and maintaining ongoing work.

While the individualisation of risk is discussed in further detail in theme 5, it should be noted that one negative aspect of the division of labour is that workers, particularly younger workers, may 'have a go' at tasks that they may not be adequately skilled or trained to undertake. As colleagues working alongside them on sites are also likely to be working under the results-based system, there is going to be little incentive for them to stop what they are doing to either supervise or train a less experienced worker. Indeed, another younger research participant (Matt, also aged younger than 25 yrs old), who has worked part-time in the industry for eight years doing labouring work for a sub-contractor builder on residential and non-residential building sites, reported that he brings his own hand tools to work, such as battery drills and screwdrivers, and generally undertakes whatever he is asked to do. Some parts of the production process are also being undertaken by migrant workers.

Another aspect related to the fragmentation of the division of labour, also mentioned briefly above, is the technological innovation of pre-fabrication. In the past, almost all building work took place on-site. In recent years, more and more of these parts of the production process are undertaken in an off-site factory. This link is demonstrated by building products suppliers like Boral who have now integrated the supply of raw materials (concrete) with fabricated materials. One of the research

participants, who works in a factory that makes timber roof trusses, reported that trusses are only delivered to construction sites for installation after they have been fully constructed. Similar processes have been developed to manufacture pre-cast concrete slabs, glass windows and walls. One key informant (KII5) argued that pre-fabrication may actually lead to improved site safety:

..... from a pre-fabrication perspective to professional organisations who do stuff in a very controlled environment. I actually think that makes jobs easier. So if you look at the [Name] project ... they brought in seven hundred ton modules from [Country], yeah sure they had to manage them over there, but from a project delivery perspective, it made the job very easy, more easy to build in a factory than it is to build on a site. (KII5)

In contrast, another research participant felt the delivery to the site of pre-fabricated materials coming with its own set of safety risks:

... I think that a lot of the safety issues actually create their own problems. Putting scaffold up around a truck for example is creating extra risk and extra problems and is increasing the risk of something happening, because you're increasing the work. So the more work you do the more chance you have of an accident happening.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

It is worth finally noting that as many of the materials used to construct modern buildings are now produced off-site, dislocation exists between those making and installing pre-fabricated materials. Those working off-site and those working on-site may not have an appreciation for the end-to-end production process they ultimately all contribute to.

Site Governance

Existing research on joint production and our interviews suggest that the key elements of the production process (such as pyramid contracting, projects being financed by task rather than time and the fragmentation of the division of labour) have critical implications for site governance.

The Department of Industrial Relations Queensland's submission (2005:27) to the House of Representatives Inquiry into Independent Contracting and Labour Hire Arrangements describes contracting arrangements of construction sites, where contractors 'often engage in horizontal and vertical contract relationships in which responsibilities, tasks, levels of supervision and communication processes are more inclined to become disorganised or confused and "allow" occupational health and safety responsibilities to be avoided' (2005:23).

One important issue that emerged from our interviews was the disappearance in some companies of the middle layer of site management. Supervisors and foremen have been removed or replaced by compliance or defect managers. This generally means that the people performing project manager roles are not tradespeople. These managers also generally do not work with the sub-contractors. Rather, their role is to determine contractual compliance including 'fining' contractors for breaches or defects. This situation was particularly prolific in government projects. One key informant (KII5) clearly distinguished between project managers from trade backgrounds, who oversee the actual completion of work, and those who are defect managers and largely administer contracts:

Exactly, and those sort of guys who – they've never actually picked up a hammer in their life versus those guys that actually built all their own stuff as well, you know, and definitely a difference. (KII5)

There was a general recognition among research participants that a gap often exists between project management and sub-contractors (and other workers), where the responsibility for finding or coordinating solutions between often disparate groups of contractors is simply not performed. Research participants suggested that a culture of joint responsibility was required. Under such an arrangement, foremen would work with contractors and other workers so that when problems are identified, all of the parties are actively involved in, and sufficiently empowered to, develop solutions.

Multiple levels of contracting and sub-contracting of work on construction projects widen the gap between project managers and workers on the ground. Contractors may want to adhere to safety standards but have little or no control over occupational health and safety on sites. Specifically, their own workers are subject to the dictates of a project manager much further up the chain. Below, one contractor in commercial construction, Alex, describes what he does when confronted with safety issues on a worksite:

You shut your mouth and play their games. I have got issues now I have got issues tomorrow, I have got issues every day and if I turn up there and start getting up the builder and saying this is a joke, all they do is put pressure on my blokes for the rest of the job. That is just how it is.

(Alex, Sub-contractor, Mechanical Plumber, Civil)

In sum, site safety appears to be related to the way in which sites are governed. While the characteristics and skills of individual project managers was reported as an important factor in worker health and safety, evidence also suggested that responsibility for safety was enforced on project managers inconsistently. Some major multinational construction companies in the civil construction sector, for example, have a risk management profile that they enforce rigorously down the line of contracting. The effect of this is that all contractors and sub-contractors working on their sites must be approved by their central administration as matching their risk management profile. In one case raised in the interviews, the risk management profile of one large company was effectively mobilised to bring another major construction company into compliance.

As one union key informant (KII1) describes:

They will not start jobs until their risk management profile is to a level that they're going to be approved of by the head office. They're very rigorous about it... They see that the employment of sub contractors and sub sub contractors is part of their risk management profile. They will not allow those people to come on unless that risk management profile is to the same standard as [company name]. (KII1)

Worker Voice

Trade unions have historically played an important role in governance of workplaces, including around safety, by providing workers with a voice. This is especially true in the Construction Industry.

For example, both OH&S safety representatives and worker representatives on company or site OH&S committees often come from rank and file members of the relevant union. When construction unions negotiate enterprise agreements or framework agreements, they endeavour to embed both governance structures and voice mechanisms in agreements to capture all on-site workers, regardless of whether they are directly employed by head contractors or engaged as contractors.

One union key informant (KII1) states:

We seek to have the same contractual arrangements passed on through their sub contractors. To a large extent that does work. We have actually members on the floor work start to see other contractors then forward sub contracting after that, where we've raised some concern, but we tend to be able to get on to that fairly easily and because of the good relationship we have with the principal, we can iron them out, but it's not perfect, but it's an issue that we monitor. (KII1)

A number of employer key informants also acknowledged the beneficial role unions can play in site governance. For example, larger civil construction companies are more likely to insist on certified agreements. For some companies, this process makes economic sense as it assures industrial stability for clients sensitive to delay. However, from a safety perspective, this also means that health and safety practices and procedures are subject to union discipline. On these sites, it appears that the focus on risk management and the presence of union certified agreements positively impact on OH&S outcomes more so than the form of contract under which workers are engaged.

The level of union membership and coverage of union-negotiated site agreements differ markedly between sectors and sites within the industry. The qualitative research suggests that those workers within the residential building sector were less likely to make reference to the role of unions or union members in site governance or, specifically governance of workplace safety, than were those working in the civil or commercial sectors. Associated with this was the observation that contractors are not well covered by union-negotiated collective agreements, and typically have limited bargaining power or voice. While a number of research participants mentioned that they were a member of a professional association such as the Electrical Contractors Association or the Master Builders' Association, they tended to focus on the role these bodies played in licensing, rather than as representative bodies providing them with a voice on-site or in their industry.

Relevantly, the Department of Industrial Relations Queensland's submission (2005:27) to the House of Representatives Inquiry into Independent Contracting and Labour Hire Arrangements highlights:

OH&S statutes have built the principal institutions for workplace participation (i.e. OH&S safety representatives and OH&S committees) around the presumption of an identifiable and relatively stable group of employees located together or in very regular contact, and working for a single employer. Many contingent work arrangements break the nexus or weaken it to a point where it would be extremely difficult for these mechanisms to be used effectively.

The controversial establishment of the ABCC, the subject of the criticism of the International Labour Organisation (ILO) (ILO, 2009), and other legislative limits to union voice, such codes of industry practice around contracting, may have had the perverse effect of also eroding site governance

processes that make sites safer by permitting workers to actively participate in their own safety. These initiatives further reinforce the shift towards a compliance, audit and default approach to safety as opposed to a more consultative approach where parties operating within the industry work collaboratively (even though not always harmoniously) to develop strategies to improve safe and productive work practices.

Conclusion

The organising and financing of production through pyramid contracting and fixed price tenders, the fragmentation of the division of labour, the deskilling of segments of the construction workforce, low quality on-site supervision of the production process, and weakened site governance all work to create the spaces in which 'sham contracting' can occur. Production in the construction industry has long been organised on a pyramid contracting arrangement. These patterns have not, in principle, changed, but the commercialisation of production has made the construction industry more vulnerable to 'sham contracting'. This situation is the focus of the next section.

Theme 3 Competitive Pressures

Introduction

The building and construction industry is characterised by unusual and dynamic competitive pressures. This is partly related to the historically extensive sub-contracting of work, and because activity levels can vary considerably over quite short periods. More recently, competitive pressures have seen an evolution of the integration of construction and the property market into global financial flows, and the way building companies work. Property developers in commercial construction are, as mentioned briefly above, now far less involved in the construction process and far more global and financially-oriented. In addition, Head contractors currently undertake very little actual construction work via directly employing staff, having become more like hybrid project management/financial services firms. This has re-allocated costs and risks across the industry, and there is evidence that rates of return across the industry vary, with in general profit rates declining as we move down the sub-contracting pyramid (McGrath Champ et al, 2010).

This downward pressure is also presenting new challenges for site governance structures in some sectors, and on wider regulatory agendas. The qualitative research suggested that both the competitive pressures/changing business models and the cyclical nature of activity are important to the experiences of workers in the industry in terms work engagement and safety. These two factors establish a framework within which it is possible to understand some of the important dynamics of how the industry has evolved and within which workers and employers have developed individual and collective strategic responses/behaviours.

Particularly strong evidence from both employer and employees about the competitive dynamics of the industry and these dynamics are mediating the risks that come from current forms and momentums of competition.

Sub-contracting as a cost and risk management system

While the high levels of sub-contracting in the industry is partly a result of the technical organisation of production (work flow and task specialisation), contracting is also an important response to competitive pressures in the industry. In particular, contracting is recognised not just as a way of accessing specialist skills, and dealing with volatility, but more broadly as a way of controlling (or allocating and re-allocating) costs and risks at different levels of the industry (see also Engineers Australia, Queensland Division Taskforce, 2005:20). This control of risks and costs feeds directly into the momentums for shifting to engaging work on the basis of contracting. As noted by Toner and Coates (2006:102):

The principal factor behind the growth of self-employment (and contracting more generally) in the construction industry has been competitive pressures, which have intensified the degree of subcontracting in the industry and led to a dramatic increase in the share of both self-employment and employment in small firms.

Toner and Coates (2006:106) go on to argue that:

...what appears on the surface as simply short-term competitive advantage through the use of non-standard labour, which is widely documented in the industrial and labour relations literature, has foundations in a deeper competitive process, as labour markets, firms and financial assets are thrown together into constant competition across industries and locations.

A slightly broader question pertains to how individual contractors control costs across the building process and cycle. In its submission to the House of Representatives Inquiry into Contracting, the Department of Industrial Relations Queensland noted that cost control and minimisation were driving forces in the shifting balance between engaging labour as employees or on contracts. In shifting forms of engagement, the Department also concluded that workers were not being fully compensated (Department of Industrial Relations Queensland, 2005:18).

The issue of costs and volatility then lead us to a broader issue that has seen been behind many of the competitive dynamics shaping the industry – risk. This issue was discussed in terms of allocating costs and reward in joint production systems in the previous chapter, where it was understood as a mechanism to balance the ambiguous relation between (on-site) co-operation and arm’s length transactions (rewards). To illustrate the point in a direct way that builds towards a consideration of the competitive dimension of risk, the business model of a contemporary large, head construction company is now considered.

Large commercial construction companies are typically involved in individual construction projects of two or three hundred million dollars, both in Australia and internationally. Despite this, a company contracted to build say an office or hotel construction project may, as mentioned above, directly employ a very small workforce. In terms of on-site activity, this may mean that a head contractor on large multi-storey commercial construction site may only have a handful of employees (including the site project manager and a few ancillary and administrative employees). In significant ways then, the modern large construction company, as head contractor, no longer directly builds, but supervises the work of many other firms and suppliers, certifies the work and arranges payment. This is more akin to a hybrid project management and financial services entity than a traditional construction company. In this business model, head contract firms specialise in allocating (outsourcing) work and risks associated with construction through their network of sub-contractors.

One key informant described the consequences of changes in the following terms:

- Builders now are more administrators and not actively involved in the production process;
- Builders don’t supervise production, ‘rather they inspect work done and issue letters of defect where the quality is not there’;
- Builders now employ ‘defects managers’, not supervisors. They prefer to sue people to solve a problem rather than prevent it at source through proper supervision; and
- In this way the economics of the industry dictates behaviour – builders are avoiding supervisory and managerial function and sub-contractors are expected to do much more.
- They are really absorbing a lot more pressure and risk (KII10).

As a business model, this can be cast as sitting somewhere between project and hedge fund management. Toner and Coates (2006) note that a similar process of financial transformation has occurred up the construction industry value chain to the big property developers. They cite a comment by Peter Verwer, Chief Executive of the Property Council of Australia, before a Senate Inquiry into the Building and Construction Sector (cited in Toner & Coates, 2006:107):

The clients in the property sector have a different role than they did even a few years ago, and it is a more distant role from the construction sector than had previously existed ... in the past the clients used to be part of the manufacturing process that was the construction industry-they were deeply embedded in the food chain. Those were the days when the AMPs and National Mutuals, as they were, all had chief engineers, big construction departments and all the rest of it. They do not do that anymore; in fact, those positions do not exist at all. The reason for that is that the property sector has been very much integrated into the capital markets sector over the past decade. It thinks like the capital markets sector, and the main questions it asks itself are: where should we invest this money, and what risks are attached to it?

Conceptually, this transformation at the top of the building industry raises concerns about the sorts of site governance and risk management systems appropriate to this business model, and also the appropriate terms on which labour contracts should be made with such sophisticated and complex risk shifting institutions. Thinking in terms of risk and financial calculation, the question may be re-posed as whether, in these changing circumstances, head contractors or others are able to unfairly harness competitive pressures to shift risks (up and/or) down the sub-contracting chain. That is, to 'arbitrage' as it were from the industry's evolving structure and the growing obsolescence of earlier regulatory and governance frameworks. By arbitrage we mean to make abnormal and risk free returns by either avoiding regulatory obligations or shifting risks and costs upward (to the client), or downward (into the sub-contracting network).

One key informant understood the modern building industry in explicitly these financial terms of risk and costs allocation/shifting, and concluded that the head contractor is currently in control in commercial construction:

...I believe there's an arbitrage of knowledge between clients and head contractors, and head contractors and sub-contractors, and the arbitrage is unreasonably leveraged to the benefit of the head contractors almost all the time (KII5)

The issue of 'sham contracting' might then be seen as one aspect of this rather more significant and wider process occurring up and down the construction contracting supply chain. To extend the risk/finance metaphor, 'sham contracting' can be thought of as exploiting (or arbitraging) the regulatory gaps between 'contracts of' and 'contracts for' service that we noted are present in pyramid contracting production systems (by adding another layer in the pyramid - the worker as contractor, as it were). It is this understanding that motivated the research strategy employed for this report - to approach 'sham contracting' from a thematic understanding of the construction industry in its all its complexity and dynamism.

A number of research participants and key informants made direct comparisons with the competitive cost-driven culture and health and safety issues. While this link will be taken up later in a separate section, it should be noted that many research participants were keenly aware of the competitive pressures and their implications. What seemed to differ between them was the way the pressure was transferred onto them. According to a research participant, Sam, who is more involved on the sale side of domestic houses, the tight margins in the sub-sector can encourage the cutting of corners, with the knowledge that it loads up safety risks:

I think in some situations builders, because builders, it's a very competitive market and margins are very tight, particular at the moment or in recent years so I think builders often cut corners and let's face it, occupational health and safety costs money and sometimes in this competitive market they're more inclined to cut corners and not to spend the money on this bit of safety gear. Well because the fact that it's to survive people need to win work and to win the work because it's so tight the builders are obliged to cut corners and safety is one of those things, it's a risk in many occasions.

(Sam, Employee, Salesperson, Building/Developer, Cottage)

Competition and Client and Head Contractor Arrangements

Existing research and policy across international jurisdictions has emphasised the important role played by the client/owner in the construction process, not just in terms of the quality of the finished structure, but also in the construction process itself (Bryant et.al. 1969; Cherns and Bryant 1984; Ryan et.al. 2006; Swedish Construction Forum 2006, UK Health and Safety Executive 2007 ACT 2007). The importance of this role has also been discussed briefly, above.

The Swedish Construction Forum (2006:7-8), for example, noted, 'the construction client has a key role to play in the sustainable development of the built environment'. The Forum also suggested that in order to fulfil those responsibilities a holistic approach is needed which addresses '...the creation of every building and structure (road, bridge etc) from concept to realisation, through usage, alteration and finally, demolition.... The holistic approach makes it possible, right from the initial stages in the process, to create the appropriate conditions of other players in the construction process, and during the building's period of use and long-term management'. Put simply, it was concluded that a client with the skills and desire can contribute significantly to "...greater accountability, better quality and increased productivity and competitiveness"⁷

An industry, like that present in Australia, where a handful of top-tier project management firms dominate the market, and with a large number of small sub-contractors who tender for work on the basis of lowest cost, this sets up a dynamic of low margin short-term work. This is just the sort of environment Hampson and Brandon (2004) characterised as fragmented and adversarial, and in which corner cutting on OH&S and 'sham contracting' could be expected to proliferate. Ryan, et.al (2006) report the results of a survey of the industry that suggested that client education and capacity is required to improve the construction industry. Of course, the government as a key client has a special capacity to affect change (see for instance Australian Capital Territory Government, 2011)

⁷ It is notable that in Sweden the Occupational Safety and Health Act assigns the construction client with responsibility for ensuring the working environment is satisfactory, both during construction and when in use.

Underscoring the key role of clients in the nature of the construction process itself, Costantino and Pietroforte (2002:22) report the results of a study into sub-contracting in commercial and residential construction and conclude that the relationship between commercial contractors and subcontractors is strongly dependent on the type of relationship between owner and general contractor in a given project.

As already touched upon in the discussion of the production/construction process, the building and construction industry is characteristically a project-oriented activity, with most buildings having different design, construction and locational attributes. Each project therefore involves assembling different teams of workers and different materials in different locations. This makes each project a discrete and different experience. That being said, two attributes were reported as influencing the way competitive pressures were absorbed and distributed through the construction chain and therefore the effectiveness of sub-contracting arrangements (and quite probably the extent of 'sham contracting') – the role of large and regular clients and the head contractor's business model.

Different Head Contractor Business Models

Construction companies that build the major resource and processing projects tend to be driven by engineering models of construction, and have systems and processes, which make safety and other compliance issues central priorities. These company types were contrasted by a number of research participants and key informants with some of the practices in, for example, commercial construction, where more uneven practices seem to prevail.

Specifically, the qualitative evidence suggested that in the residential sector competitive pressures were largely managed individually by the small sub-contractors themselves. Most people in the sector understood that management of those pressures was about the way their experience and trade/craft skills had given them the capacity to make the right decisions and to know when compromises around costs and safety could be made and when it couldn't. Of course, a corollary of this individualisation of risk management is that those who did make compromises for competition and were injured or lost money were probably to blame and were unlikely to be very good tradespeople. This is an issue discussed in more detail later in the report.

Client Engagement in Projects

It has already been noted that there seems to be a difference in project management between sectors of the construction industry, even when projects are of a similar size. In the case of the resources sector, it was noted that mining companies as clients tend to deploy an 'owners team' during construction staffed with engineers and relevant technical staff and tasked with monitoring and auditing the head contractor. This establishes not just that policies are in place but that they are also adhered to. Engineers Australia Queensland Division (2005) has also noted the differences between sectors on the basis of the different relationship between clients as owners in those sectors. In describing a problem of tendering on the basis of sketch plans:

...the problem is particularly evident in the building and infrastructure sectors – more so than in the resources sector. Perhaps this is because the owners of resources projects are more concerned with the "whole of life" performance of their projects, for example ease of maintenance, and reliability, throughout the life of the project...

Engineers Australia also noted that contributing factors included that client decisions in that sector tend to be made by professional engineers and that they were more regular clients in the construction industry.

Several key informants noted that while the state government nominally has a similar capacity, and often use similar contracts that establish the right to monitor, there was far less evidence that they actively monitored the building projects they fund, but instead often used the contract for regulatory compliance checking. Some key informants also suggested that the key role that public procurement has in setting industry standards for construction. In addition, many key informants noted the important role of public procurement as a standard-setting mechanism in the industry, but contrasted current with previous procurement systems. However, workers tended to report more stringent safety standards on government sites and compared this to the 'safety - productivity' trade-off commonly held by commercial building companies.

In explaining the relative strengths of different parties and their capacity to influence contracting arrangements and safety compliance in the industry, one key informant noted that in the midst of change in the nature of building, head contractors seem to have established a position of strength. He noted, however, that the client can play a critical role in determining how the construction process is governed and that there is big difference between clients who undertake occasional developments (or who do not resource the building with an owners team) and those who are building projects all the time (like the government for example).

They've (the head contractor) got the resources, they've got the experience, so you know If you have a client, as opposed to a subbie, if you have a client who once every five years builds a major capital project, he doesn't have the skills, and the cunning and the systems, and the experience to know the finer nuances of how things are done, whereas contractors, you do it every day, you live and breath the thing seven days a week. The subbies on the other hand, whilst they have the experience, they don't have the experience at a professional level, so almost all my clients, they just don't read the contract, they just go ahead and sign it...And they go "Oh well we'll just hope to survive (KII5)

One research participant, Brett, who worked for a company that generally won large government jobs through tender, was brought onto site as small-scale sub contractor. According to Brett, the public provision aspect of the site (government job) was a major factor influencing safety levels, compliance and auditing. Brett felt this was far more influential than the contracting arrangement or form of employment, itself. When discussing work on government sites, Brett reported:

Look, it didn't really matter whether they were the company employees or sub-contractors, there was a set of safety guidelines and requirements that had to be followed, so it didn't matter who it was or where they came from, whether they were direct employees or not, you had to follow those safety guidelines so it didn't matter who you were."

(Brett, former employee, Electrician, Commercial & Civil)

More specifically, the presence of a site supervisor whose responsibility it was to enforce guidelines was critical in promoting safety, regardless of employment arrangements:

...when there is someone supervising it, or a set of guidelines that everyone has to follow; to be on site, you've got no choice, really, so regardless of who you are, you've got to follow the rules.

(Brett, former employee, Electrician, Commercial & Civil)

Therefore a question that arises is whether sites without site supervisors backed by strong processes and active client engagement in the project are more likely to be those where individual contractors and employees have to manage safety guidelines themselves, potentially creating more opportunity for 'safety slippage'. In some ways the Overview of the Industry report by the Cole Royal Commission into the Building and Construction Industry posed the question in similar ways when analysing the relationships between clients/owners and construction companies.

Although posed in terms of the public private sectors, the Cole Royal Commission (2002a:15) report noted that there are at least two ways of thinking about involvement in construction projects:

... 'who owns the project' and 'who engages the workforce responsible for building the project'

Clearly, if a client engages a construction company to undertake a project, certain responsibilities would seem to flow from that relationship for the way that contractor then engages labour and the safety of people who work on that project, just as a head contractor has responsibilities for delivering a building that does not put the safety of occupants and users at risk.

But to return to the issue of resourced site management, we found several research participants contrasting differences according to resourcing of site management and safety. Compared to Brett's experience (above) on the private housing site, this appears to be the case (see below):

Yeah. Your high end residential, but not really – it's borderline commercial, so it's really relaxed, and there's not as much money in it again. That's a big thing because scaffold costs a lot of money, and just time setting things up where they haven't actually allowed for it in any quotes, so it's more get in, do it, whatever you've got to do, and get out. So it's, yeah.

(Jason, Self-Employed Carpenter, Commercial & Residential)

For Karl and Darren (see below), health and safety now considered a 'fact of life' so that the only way companies can undercut costs in a competitive industry is to either 'pay your workers less', or to make the workers cheaper by transferring responsibility for meeting health and safety on to them by having employees on ABNs:

Like, well you can pay your workers less, you know all these sorts of things, you can, you can try and cut corners but you can't really do that nowadays with legislation the way it is. Well, well workplace health and safety's changed this from sort of being an optional thing it's just been a fact of life, everyone just does it now.

(Karl, Former Employee, Electrician, Sub-contractor, Commercial)

the contractors tend to take a lot of short cuts like when they are doing trenching and they are trying to get away without using shoring and that.

(Darren, Employee, Construction Crew, Local Council)

This was raised often in comparisons between the more stringent safety standards of working in government and the sacrifices made for 'speed and profit' by the 'big companies'. Some research participants, including Darren, observed that safety in the industry was enhanced by having workers who could not only identify safety risks but were empowered to say no to working in dangerous conditions:

if you recognise a safety hazard you can say 'no I am not doing it'... like anyone could pull up the job on the council if they deem it unsafe... but the contractors, the guys that work for the big companies, they say 'rack off we will get someone else in that will do it'

(Darren, Employee, Construction Crew, Local Council)

But still there is an idea that safety is reliant on who is managing safety on the site. As Darren says, he is really stringent but when he pulls up someone on a site for using a chain saw without chaps he comments, 'a lot of guys would have let him get away with it'.

A culture of 'corner-cutting'

Earlier research and submissions to various inquiries have expressed concerns that employers can avoid obligations in areas like payroll tax, superannuation, unfair dismissal and workers' compensation if they hire workers as contractors, despite the underlying economic relationship being one of employment. This is the arbitrating of regulations of engaging labour noted earlier in this chapter. This phenomenon is also seen as detrimental to worker welfare, an indication that labour law is "...failing to protect a group of workers that, because they are essentially working in an employee-employer type relationship should be covered by that law" (Waite & Will, 2001:55).

Several key informants from both employer and union organisations, and several research participants, noted that once a contractor embarks on arrangements that cut corners (ignoring health and safety issues, 'sham contracting' and so on), it starts to pervade many aspects of the company's business practices.

This point is aptly summed up by one key informant, (K117), an employer representative, who noted:

they (employers/contractors who cut corners by evading regulations) start to do the wrong thing by people in the industry. They start to go down the wrong track in how they manage labour more generally. (K117)

Rights for Workers to Identify and Act on Safety Issues

Safety also seems to be enhanced by having workers who can identify safety risks and permitted to say no to working in dangerous conditions. As Darren reports:

if you recognise a safety hazard you can say 'no I am not doing it'... like anyone could pull up the job on the council if they deem it unsafe... but the contractors, the guys that work for the big companies, they say 'rack off we will get someone else in that will do it'

(Darren, Employee, Construction Crew, Local Council)

Size of the Construction Project

One of the clear attributes that differentiates site governance and helps to explain the differences across 'sectors' in the construction industry is size of the project, in terms of extent of contracting and risks of a project. The qualitative research suggested that while there is more individualised and output based contracts in say residential construction, control over that work, the number of people

on sites and the risks on sites may be lower. In short, and quite apart from any other differences in the way building work is done, there may be differences in the consequences of sub-contracting and its effects on health between a carpenter working on a single storey residential cottage and one working on a multi-storey commercial site.

When asked if commercial pressure impacts on safety, one worker, Simon, states:

Absolutely. roof structures or anything that's over three metres high, to do work on a roof now we have to do stuff like, to do a \$5,000 roof repair might cost \$20,000 to get the scaffold up there, which for most people aren't going to spend \$20,000 on scaffold to get a little bit of their roof to fix. In our case we're fortunate that the insurance companies are footing the bill, so most people don't care, however it's just going to; most people wouldn't get it done.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

Regulating Risk and Compliance in a Fragmented and Hierarchical Production System

The qualitative research suggests that changes in the industry, especially in commercial construction, has seen a change in both the balance of power in the industry and in the way risk is allocated through the sub-contracting system. It was found that in situations where the client does not play an active role in the construction process, and head contractors act like a combined project management and financial services firm, the head contractor may have greater opportunities to influence both contractual and on-site risk allocation.

This findings is consistent with a growing literature on the way contractual and on-site arrangements allocate and re-allocate risks and rewards associated with construction (Loosemore 1999, Yates and Sashegyi 2001, Lloyd 2010). A number of general principles are emerging about the way contracts should apportion risk. For instance, Mead (2007) reports on a set of principles developed by the international construction law expert Max Abrahamson (known as the 'Abrahamson principles') about the fair allocation of risk in construction⁸. Abrahamson (cited in Mead, 2007:24) suggests that parties to contracts should bear risk under the following principles:

- the risk is within the party's control;
- the party can transfer the risk, e.g. through insurance, and it is most economically beneficial to deal with the risk in this fashion;
- the preponderant economic benefit of controlling the risk lies with the party in question;
- to place the risk upon the party in question is in the interests of efficiency, including planning, incentive and innovation efficiency;
- if the risk eventuates, the loss falls on that party in the first instance and it is not practicable, or there is no reason under the above principles, to cause expense and uncertainty by attempting to transfer the loss to another.

Mead (2007:24) suggests there is evidence that the principles listed above not being followed in practice. He notes as evidence the findings of a joint study undertaken by Engineers Australia and the WA Chamber of Commerce. The findings included that:

⁸ Abrahamson's principles consolidate and build upon a tradition of work in law and project management (see for instance, Loosemore (1999) for a review.

- risks were not allocated to the party best able to manage the risk;
- formal risk assessments were not being undertaken;
- risk clauses varied from those in standard contracts;
- risks were transferred to consultants and contractors which were impossible for them to manage;
- risks were not costed in tenders;
- cost savings would have occurred had risks been more effectively allocated;
- the implications of changing risk allocation were not known; and
- disputes and claims increased as a consequence of changes to risk allocation.

It should be noted that many of these principles for contractual risk allocation assume that contracting parties are not only arm's length but also of equal power in the contracting relationship (Loosemore, 1999). The reality, of course, is that pyramid sub-contracting is based around a degree of asymmetry in power, and so, despite even the best formal contractual arrangements, power matters in how risk is borne on the ground, with obvious implications for risk shifting onto workers in contractual and safety terms. Key informants and workers suggested that the gap between powerful head contractors and clients and sub-contractors seems to be widening, and that some of that risk is also shifting onto workers. Mead (2007:34-35) also concludes his survey of recent trends in risk allocation in the Australian construction industry with the following observation:

The reality is that as a result of inequality in bargaining power and the desire of contractors in a competitive market to secure the project, risks are not always allocated to the party best able to manage them and there is not always the ability to insist upon an appropriate risk premium in exchange for having taken on that risk.

While a number of workers simply noted that there had been cost and other pressures being shifted downward, key informants were able to comment on the levels at which this pressure is coming from:

If I was the state government and you were putting something out to tender, I'd be asking what have you done to mitigate any potential problems? Are workers going to get a fair day's pay for a fair day's work in line with industry standards? I think that's a requirement the government should be making quite clear...I think there's been a bit of a disconnect in the last couple of years, they say "It's not our problem". But I'm pretty sure if the client told me to make sure you (would) ask the right (questions) and you got industrial stability, the actual principal contractor would make it happen... There is a solution (to sham contracting and poor occupational health and safety)... this is not rocket science. The state government got it right in the past. (K111)

Volatility in Industry Activity

The volatility of activity in the building industry is well established, but complex. Text Box 5 presents graphically this volatility for the construction industry in Queensland. This complexity present both because there is volatility within the overall sector (between residential, commercial and civil) and because of the interaction between construction activity and the rest of the economy. As an ABS report recently observed:

In many ways, industry performance both drives and is driven by levels of employment and economic growth. Demand for, and supply of construction services is driven by economic factors including population growth and consumer confidence, changes in interest rates and

inflation. Most recently, government policies affecting housing and infrastructure projects (i.e. "Building the Education Revolution" or BER) have been an influence (ABS 2010, Cat 1350.0).

Industry volatility creates a boom-bust cycle in work flow and often in industry culture, so that in good times industry actors will try to maximise income relative to hours⁹, while in bad they will try to minimise costs. In the wake of the global financial crisis and especially the current very pronounced downturn in commercial and residential construction in south-east Queensland (and the extensive stoppage to work caused by recent flooding), there has been a perception that its effects on industry dynamics has been much more damaging.

When asked about the impact of the downturn on contracting, tendering and so on, two basic responses were reported. One group of workers tended to better understand the impact of the contracting process on safety. The second group, while still concerned about safety, often felt pressured to cut corners.

the good ones already build it(proper safety) in, and then they're encouraged to try and match a price with another contractor who doesn't. You know like you said, you said something like a level playing field (is needed).

(Jason, Self-Employed Carpenter, Commercial & Residential)

I dare say [the down turn in construction] probably did, mean people trying to undercut other people for jobs, where they're trying to put in a cheap price which means they have to take shortcuts sort of thing. So we don't believe in that, safety comes first, you're no good to anybody if you're hurt or die on site. If we couldn't do it for that price or other people were willing to do it cheaper, they got the job.

(Karl, Former Employee, Electrician, Sub-contractor, Commercial)

Conclusion

Competitive pressures have driven and are driving sub-contracting as a way of managing costs and other risks in the industry. Competition has also changed as the construction industry, and especially developers and the large head contracting firms change their integration into global property and financial markets. There are differences, however, in the way individual clients and head contractors arrange and control risks and this seems to determine the effectiveness of sub-contracting arrangements in terms of project quality and processes.

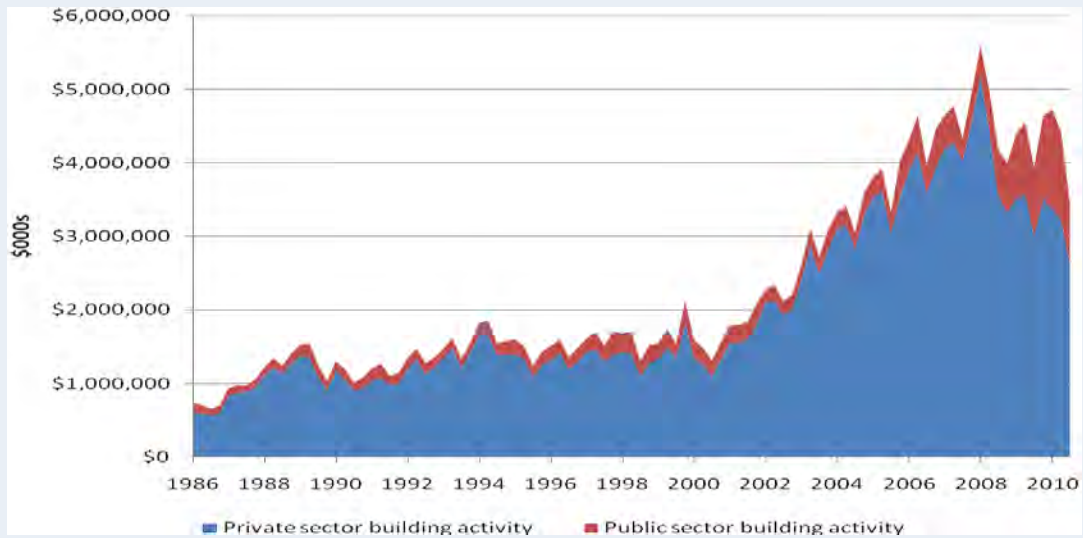
In this context, 'sham contracting' can be seen as one expression of a culture of 'corner cutting' as a way of managing those risks. It is of course a cultural response that risks not only breaching laws and regulations, including health and safety, but of cannibalising the industry by making it more onerous and dangerous than it needs to be. The size of the firm and size of construction project both affect the complexity of contractual arrangements, their management and the way that safety is managed. Pressures associated with managing large projects means hard to reproduce management expertise, as site managers often leave the industry at a relatively young age. Safety standards are typically better where once risks have been identified, workers are 'permitted' to stop work until their problem is addressed.

⁹ For economists, building workers provided one of the classic paradoxes – a backward bending labour supply curve. After a certain income level, building workers were found to respond to higher rates by actually offering less labour, suggesting that they were seeking to maintain a certain income and lifestyle over a cycle.

Text Box 5: The Cyclical Nature of the Construction Industry

In the decade to 2000, private sector building activity grew at an average annual rate of 4.3 per cent. In the decade following, the construction boom saw it grow at an average rate of 9.9 per cent, Figure 5a. From Figure 5a we can also see that since September 2009, public sector activity has been over 20 per cent of total building activity, peaking at 29 per cent in September 2010. This compares to an average over the previous decade of around 11 per cent.

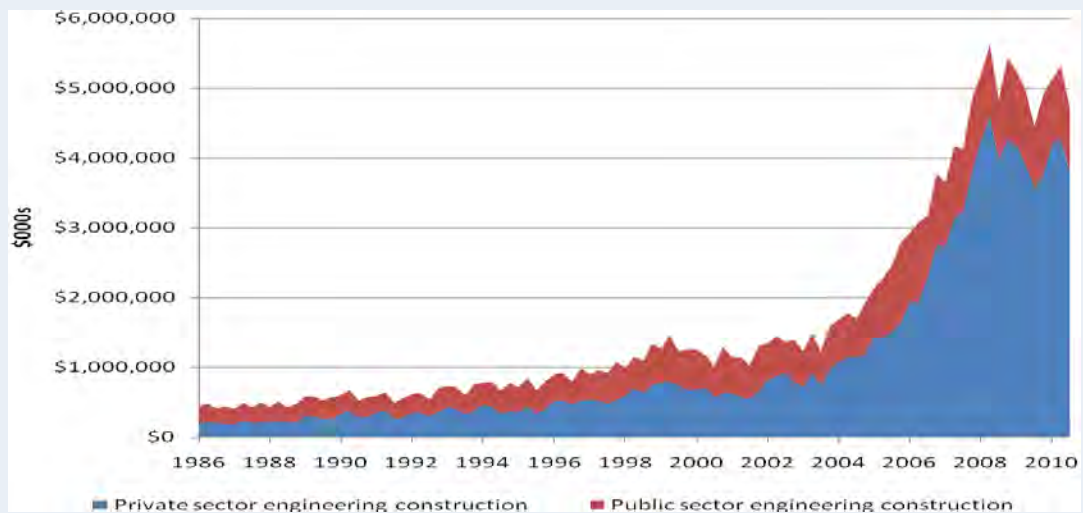
Figure 5a, Building activity (Residential and Non-residential), by sector, Queensland, 1986 to 2010



Source: ABS Catalogue 8752.0, Building Activity, Australia, Table 15, Value of Building Work Done, By Sector, Queensland

A similar boom was experienced in engineering construction. The decade to 2000, public sector growth lagged, averaging 6.8 per cent and consequently fell as a proportion of total investment, Figure 5b. The public sector's share of engineering construction has fallen steadily since the 1980s, from 58 per cent to a low of 17 per cent in early 2009. The slide stabilised with the Federal Government's stimulus package, and has represented about 20 per cent of total activity since mid-2009.

Figure 5b, Engineering activity, by sector, Queensland, 1986 to 2010



Source: ABS Catalogue 8762.0, Engineering Construction Activity, Australia, Table 36, Value of Work Done by Private Sector, For Sector, States and Territories, Original

THEME 4 - FORMS OF CONTRACTING/EMPLOYMENT ARRANGEMENTS

Introduction

It has been established that the building and construction industry is characterised by high levels of contracting, and that at the level of individual building worker this often creates a number of regulatory gaps between work performed by employees and contractors. The space is quite wide and a considerable grey area exists within and between regulatory frames (employment and common law, health and safety, income and corporate taxation, workers compensation, superannuation and so on). The building and construction industry uses a range of contractual and employment arrangements, and there is evidence that there has been a wider trend increase in the use of non-traditional types of work, including contracting, labour-hire and other forms of temporary work both in Australia (Quinlan & Mayhew, 2001) and in other countries (Forde et al, 2009; Vosko et al, 20069; 2009). This issue was explored in detail in the qualitative research, with workers providing clear insights into different types of employment and contracting arrangements. Key themes around some of the perceived advantages and disadvantages of employee and contractor status emerge from the analysis of this data.

Evidence of Pervasive Contracting

As already mentioned previously, Australia's legal system is focussed on the distinction between *contracts of service* and *contracts for services*. Setting aside the problems associated with there being no clear rule for determining whether an individual is an employee or contractor and the lack of an agreed definition of 'sham contracting', it is clear from the statistics presented earlier in the report that there has been an increase in the number of workers who fall into the *contracts for service* category.

The research found that, in general, work via contracting is more prolific in the residential sector, but that it is also quite common in the commercial and civil construction sectors. It has also been established that workers often enter into a contractual relationship with one sub-contractor for a sustained period. And as we will show, while there are many construction workers who prefer contracting per se, their preferences are constrained by what work is offered and the terms under which that work is offered.

It was not a specific aim of the research to make an assessment as to whether the members of the qualitative sample were, based on indicia identified earlier in the report, genuinely independent contractors or 'sham contractors'. With this strong caveat, it is likely that most of the 28 workers we interviewed would to be better categorised as employees and most of the self-employed many may be better categorised as contractors. A number of the workers, however, while employed under commercial contracts for service, had work arrangements that appeared more consistent with them being employees. For example, several of the research participants discussed about their working arrangements in terms of their 'employer' or 'boss' but when also noted that they worked under their own ABN.

Everybody is a subbie bar the people in the office. Even our foreman, they're on some sort of salary agreement, but they still have to put in invoice...on their ABN.

(Jason, Self-Employed Carpenter, Commercial and Residential)

The principal contractor, like the job that we are on now, he would have 15 staff, maybe a few more because they employ the crane crew and the blokes that work the hoist as well. So say they have got 20 staff and then the rest would probably be 400 people on site.

(Eddy, Employee, Scaffolder, Cottage & Civil)

One question of importance here is whether the pervasiveness of contracting is being driven by the demands of individuals for more flexible, entrepreneurial forms of operation (a desire for genuine independent contracting relationships), or the attempts by employers to outsource costs and risks (contingent and precarious employment). Our interviews with workers and key informants suggested that both supply-side and demand-side factors are driving contracting. These two factors are discussed in turn below.

Supply Side Factors

The Risk and Reward trade-off

The qualitative research findings suggested that the push towards contracting at least partially coming from the workers. Contracting is viewed by some workers as offering the *potential* to earn a much higher income than working 'on staff' and being paid wages or a salary:

"You earn far much — far more money as a contractor, you potentially do.

(Brett, former employee, Electrician, Commercial & Civil)

While Scott is an employee, he recognises some of the potential rewards of contracting, including job satisfaction and the ability to take ownership of work:

Yes when times are good you don't tend to be in a position where you reap the benefit of that so yeah your income is still your income unless you manage to snag a role that has you know some kind of proper related bonus scheme but that is not going to happen in a government owned corporation.

(Scott, Employee/Project Manager, Commercial & Civil)

Other potentially attractive elements of contracting include the ability to minimise (or avoid) taxation and flexibility over working hours. Operating as a contractor also, conversely, means taking on liabilities and overheads. Brett acknowledges that the bigger the contractor, the larger the potential profits, but this also comes with associated higher overheads:

Just the liabilities, all the responsibilities lie with the principal contractor. Obviously all the big costs: insurances, vehicles, premises, you've either got to buy a premises or lease or rent a premises, there's all those costs. There's ongoing ...

(Brett, former employee, Electrician, Commercial & Civil)

Sense of independence

One of the common reasons given by construction workers for their preference for contracting was the sense of independence they derived from working for themselves. Simon uses phrases such as not having to 'toe the company line', 'the illusion' of being independent and how it is about a 'mindset' more than anything:

...I suppose while I was working on ABN I had the illusion at least that I was independent and could do what I felt like, whereas now I feel I've got to really tow the

company line, even though I did before anyway. The reality is I'm not really doing anything different now to what I did before, so nothing's really changed as far as that goes, and it's just a mindset I suppose more than anything.... I worked for myself most of my life and then it is just a mental thing more than anything.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

Robert also refers to the sense of independence he gains as a result of working for himself:

Being self-employed, and yeah, we sort of govern that ourselves. You could work seven days a week if you want to, but you've got to have a life too, so that's up to each individual how they – we sort of – it's our choice just to work five days a week, and have some family time.

(Robert, Self-Employed Builder, Cottage)

Some employees, however, recognised that they may not be sufficiently motivated or just not willing or able to absorb the risks associated with working for themselves. On this, Darren comments:

Oh just if I was working for myself I would say 'oh gee it is a nice day today I am not going into work.' (Laughter).... Oh yeah but there would be too many of them just the actual, you just get paid all of the time, it doesn't rely on what you do or what you can drum up yourself. The weather because like when you are working outside it sort of reliant on if you get rain or not.....

(Darren, Employee, Construction Crew, Local Council)

Demand side factors

It was suggested above that understanding the drive towards greater sub-contracting and away from direct employment, requires consideration of wider changes taking place within the construction industry. There is evidence to suggest that some of the drive toward greater sub-contracting is connected to the changing balance of power in the construction industry, with the growing power of head contractors in the construction supply chain driving costs, and risks downward and sub-contractors responding by attempting to keep their own costs and risks manageable.

Changing balance of power in the industry

The factors that motivated workers to engage in a contracting relationship are outlined above. There was, however, also evidence that some head contractors were using contingent and precarious forms of employment as one way to minimise or outsource costs and risks. When discussing the relative advantages and disadvantages of being an employer compared to a sub-contractor, Brett articulated benefits for firms in engaging workers as employees. According to Brett, the employer-employee relationship was cost-effective for employers:

It was probably profitability, I would say. We were all on minimum wage or close to minimum wage but the charge-out rates per man were the same as anyone else so to pay minimum wage plus holidays, sick and super, is far less than sub-contract(or) costs

(Brett, former employee, Electrician, Commercial & Civil)

One key informant mentioned that head contractors tender for work on the basis of pay rates in collective agreements only to utilise contracting arrangements with 'all in rates' to their project control costs. However, when head or large sub-contractors were forced to bear the costs of

engaging workers on a site, the benefits of shifting risk via labour-only contracting reduced and direct employment became more attractive. A key informant from an employer association held the view that in the recent past, contractor rates were generally well above wage rates. This informant also commented on a recent turnaround where, particularly on government sites, the rates of pay specified in collective agreements are now often well above the contractor rates. This has resulted in an incentive for head contractors to shift workers back on to staff. This is thought to have intensified as a consequence of pyramid-contracting down the chain to other sub-contractors in preference to employing staff in order to control their own costs. On this, one key informant noted:

Regarding the sham contracting ABN issue, I've seen it probably come through an organisation, probably one organisation but that company has then changed them over to full time employment. However, a lot of those guys and I will say this to you, that was a request by the actual employee. However, after we guided those people about the concerns we have with ABN contracting and sham contracting, those people clearly decided to become permanent workforce employees. The biggest issue we've got is non-EBA companies. (K11)

It is important to reintegrate that industry employer associations do not necessarily share the same view as unions about the main factors driving 'sham contracting' in the construction industry and neither do they necessarily agree on whether regulatory reform is necessary. Summarised views of some of the key industry stakeholders are presented in Text Boxes 3 and 4.

Evidence of two site governance models for managing pyramid sub-contracting

The construction industry has evolved two basic site governance models for managing contracting and employment arrangements. The first involves systematic and collaboratively-managed arrangements. This model has historically been a feature in mining, resources and other civil or engineering projects as well as commercial (especially CBD) construction. The second approach is a system in which arrangements are individualised and fragmented. This second model has historically been a feature of the residential sector or cottage industry.

While commercial construction used to have strong association with the systematic approach to site governance, our interviews, as mentioned above, provide evidence of a transition in some parts of this sector to more individualised and fragmented arrangements.

The two governance models are in part about scale; that is, large projects are far more complex and require more technical and co-ordination capacity (project managers, safety officers) and small, low rise residential projects are typically both less complex and require less on-site co-ordination. The different site governance arrangements, however, might also be thought of as two different ways of arranging the risks and costs associated with contracting. One model conceptualises the construction as a unity and manages the process. The other, in contrast, conceptualises construction as a series of discrete tasks and manages each as a separate transaction. This notion of a process-based compared to a transaction-based approach to contracting raises the question of which approach is fit for purpose in the context it is being used?

The use of Master Agreements for instance might be taken as a symbol of the process-oriented approach, whereas individual contracts reflect a more transaction—oriented approach

The use of Masters Agreements and in general, higher union density in civil construction means that workers are more likely to be engaged on standard employment contracts with full benefits. In some cases unions are able to negotiate an agreement which covers a whole site to ensure that everyone is compliant and the terms and conditions of everyone working on the site cannot be used to gain competitive advantage in the tendering process. Union (KII1)

In more fragmented and transaction-oriented governance systems, contracting can be used as a cost reduction/risk-shifting tool by head contractors. When asked whether different head contractors or different companies seem to make a difference to the safety culture on-site, Jason said:

Definitely. It's where money's tight I've found. If it's a really big job, and there's a lot of people, then generally safety's really, really good, and strict, but if it's a smaller job where they might get an outside OH&S person through, then they're not too concerned a lot of the time, unless they hear somebody's coming.

(Jason, Self-Employed Carpenter, Commercial & Residential)

As already discussed in earlier sections of this report, competitive pressure seems to have encouraged some head contractors establishing arrangements that can lead to a culture of 'corner cutting'. This problem was identified by one key informant as follows:

...since I got back into construction is that what I've found out and what I've heard and a lot of it is pretty good information and fact finding, is that when we have companies that are sub contractors and have agreements with us, we have a pretty good safety record;.. what we find out is that these guys work outside of normal hours; they'll do anything to cut corners because they've got to get the job done, because it's based upon the dollars that they earn and the time that they can do it in. (KII1)

Cost pressures arising from head contractors pushing risk downwards in the production chain were also identified by workers as negatively impacting on safe work practices. Simon relates downward pressure on safety, in part, to work being done by poorly qualified or unscrupulous contractors:

I don't think so, I think that a lot of people are finding very creative ways to make sure safety happens. There is certainly changed method of construction in some areas, some things are just taken as norm now, because the law is there, you got to abide by the law. So it certainly comes into account, the fact that most of the spending involving construction has happened in [Town] in the last year and a half has been predominantly government spending. The client doesn't really matter, the client just ponies up for the stuff you can't really object seeing as they brought it in. Yeah when times are busy it's probably more a time when you see those sorts of things happening (when it's busy) people want to get things over quickly and policing from workplace health and safety is thinner, because there's more people around. Then you probably see more and people are just trying to get the job done, so you get the shonkies coming into town and they're the ones who don't abide by the rules properly.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

Workers were also very aware that raising concerns about safety with head contractors could risk future work with that company:

..... I think like the contractors, I am not too sure whether you would call it contractors but the guys that work for the big companies so they say 'rack off we will get someone else in that will do it.' Yes because they are actually profit driven as opposed to safety driven.

(Darren, Employee, Construction Crew, Local Council)

Perceived benefits of contracting often not realised

A number of problems were revealed with workers being engaged as contractors. This included the perceived benefits of contracting, in particular the attractiveness of earning significantly higher wages, not always materialising when shifting from employee to contracting status. The workers recognised that benefits arising from contracting usually also come with some costs or risks. The contractor must arrange for their own ABN and keep records and books, and often work out quotes and plan jobs to ensure continuity of work. This is not only time consuming but involves tasks and skills that not many building workers possess, nor wish to have. They must also pay for their own superannuation, workers compensation and public liability insurance and make provision for their own leave. Many research participants reported that taking all this into account, the benefits of contracting were not as great, even if they are fully compensated for the costs and risks that they assume by shifting their legal form of working. Indeed, many of the costs and risks are probably not well managed at the individual level.

Scott, who has decided against contracting, identifies some of the external risks associated with contracting:

Disadvantages of working as a contractor well the when the work runs out there is a potential for your income to be severely affected. You become more subject to external influences, not necessarily industry related so it may be ... you may have a bad run of luck and undeservedly earn a bad reputation and that affects your ability to work anywhere. You might have major equipment failure and so you become at the mercy of a whole bunch of external risks.

(Scott, Employee/Project Manager, Commercial & Civil)

A number of employees, when asked whether they had considered contracting, explicitly acknowledged that while they might earn more, they did not feel equipped to manage the administrative and regulatory requirements of self-employment, such as preparing business activity statements and organising the relevant insurance coverage. For example, Darren saw the administrative burdens associated with self-employment was given as one reason he had decided against contracting:

Just the Oh yes because a lot of guys would have let him get away with it (the tax)Yeah trying to work out if you have got all of those bloody..... trying to organise your own tax and it would be a heartache I think.

(Darren, Employee, Construction Crew, Local Council)

Text Box 6 tells of how Eddy, initially attracted to sub-contracting, eventually asked his 'boss' to go back on wages.

Text Box 6: Perceived benefits of contracting not always realised

'Eddy' has over 30 years experience working in the construction industry. He is currently a scaffolder, working primarily on government funded construction projects for a company that employs around 120 workers. He is highly mobile, spending months of the year away at sites in different parts of the country.

Although he has worked for the same company for the last 25 years he found himself sub-contracting to his employer when they hit hard times. When his boss suggested he and another employee set up their own business inside the company he was initially enthusiastic about the higher income this would attract for the same work. But he had to pay into his own superannuation and workers comp; he had no sick pay or holiday leave and when it came to invoicing the company, he found he was only being paid for a quarter of the amount – not enough to support his family and pay his expenses.

After 18 months Eddy had had enough of being underpaid and renegotiated with his boss to go back on to wages.

In addition, despite the common notion, as mentioned above, that the ‘freedom’ of being self-employed would facilitate greater flexibility, many of the contractors acknowledged that in reality, they usually had no choice but to work long hours, because they needed to take work when they could get it and because they were paid on results not on the number of hours worked. For example, Rod mentions the difficulty of not being able to take leave, as he is forced to take work when it is offered:

I applied for a job back with [them] permanently but they don't seem to want to give me a crack. They're happy to use me. Like I said, I don't think I've had any time off in three years.

(Rod, ABN Worker, Safety/Site Trainer, Civil/Mine Construction)

Simon refers to a common pitfall of self-employment; difficulty in qualifying for bank finance due to his irregular income and risky contractual status:

Yeah getting finance, trying to; even though I'd worked for the same company and no one else for three years, best part of three years, to try and get finance they say you've been self employed, so you haven't worked for that company for three years, you work for yourself. So you go and get finance and that was always a bit of an issue and I'd do different types of loans and show different types of things to try and get finance for different things yeah. So that's one thing I was always thinking oh yeah it'll be nice to be on salary, if I'd been on salary I'd be able to just show my payslips and walk into a loan sort of thing.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

In a context where individuals are asked to manage a range of risks and costs, there is a natural tendency for many, especially those struggling financially, to look for ways of cutting costs to get work, or to manage payment streams with very little working capital. This might mean not maintaining equipment (tagging), not renewing insurance, or working in unsafe ways. One effect is that competition among firms/contractors around price means that some unscrupulous contractors can take out the costs of safety and/or use unlicensed workers.

David, who was until recently a sub-contractor, explained that he couldn't afford to take out income protection and couldn't see the value in it over time:

Yeah it (insurance) has, it's just unbelievably expensive now. If you put that same money away per year you'd actually be better off in five years time than if you did it through them)by the time you pay your material and your men there's really no tax advantage.. So it's just too hard for us, it's cost us a lot of money and it makes it very tough for us as a business, small business, we were just hurting because of the high insurance we've got to cover because of other people's mistakes.

(David, Former Employee, Operations Manager, Commercial)

There was also a sense among some research participants that risk in relation to public liability was being unfairly transferred onto small contractors:

Well say for (public liability) instance if you're on a site you have somebody come on and they trip over, you're liable whether or not you had the signs up, whether you told them

they had to wear, they couldn't even be onsite we're still accountable even though you say look you're trespassing, as soon as they walk on they can wander on and you're accountable.

(David, Former Employee, Operations Manager, Commercial)

Provision of tools and other equipment is perceived as another cost pressure on contractors. Some research participants said they lacked the capital necessary to run their own business, such as to fund the purchase their own tools, machinery and vehicles. Some head contractors, particularly on government projects, were seen to place pressure on contractors to ensure that equipment was safe:

Like the government, the government pays for the trestles and all that, they get it, buy their own and they've got to have it all there so all got to be kept on, checked and all that stuff. The leads everything still got to be checked, even though they don't like it it's still got to be checked. It's a lot more pressure on them than us.

(Allan, Small Business Owner, Painting Sub-contractor, Civil)

Perceived benefits of employee status

Just as construction workers identified a number of perceived benefits of contracting, they also readily acknowledge a number of perceived benefits attached to being engaged 'on staff' as employees. Not surprisingly, the main advantage related to security. Many of the employees stated a strong preference for stability of work in lieu of forgoing higher potential earnings:

Just consistency, like for me as a fulltime employee, although the wage was minimum, you got it every week without fail, regardless of what the work levels were like, holidays and your sick was all paid.

(Brett, former employee, Electrician, Commercial & Civil)

I like to know where I'm going everyday. I know I've got a steady income.

(Wayne, Employee, Forklift Operator, Cottage & Commercial)

I have thought about it (contracting) but with children at home and a mortgage you know personal circumstances would dictate that I would be very conservative.

(Scott, Employee/Project Manager, Commercial & Civil)

Troy similarly suggested that one of the two of the main disadvantages of being a contractor was the precariousness of not having a guaranteed income:

When the work dies off my income dies off. Probably a lack of sitting in an office with other people to bounce things off you know talk about what you are working on or get a bit of help or help someone they are probably yeah the two negatives to it.

(Troy, Self-employed, Draftsperson, Cottage & Commercial)

Simon feels fortunate to have recently changed from being an ABN labour-only worker to 'on salary' with the same company. He recognises that the precariousness of contracting means ABN workers are often hardest hit during downturns:

Yeah part of my salary package was to get a company car provided, brand new car, so that was something I wouldn't have got if I stayed on my ABN, that would have been well part of the condition of getting a new car is that you have to be on salary. So you make that choice and yeah..... Probably with the economic environment that we have is a security thing as well..... Job security yeah just the fact that the other guys who are still on ABNs are going to probably be, as work slows up they're going to be let go before I will sort of thing. So yeah which is probably more of a solidification of my position and probably hand in hand with that is confirmation of the value of your services sort of thing, where the company want you to be there and want you to be on salary rather than let you go plodding along like you were before. So a tangible way that the company shows they want to keep you on sort of thing if that makes sense.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

Simon also touched upon the fact that companies sometimes offer 'valuable' staff (i.e. those with particular skills or perceived as reliable or hardworking) permanent jobs. This suggests that employers are using the ease of changing between contractor and employee status to manage a number of 'core' workers; often at the expense of a much larger 'periphery' of contractors and labour hire workers.

It was also noted that workers with employee status were generally more receptive to taking OH&S seriously. This was linked to the cost pressures faced by contractors to complete work on an output-basis as opposed to a time-taken basis. For example, Simon, who used to be an ABN worker with the same company, is now on staff. He explains that the building company that he works for, which is usually the head contractor for projects, has around 20 employees. In his current role with this head contractor, he has responsibility for organising all of the sub-contractors. His observation is that employees are more likely than contractors to be receptive to safety procedures:

Yeah normally people who are employees tend to be a little happier to comply with a lot of the things, because it's not costing them any time or money, the company that they work for, so that doesn't really matter to them what they do. They want to spend three hours getting site inducted, well they don't care, three hours closer to knock off sort of thing. Whereas as I said, someone comes on to do a two hour job and they've got to spend two hours doing site inductions, halves their hourly rate or halves their profit sort of thing.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

Contractors were viewed by some research participants as less likely to raise concerns around OH&S. This was seen by one key informant as something that head contractors were cognisant of, and sometimes even exploited, in order for jobs to be completed on time:

It's just a natural flow on effect that when you individualise it down to an ABN process if they're not prepared to stand up and talk about things that are near and dear which would be the wages and conditions, we don't find out until the end of the job, it's highly unlikely that they are going to be reporting breaches of safety as well and the bosses know that and get away with it. (KII1)

Text Box 7: Complexity, Precariousness and Contracting

When Rod's original employer made him and the rest of his permanent colleagues redundant he was forced to trade in working locally for a fly in, fly out job. With the birth of his first child it became harder and harder for Rod to be away from his family responsibilities.

After years struggling to balance his work and family life as a mobile worker, Rod sought to resolve the problem by seeking work again with his original employer so he could spend evenings with his young family. His old employer wanted him back and he became an integral part of their workforce, but despite this, they were not willing to take him on as an employee. He recalls – "I applied for a job back with them permanently but they don't seem to want to give me a crank. They're happy to use me... permanent contractors, is what they call us".

So Rod now has an ABN, but as a contractor his hourly rate does not include a premium to compensate for the lack of sick pay or holiday pay, he works on a roster and has no control over his hours of work, and he gets no penalty rates for night shifts or holiday work. He earns a flat hourly rate which turns out to be the same as his permanent colleagues. Without sick leave or holiday pay Rod has not had a break for the past 3 years and is at risk of fatigue. As he puts it – "we don't get the holidays and we don't get the loading and when they've got no work they just tell us to stay home."

Even though Rod does not get any of the advantages of higher rates of pay or autonomy that many employees associate with contracting, he is still responsible for putting in BAS statements, an administrative burden he is ill-prepared for. To organise his tax, Rod needs the help of his wife as well as an accountant to work it out. He says, "I pay the BAS as we go along and my wife, she works all that out. She does the BAS statement. She pays that every three months whenever that comes out. At the end of the year I just trust my accountant does the right thing. I don't understand it, that's why I pay her the big bucks to do it. It's too complicated".

Even though part of Rod's job is training and assessment of workers, when new equipment arrives on site, he himself is excluded from training. For example, he says - "say they buy a new fleet of trucks, the permanent guys get to go on the course and they don't send contractors".

The boom and bust cycle of construction work and a perception of high premiums paid to sub-contractors make contracting attractive to workers. When there is a boom, employees are unable to take full advantage of market-based incomes despite still working long hours. When there is a downturn, they are vulnerable to losing their jobs. The flow-on effect is that there is drive for contractors to try and earn as much money as they can in the booms to tide them over during the busts. Ultimately, individual workers make constrained choices, largely based on where the work is available and much less on their actual preferences for type of work arrangements.

Changing employment arrangements driving ‘sham contracting’

The legal system focuses on the traditional division adopted to distinguish between working arrangements between an employee and a contractor. As mentioned earlier in this report, some commentators further distinguish between ‘dependent’ and independent contractors with the implication that many contractors are somewhere between employee and contractor (Commonwealth of Australia, 2002b:8). Independent contractors are employed under a commercial contract with working arrangements *inconsistent with them being an employee*. They usually operate their own economic enterprise or engage independently in a professional trade, and are engaged by a firm to provide a defined service for a predetermined fee. Dependent contractors, on the other hand, are employed under a commercial contract but with work arrangements *more consistent with them being an employee*. Rod’s work arrangements, described in Text Box 7, seem more akin with him being an employee than an independent contractor.

The Cole Commission recognised the notion that ‘the language of the law has not yet given general recognition to the concept of the dependent contractor.’ (Commonwealth of Australia: 2002:8). While the category of ‘dependent contractor’ might be useful in helping us understand what is currently occurring, it is a different question as to whether a new legal category of ‘dependent contractor’ needs to be created. For instance, will setting off in the direction of developing a statutory response to a new category of workers run the risk of losing sight of the problems of the use of contractors? Such an approach may simply provide legitimacy to work arrangements that are, in many cases, inferior to those applying to employees. It also runs this risk of taking resources away from interventions designed to improve safety practices among all construction workers.

In their submission to the House of Representatives Inquiry on Independent Contracting and Labour Hire Arrangements, the Department of Industrial Relations Queensland (2005:9) expressed grave concerns about the use of ‘sham contracting’ to hide a genuine employment relationship for the following purposes:

- To undermine employment conditions;
- To remove workers out of the PAYE system; and
- To remove employers’ obligations for workers’ compensation, superannuation and public liability coverage.

The undermining of employment conditions can be better understood by looking at the combined factors of what is happening with the award system, the growth in the prevalence of 'hourly contract rates', the use of intermediaries such as labour hire agencies and the confusion that is sometimes associated with workers shifting between contractor and employee status and vice versa. Each of these points is discussed in turn, below.

Minimal reliance on award system

As discussed earlier in the report, there has been an increase in the number of workers who fall in the contracts for service category. These workers are not covered by industrial instruments (that is awards and/or registered agreements). Despite this, the common law conception of employment continues to activate various forms of regulation (Stewart, 2011: 4). While independent contractors may have the protection of some forms of regulation, they are protected by a much narrower range of matters than is the case in relation to employees (Stewart, 2011:6-7).

While construction workers used to have industrial arrangements structured by awards supplemented by over-award site agreements, in the last twenty five years the introduction of enterprise-based bargaining to replace awards has seen the reduction of the award system to a 'safety net'. There has also been an increase in the number of workers who are not covered by industrial arrangements, such as contractors (Stewart, 2011). Another significant change identified by Smith (2010) is a "trend in the past 30 years [of] people doing the same job but on different employment contracts, hence a separation of work relations and employment relations" (Smith, 2010:277). Work sites, especially building sites, now often combine people working alongside one another on range of different employment and contracting arrangements and engaged by a number of enterprises (Durham, et al 2002).

Growing prevalence of 'hourly contract rates'

The qualitative research suggested that virtually no-one, other than apprentices, is employed on award-only pay and conditions. Key informants confirmed that workers who may have been employed on award rates in the past are now employed as contractors on the basis of a 'loaded hourly rate'. This rate is considerably higher than the relevant award rate and usually covers workers' compensation but employer contributions to superannuation are not necessarily made on behalf of workers. When it comes to common law tests such as those discussed in Text Box 1, the typical hourly rate worker in Construction would pass some of the tests but fail on others. For example, Rod does not get paid penalty rates when he works night shifts or weekends yet he is paid the same basic hourly rate as permanent employees who are entitled to paid leave and payment for overtime. Other contractors working for the same company are paid more or less than him, depending on what they can negotiate. Rod also has minimal discretion over the completion of his work tasks; another of the indicia of employee status:

As I said it's a strange situation because they're use me across the... well they've got five crews they've got there. They've got a drill and drag line crew, I spend time up there when they're short of blokes, I work across all the workshop crews when they've got blokes short and I keep flicking from crew to crew. I just fill in anywhere where they're short. Normally they just ring me direct and say yes I'm available or not.

(Rod, ABN Worker, Safety/Site Trainer, Civil/Mine Construction)

One key informant suggested that loose terminology exacerbates these problems. Distinguishing between genuine contractors, employees and ‘sham contractors’ is not helped by the practice of some head contractors requiring their sub-contractors submit invoices on a weekly basis. For example, contractors often engage other contractors to undertake particular parts of a project. The latter group of contractors are generally paid on a weekly basis under contract, but their remuneration is referred to as a ‘wage’.

Vulnerability of precarious workers

There is a range of reasons why head contractors might opt for using contractors and labour hire arrangements. Labour hire arrangements were traditionally used to cover temporary shortages or during periods of peak demand. Labour hire arrangements and contractors, are, however, also used by some companies to replace discrete sections of their permanent workforce. Burgess, Rasmussen and Connell (2003) found that labour hire agencies are increasingly offering a wide range of services that mediate between the job seekers and job providers. As such, such services enable employers or labour hire agencies to avoid compliance with superannuation, taxation and workers’ compensation costs (cited in Department of Industrial Relations Queensland, 2005:16). Hall (2002) suggests that cost savings also involve lower investment in training (cited in Department of Industrial Relations QLD, 2005:16). Underhill (2004) found some evidence that firms were using labour hire as a means to remove the presence of trade unions from key areas of their organisation (cited in Department of Industrial Relations Queensland, 2005:16). Arguably, contracting is being used by some employers for the same reasons.

On use of labour hire, one research participant, Troy, explained that he has been initially sent to all of the recent jobs by a labour hire company. He recounted how labour hire companies are used as the vehicle to put workers on trial and if they prove themselves, then they are offered a job. If not, then they “get rid of them” after a few weeks”. It stands to reason that if workers have only one or two weeks to prove themselves, they may feel under pressure to perform tasks that they are not trained to undertake are not very likely to raise any concerns about site safety . Relevantly, labour hire was specifically mentioned by some research participants as being the most vulnerable form of construction work. Paul noted that the precariousness of their employment status might see these workers de-prioritise safety in order to get a job done:

when you are looking at employing me it's a lot harder to get rid of someone like me than someone from the labour hires. You can just say 'we don't require you tomorrow.' You know and I mean those poor buggers they are threatened so they have got to... most of them they do go that little bit extra and forget about some of the safety issues sometimes and just get on with the job you know

(Paul, Employee, Crane Driver & Rigger, Civil)

Shifting between employee and contractor status

Our interviews with workers provided evidence that construction workers do move in and out of contracting. As mentioned earlier in the report, some of the contractors we interviewed saw themselves as employees of the head contractor that they work for; arguably with good reason. If sub-contracting is only used for genuine reasons, we would not expect to see such a high incidence of workers moving between contracting and employment arrangements.

Despite the *Fair Work Act* containing a provision (section 358) prohibiting employers from dismissing an employee in order to re-engage that worker for the 'same or substantially the same' work under a contract for services, our interviews provided evidence of this during our interviews. For example, Rod (who works in construction on a mining site) was made redundant by his employer and then re-hired later as a sub-contractor to do substantially the same work. While he would clearly prefer to be engaged as an employee, after being made redundant, Rod was re-offered his job as a contractor:

When [Large Mining Company] left, they made us redundant, the permanent work force was made redundant. It was an option, you know. ... and I did like the fly in and fly out thing for a few years. I discovered after three months I have a young family and I found it very hard to spend time away from them so I came back and said are you interested in me and they said yes we're interested in you as a contractor. I've worked as that since.

(Rod, ABN Worker, Safety/Site Trainer, Civil/Mine Construction)

A number of research participants described their movement from ABN worker to employee. In these instances, head contractors appear to have re-assessed the viability of the cost structure for contractors. With Sean's company, it appears that they decided to put workers back on staff after coming under external scrutiny:

I used to be on ABN and they said to me half way through last year, "Look, we're going to have to give you a package because otherwise we're going to have to start paying you all this extra stuff", which as an ABN provider I'm supposed to provide anyway. My own super, my own workers' comp, all that sort of stuff. I used to provide myself and then they said, "Look, we're going to have to start providing that so we'll give you a package." So, they gave me a decent package. So, that's what's happened. Most people have gone onto wages now, whether it's casual or full-time or whatever it is. There's not too many left on ABN. And this is where the problem is with the [Name] hospital site. That you're dealing with all the ones that are left that are still on ABN and happy to work under ABN are now standing up and saying, "Well, we should be also getting the super and the fuckin whatever, whatever" and that's why they're sort of jumping up and down.

(Sean, Employee, Site Supervisor, Plumbing Contractor, Civil)

In the above quote, Sean also raises a problem where people working on ABNs were working alongside employees and inconsistencies between pay and conditions of employees and contractors ultimately led to disputation on the site.

Another research participant, Simon, talked about how he moved from an ABN worker to an employee with the same company. When asked why he changed, he said that the company had pressured him to do so:

Yeah I've actually only been on salary since February I think this year..... Pressure from the company, because I was advancing further into management, they didn't want me to continue on an ABN, they wanted me to be actually a part of the company. So it was either stay on ABN and not advance any further or if I wanted to advance any further I had to stop using my ABN and actually go on salary.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

Relevantly, the CFMEU reported that between 30 June 2009 and 30 June 2010, the ATO issued 57,000 additional ABNs to construction entities with 80 per cent issued to individuals in construction, rather than to companies or 'other entities' (CFMEU, 2011:28). On this matter, key informants from both employer associations and unions alike raised concerns about how easy it is for workers to obtain ABN numbers. As already discussed in the section on the production process, sub-contracting has historically been a feature of the cottage industry, yet the use of sub-contracting and labour hire now appears to be an increasingly common feature the landscape in all three sectors of the industry with a marked increase in the commercial sector. To repeat, the apparent ease with which head contractors can switch a broad range of construction workers from contractor to employee and vice-versa must raise a question about the legitimacy or genuineness of such practices and therefore, of regulatory gaps that are being exploited.

There is evidence that different forms of engagement affect the way skills are used and developed. Extensive sub-contracting tends to be linked to task fragmentation and thus the way skills are used. Contracting and the output-based focus tend to result in training being viewed as a (discretionary) cost rather than an investment. As result, training is one aspect that can be cut or minimised. Finally, sub-contracting is also associated with the proliferation of small firms with little working capital, let alone fixed capital, and therefore investment in training is difficult in capital-starved small businesses (Mayhew, et al 1997; McGrath-Champ, et al, 2004; Toner & Coates, 2006). Furthermore, contracting tends to encourage a short-term view of the industry and result in high churn labour flows, including the use of temporary migrants.

We found, for instance, a carpenter who had been an employee only for the time of his apprenticeship and has been working as a contractor with the same firm for many years.

Conclusion

This section has explored contracting and employment and the interaction between the two, in context of forces at play in the construction industry in Queensland. It has helped to consolidate a number of the findings developed in the earlier three themes of the report. The question of whether the trend towards contracting, and 'sham contracting' in particular, is being driven by the demands of individuals or by employers to attempt to outsource costs and risks was examined.

There is no doubt that some workers prefer the perceived benefits associated with self-employed as contractors. The qualitative research findings suggest, however, that the fierce competitive pressures faced by employers and the fragmentation of the production process act as strong drivers for companies to use, to their advantage, a continually changing mix of different types of employment and contracting arrangements. In particular, there is strong evidence that 'sham contracting' needs to be understood as one manifestation of the changing power structures at play in the construction industry.

Most head contractors operating in the industry appear to be sound. Some, however, seem to be shifting risks through contracting arrangements. Once they do this, the scope exists for them to do the wrong thing by their workers. This, in turn, puts competitive pressure on those head contractors and sub-contractors who are trying to do the right thing. That is, it creates an uneven playing field. The use of 'sham contracting' appears to be linked to the larger issue of different approaches to labour management. Employers with culture of 'corner-cutting' are also those more likely to adopt

fragmented and individualised site governance and in so doing, create the space for 'sham contracting'. In this context, we found 'sham contracting' to be one by-product of a broader cost-driven, risk-shifting approach to construction.

If improving workplace safety is an important goal, future debate should ideally focus on identifying practices, procedures and laws that will apply to all workers across the industry. There is a danger that setting off in the direction of developing statutory responses for new categories of workers runs the risk of perpetuating an uneven playing field and is not likely to lead to improved workplace safety in the industry.

Text Box 8: Construction Industry Safety Record

The Construction Industry was been identified under the National OHS Strategy 2002-2012 as one of the five industries to receive priority attention (Safe Work Australia, 2010). It was selected on the basis of a combination of high incidence rates and high employment (Safe Work Australia, 2010).

In 2008-09, the industry employed 9 per cent of the Australian workforce. Within the industry, 72 per cent of workers were classified as employees and were covered for workers' compensation. Employers in this industry paid 2.5 per cent of payroll to cover their employees for workers' compensation (Safe Work Australia, 2011). In 2008-09, the Construction Industry accounted for 11 per cent of all serious worker's compensation claims (14,740 claims). This equates to 40 employees each day requiring one or more weeks off work because of a work-related injury or illness (Safe Work Australia, 2011).

The incidence rate of serious claims in this industry has fallen 28 per cent since 20001-01, from 31 to 22 claims per 1000 employees in 2007-08. However, this rate remains much higher than the rate for all industries of 14 claims per 1000 employees and was the fourth highest of all industries for 2007-08 (Safe Work Australia, 2011).

The most common causes of compensated injury and disease in the industry in 2008-09 were:

- muscular stress (due to manual handling or repetitive movement), which accounted for 35 per cent of claims
- falls, trips and slips of a person, which accounted for 26 per cent of claims; and
- being hit by moving objects, which accounted for 16 percent of claims (Safe Work Australia, 2011).

Over the past three years the most common causes of fatalities in the industry were:

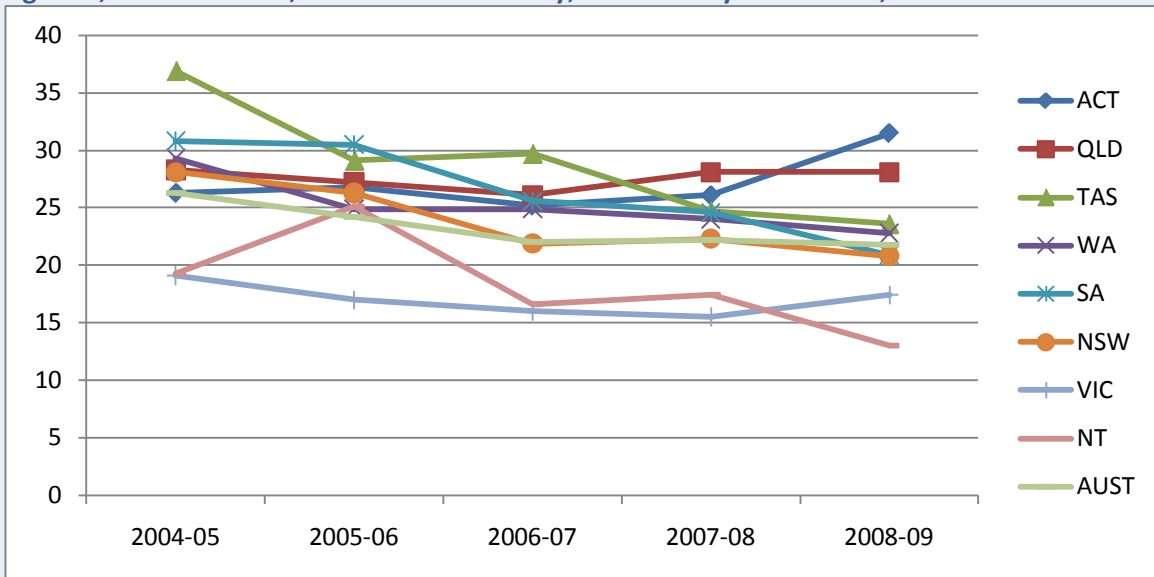
- long term contact with chemicals and substances (often resulting in occupational diseases), accounting for 37 per cent of fatalities
- vehicle incidents, which accounted for 16 per cent of fatalities; and
- falls from a height, accounting for 11 per cent of fatalities (Safe Work Australia, 2011).

Injury rates differ within the sub-groups in the Industry, however since the Strategy began, falls in incidence rates have been recorded by all sub-groups within the Construction industry. Non-building construction recorded the greatest fall (28 per cent), followed by Building structure services (27 per cent fall), Site preparation services (27 per cent fall), Other construction services (27 per cent fall) and Installation trade services (26 per cent fall). These sub-groups account for more than half (57 per cent) of employees in the Construction Industry (Safe Work Australia, 2010).

Text Box 9: Workers Compensation Claims

The incidence of serious claims in the Construction industry varies considerably by jurisdiction; as does the degree to which claims have fallen from 2004-05 to 2008-09, Figure 1. For instance, while Tasmania had the highest incidence of serious claims in 2004-05 (at 36.9 claims per 1,000 employees), this fell to 23.6 claims per 1,000 employees in 2008-09 (i.e. a 33 per cent fall).

Figure 1, Serious Claims, Construction Industry, Incidence by Jurisdiction, 2004-05 to 2008-09



	ACT	QLD	TAS	WA	SA	NSW	VIC	NT	AUST
2004-05	26.3	28.3	36.9	29.3	30.8	28.1	19.1	19.3	26.3
2005-06	26.8	27.2	29.1	24.9	30.5	26.3	17.0	25.1	24.2
2006-07	25.2	26.1	29.7	24.9	25.6	21.9	16.0	16.6	22.0
2007-08	26.1	28.1	24.7	24.0	24.6	22.3	15.5	17.4	22.2
2008-09	31.5	28.1	23.6	22.8	20.9	20.8	17.4	13.0	21.8

Source: Safe Work Australia (2011)

Relevantly, from Figure 1 we can see that the incidence rate for serious claims in the Queensland Construction industry has remained in the range of 26 to 28 claims per 1,000 employees across the five year period from 2004-05 to 2008-09. In 2008-09, the incidence rate for Queensland also remained considerably higher than the national average for the industry (at 28.1 compared to 21.8 claims per 1,000 employees).

Safety Implications

Introduction

The earlier sections of the report focussed on the themes of sectoral differences, the production process, competitive pressures and contracting and employment arrangements. In these sections, a number of references to OH&S implications were made in passing. The current section attempts to draw together the safety implications coming out of these four overlapping themes. We initially provide some context by discussing the regulatory context. In assessing the research participants' observations on OH&S, structural and cultural themes emerged that relate to the structure of the industry and an associated individualisation of risk; the production process (specifically competitive tendering and work intensification), differences between practices on private and public sector sites, site coordination, and the role of principal contractor and individualising risk through reliance on tacit knowledge. These dimensions are explored in turn, with a particular focus on how they influence important OH&S outcomes: the adoption of OH&S policies, increase risk of injury, participation in formal OH&S decision-making processes, return to work practices and workers' compensation arrangements.

Regulation

Queensland construction sites are regulated by OH&S laws. Principal Contractors are subject to general duties under statute law under the Workplace Health and Safety Act, 1995 [Qld]. These general duties apply beyond employees and, as Johnstone (1999) suggests, extend to contractors, franchisees and their employees and sub-contractors. Section 29A of the Act stipulates certain responsibilities on different levels of contractors and sub-contractors and this is particularly important in pyramid contracting relationships such as those sometimes found in construction.

There are therefore a range of policies, procedures, and regulations that apply to OH&S on Queensland construction sites. Our research sought to find out about the perceptions and practices of workers concerning procedures around site safety and whether workers feel empowered around OH&S. The research also sought to find out whether there were any perceptions of differences between the OH&S practices and procedures between employees and contractors.

Several research participants described instances of injuries to themselves and others. Many of these were described as being 'part-of-the-job', a matter of course of being exposed to the routine hazards and risks intrinsic to the industry. When OH&S hazards and risks were recognised, the control measures introduced were focused on individual workers rather than on the risk avoidance or mitigation processes themselves. These injuries were, however, often quite a serious nature:

We've got a few injured at work. They've been like using a jack hammer and jack hammered so much he'd jarred his teeth, had to get those fixed up. You know, the barricade, before we had safety rails were falling back and bang cutting their hands, breaking legs. Slipped on stairs, going down stairs, because the old stairs used to be painted with enamel instead of painting with the non slip we all paint with non slip on and fallen all the way back down and jarring their back up. All sorts of injuries, falling off roofs....

(Allan, Small Business Owner, Painting Sub-contractor, Civil)

Oh yeah there've been a few, no fatalities that I know of yet, there's been a few fairly bad incidents..... Like broken arms, getting fingers crushed, like people in mines have been crushed between articulated vehicles, they haven't lived. I didn't know them but yeah.

(Mick, Employee, Electrician, Civil)

Therefore within the qualitative sample, experience of injury and risk of injury was evident, reflecting the trends evident within the Construction industry of high rates of work-related injury and fatality. More details of this are presented in Text Box 8 (Construction Industry Safety Record) and Text Box 9 (Construction Industry Workers' Compensation Claims).

Sub-contracting is an important issue to consider as it can undermine the regulation in several ways. It often, as outlined in detail above, leads to multi-employer worksites with numerous isolated workstations that can stretch regulatory resources and create ambiguity and complexity around issues of legal responsibility for safety. Sub-contractors are often not effectively covered by employment regulations and their employment practices are often subject to little scrutiny, including O & HS practices in the absence of inspection.

The Production Process and Increased Risk of Injury

Competitive tendering

Construction projects, particularly once it reaches the sub-contractors on site, are often characterised by very tight profit margins that result from the competitive tendering process that sets the price at a minimum. Although regulatory regimes are in place and demand certain standards of OH&S, employment status and the organisation of the industry have also been found to be important influences on OH&S outcomes. These factors can increase the likelihood of injury, despite the legislative and regulatory regimes that are in place. OH&S is not always a high priority when planning a job and often viewed as an "add-on" cost impacting on already slim profit margins (Hager et al, 2001). The "trade-offs" that occur are pushed downwards with the ability for workers to resist. Clearly where competitive pressures are intense, contractors are forced to make "trade-offs" so working conditions, pay and safety all become potential targets for compromise. We have already reported comments to this effect earlier in the report.

As noted by one of the research participants, Sean, health and safety is strongly dependent on the principal contractor/ employer and whether safety is perceived to be expendable at the cost of production. Lax OH&S on work sites can be a symptom of the costs of safety being omitted from project costs or it being squeezed out to improve profit margins.

Health and safety, it's one of those weird ones. It depends on the company. No matter what umbrella you're working under, depending on the employer as to how much they take their health and safety over production, sort of thing. So, we put all the right things in place as far as health and safety, but they still push you extremely hard. For production.

(Sean, Employee, Site Supervisor, Plumbing Contractor, Civil)

In this research, research participants reported that economic survival and the winning of contracts in an intensely competitive environment appeared to be often prioritised over OH&S considerations. Where the priority is getting the work done as quickly as possible, sub-contractors, self-employed and small businesses workers are less likely to see OH&S as an issue warranting attention, to have an OH&S program, to regularly assess OH&S risks, or to undertake OH&S induction, training and supervision (Rebitzer, 1995, p. 41; Dawson et al., 1988, pp. 101-102). One mid-level site manager, Sean, described how pressure to reduce costs can also mean that even within line management structures there are tensions around devoting funds even to meet compliance requirements.

(Q) And so, what would be the sort of attributes of a project manager or company that does take it seriously. ...

(A) Well, that's right. The actual chain of command needs to be strong all the way up from the bottom to the top. ... a lot of the time I'll get feedback from my boys and I'll pass it up to my [safety coordinator] and then she'll put it into the meetings and then the people at the top will just go, "No, well we're not paying them money for that." So, then I'll follow it up in a week and go, "Look, we need all this stuff." Some of it might be, it's just following legislation. Like it might be say lifting chains. You've got to get them certified every six months. So, it might be me saying, "Look, these chains haven't been certified. We need to just get them checked", and that might be \$400 and that might get knocked on the head. "No, you're not going to get that done.

(Q) So, it's sort of like, at your level you're trying to balance the risks and I guess the guys on the production are also trying to do the same thing.

(A) Yeah. The guys on the ground don't mind putting their hand up and saying what's wrong. It's the project managers and the site supervisors that are really squeezed in the middle, because the guys on the ground, they know what's going on and they're interacting with people that may be in companies that are in better situations and did price to allow for all this sort of safety stuff.

(Sean, Employee, Site Supervisor, Plumbing Contractor, Civil)

Therefore, an important underlying factor in whether OH&S is complied with and followed is whether safety is built into the budget for the construction work and those resources are made available. Building the cost of safety into the project proposal and contract, thereby making it a condition for the work is one mechanism to promote the more stringent adoption of health and safety procedures. Some research participants reported that the financial risk and the cost involved in following legislation often comes before personal safety of workers because safety is squeezed out of the price of the job in order to win the work. As mentioned previously, there is more evidence of this being the case in the commercial and cottage industry as opposed to government works, which allocates a larger budget towards safety. Simon notes:

We assess the risk on all jobs, we don't expose any of our workers to dangers deliberately, but we try and be practical. There's a great deal of cost involved in safety, which on a commercial basis can't realistically be allowed, because there's too many other people competing and while the law is there the enforcement of the law leaves a little bit to be desired. So if you do things according to the law then you get penalised by not getting a job.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

Work intensification and safety practices

The tight profit margins that characterise the industry often seem to filter down to employees and sub-contractors in the construction in the form of work intensification. The payment-by-results system that characterises much of sub-contracting work means that returns are increased by the completion of tasks in the shortest possible time and with minimum standards. Under these circumstances, sub-contractors typically work excessive hours in order to get jobs done as quickly as possible. Pressures to complete a job quickly may be increased where intense competition amongst sub-contractors drives down the price of services performed. Research participants mentioned being pushed to meet deadlines as well as having a lack of support from above. They also noticed instances where work intensification and corner cutting occurred because of the strong push for timelines to be met.

...they just want the results. And that's, for us, and that's for a lot of people, a lot of companies, just pretty much push for the timelines and don't give you the support that you need.

Have you witnessed any examples of any of cutting corners recently on any of the jobs that you've been on?

A Yes, yes I have.

Q Like what kind of things go on?

A There's, just rushing to do things they forget, just forget to put their safety glasses on, safety equipment, sort of climb up a box or something instead of using a ladder, you know, something simple but easily done.

(Mick, Employee, Electrician, Civil)

Therefore, both sub-contractors and those working for them may work very long hours with an increased likelihood of crude forms of work intensification exacerbating the risk of injury. One research participant, Eddy, a scaffolder, provided an instance where different standards were applied for employees and contractors:

I went there and did a shutdown for them and at the same time they were building a plant but the people in the plant had to wear a scaffold, had to wear a harness on a scaffold that was say two metres high which is not even going to work anyway yet people on the plant, that we were building the new section didn't have the restrictions that we had. We were standing there looking through the fence it is the same job it is alongside us it is the same people, the same company yet they were allowed to build it one way while we had to build it another and so we said 'what is the go here?' and they said 'oh no, it is' and I said 'but it is the same line.

(Eddy, Employee, Scaffolder, Cottage & Civil)

Diminishing employment conditions through contracting processes are also evident in fatigue risk. Sub-contractors, especially in the commercial sector are often engaged in jobs that are geographically dispersed. Furthermore for contractors no rest breaks are mandated, as is required for employees covered by collective or enterprise bargaining agreements. Therefore the responsibility for managing fatigue and taking breaks resides with the individual contractor. Given the tight time pressures contractors are under, then breaks may be compromised. Brian's

circumstances are not uncommon; a combination of a long daily commute, working long weekly hours and no rest breaks:

- A *I live in [Town A].*
- Q *And is that the same place where you work at the moment?*
- A *No, I actually work in [Town B] now.*
- Q *So do you travel back and forwards or...?*
- A *Yep. ... Seventy k's. Daily*
- Q *Wow that's a big drive. ...*
- Q *What hours do you work each week? Does it vary or is it pretty similar?*
- A *No, it varies. It could be anything from 38 hours to say 60.*
- Q *Sixty and does that include all that driving that you're doing.*
- A *That can and sometimes it can go more than that.*
- Q *That's a pretty long working week ...*
- Q *So what would you say are some of the advantages of working as an employee compared to a contractor?*
- A *Well they get more regular hours and they get paid overtime. ...Yeah and under union rates they've got to have an hour's break for lunch, which they've got to take mandatory, which I don't, I just keep going.*
- (Brian, Sub-contractor, Carpet Layer, Cottage & Commercial & Civil)

The general downturn and associated shortage of work was another factor that resulted in several research participants travelling long distances either on a daily or weekly basis. This included travelling daily to and from locations such as the Sunshine Coast or to Brisbane. Joshua, for example, was travelling two and a half hours to and from work. At the same time, he was also working 'daylight to dark'.

As a result of competitive pressures and precariousness of economic position that characterises most independent contractors and employees within the industry, principal building contractors are in a position to externalise OH&S onto sub-contractors and as a result responsibility for OH&S related issues is frequently confused or compromised. For instance underbidding on contracts, the use of cheaper or inadequately maintained equipment, reductions in staff levels, speeding up production, work intensification and longer work hour all have effects on implementing OH&S standards. Even where employers want to protect their employees, the sub-contracting process makes it difficult for them to keep their workers safe when confronted with project managers higher up the chain who have no interest in worker welfare but have the power to punish sub-contracting companies for following the appropriate safety procedures when there is a breach.

You just shut your mouth and play their games. I have got issues now I have got issues tomorrow, I have got issues every day and if I turn up there and start getting up the builder and saying this is a joke, all they do is put pressure on my blokes for the rest of the job. That is just how it is.

(Alex, employer, mechanical plumber)

Text Box 10: Client Role in Safety

Brett started working in the Construction industry when he was 17 years old. He was employed by the same electrical contracting company for over 10 years, and has a range of employment entitlements including RDO's, penalty rates and workers compensation coverage.

Brett recently switched from actual construction work to the sales side of the industry.

In his previous role, work included doing renovation and refits of homes, but more usually commercial construction work won through government tender. This work was diverse, the business doing everything from government school projects, commercial light industrial work right through to underground cabling work.

According to Brett, the client played a major role in influencing safety levels, compliance and auditing. He also felt that government sites had high levels of regulation.

Public and private sector differences in practice

These dynamics manifest in differences between public and private sector sites. Research participants described that governments set the benchmarks for industry through their contracting process. In Text Box 10, Brett perceived a difference between safety practices and regulation on government and non-government sites. In general when governments were involved in contracting out there was a sense that more stringent safety requirements flowed on down the chain so that contractors and sub-contractors were required to meet higher safety standards in order to win the work. Research participants also indicated that public sites had stricter levels of OH&S enforcement, more OH&S participation systems in place and monitoring of compliance was more strictly enforced. One research participant, Simon, estimated that up to 30 per cent of the government's budget on production work goes towards safety.

So big commercial jobs certainly will have a safety budget in there, but the government themselves are allowing up to 30%, 20% to 30% of their construction budget for safety. When you consider what you get for it, that's a great deal of money to spend.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

There was, as mentioned above, a general consensus that safety was stricter and more readily enforced on public sector works. That is, despite individualisation of responsibility, on the public sites where the large commercial construction company was the head contractor, compliance measures were more likely to be enforced:

Q How would you describe the workplace safety, particularly in the construction sites that you've worked on?

A Pretty good, actually. One of the school sites that I had a little bit to do with was managed by a ... like a fairly large company, [XX large construction company], and they're very strict on their safety and so if you didn't comply, you weren't allowed on site, basically. So ... and that's pretty much the norm these days as far as I see it.

(Brett, former employee, Electrician, Commercial & Civil)

The controls on government sites appear to ensure that both sub-contractors and employees are subject to the same safety practices. Despite being tendered jobs with commercial contractors working on them, government jobs had high levels of safety regulation. All workers were required to comply with rules and regulations before they commenced work or they weren't allowed to get onto the site. Particularly on government sites, sub-contractors will not be allowed on site if they don't come with their blue card and the proper safety equipment expected of them. Workers reported that government civil sites had multi-layered OH&S procedures and practices including safety officers and tool box meetings. For example, Paul explained:

Well we have a safety committee and we also have WHSOs, Workplace Health and Safety Officers, and there is one in each section an WHSO and we have safety representatives who are there and we do pretty thorough toolboxes and most of the jobs now are on based on safety because there is a lot of talk about safety. Some projects talk a lot more than what they do others do equally as much as what they talk.

(Paul, Employee, Crane Driver & Rigger, Civil)

There is also a difference in the way in which government and non-government sites are inspected in the industry. While the government undertakes audits and due diligence across government sites,

companies will have their own internal inspectors to do site inspections. The same research participant, Paul, explained that in his personal experience, there are more company inspectors because they tend to know what the bigger companies are up to.

In addition to differences between government and non-government sites, cross-sector variance in application and compliance of OH &S procedures was reported. An illustrative example is provided by one participant, Andy, who usually works in the cottage industry, characterised by more of a low touch regulatory environment where a safety inspector is rarely seen. When Andy worked on a commercial site he took his usual cottage industry safety practices with him:

We all have to wear gloves, safety glasses, visibility vests, safety boots, keep leads tied up, have proper ladders I used to have a ladder, not a proper commercial ladder, I was working on a site and got busted one day (an inspector came on site) ... I just hid it..... (what happened?) He(the principal contractor) just laughed. He said 'mate, what are you using that ladder for?'. So the next day I went out and bought a proper ladder. I hadn't worked on a commercial site for a while. I'd forgotten. I bought a new ladder.

(Andy, Sub-contractor, Blind & Curtain Installer, Cottage)

Site coordination

The principal contractor has enormous power and influence over the construction process, including a central role in creating a safe workplace (Biggs, et al, 2005; Biggs, et al 2006; Wadick, 2010). However, when project managers transfer commercial pressures downwards on to workers there is an increased risk of injury. Some workers specifically mention that what makes a bad site is a project manager that encourages poor workmanship and cutting corners to make efficiency gains:

Poor management from the principal contractor and I think that is what it comes down to. Push, push, push, push rather than taking a step back and you know taking the extra five minutes to tidy up rather than moving onto the next job and don't worry about that stuff lying there. ... Well actually yes it comes down to the project manager on each site. They have got a schedule to meet, we have all got a schedule to meet and so you know if have had two days of rain and that schedule has been pushed out so then safety gets pushed through the back door when certain projects come up then away you go.

(Eddy, Employee, Scaffolder, Cottage & Civil)

The importance of principal contractors and site management commitment to safety is critical and can exert huge influence on the safety of a site. However even where there is significant commitment, it is hard to maintain site safety on sites with multiple employers and sub-contractors, where production is divided across specific technical and occupational differences, and therefore overarching responsibility for site coordination, including safety coordination, is complex.

Especially in large multi-employer worksites, sub-contractors are often engaged in horizontally (multiple sub-contractors) and vertically (pyramid sub-contracting) complex relationships. Multi-employer worksites and third party work arrangements that can result in fractured and disorganised work processes. Under such circumstances responsibilities, tasks, supervision and communication processes are more inclined to become disorganised. One outcome of this that has implications for OH&S is disorganisation. Dwyer (1991, pp. 133-142) has identified disorganisation which results from

sub-contracting as an important source of injury at work. The problem is only intensified when there are multiple workers on site who are working as sub-contractors and feel responsible for their own safety and behaviour. It is even more of an issue on non-government sites where there is a less apparent chain of legal responsibility over the rules and responsibilities that govern workplace behaviour.

According to Mayhew et al (1997) these complexities can create ambiguity as to who is ultimately responsible for implementing OH&S systems and practices. Poor communication between the trades can result in sub-contractors leaving unsuspected hazards for other tradespeople working on the same site (Bentley et al., 2004). Eddy provides an example to this effect:

(A) To form the walls. In the other sections they have got screens. Now the screens when they lift them up they are 500 mm or a metre above the deck and there is no formwork there is no protection for when they do the formwork and there are supposed to act as a barrier to stop anybody from falling down and anything like that and they are virtually useless.

(Q) Yes so where is the source of that problem then?

(A) It is with the form worker.

(Eddy, Employee, Scaffolder, Cottage & Civil)

Ambiguity in task definition, unclear relationships between different groups of workers at a workplace, lack of clarity around OH&S responsibilities, workers who are under-qualified or who have limited specific workplace knowledge may increase risks, and may lead to errors of omission in decision-making, breakdowns in communication, or inconsistent sets of decisions and practices (Mayhew et al. 1997). Fragmentation of tasks associated with sub-contracting also has safety effects because self-employed workers, teams or small employers do not have the resources to devote to OH&S that is the case with larger organisations.

The main ones are usually the smaller operations who are not on site for very long. Most people if they're going to be on site for any reasonable amount of time and I mean just talking for more than a couple of days and they've got a workforce involved, they're normally pretty good at being aware of their responsibilities. A lot of that comes down to personality issues of whose involved So those certain groups have certain issues that you've got to keep an eye on and that's one of those things where I'll just use my judgement But normally the ones who will come in on a short term contract, so we might get someone on a concrete pump or someone who comes in to set up some sort of temporary scaffolding maybe or something like that, who's going to be in and out in a short space of time and they might go to three jobs in a day. They're the ones that you have to sort of keep an eye on, because they think they're outside the law, because they're not going to be there long enough to get caught or for anything like that to happen.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

Thus financing arrangements are likely to reduce the overall resources devoted to OH&S. However because OH&S regimes are largely focused on safety hazards and risks, and not the economic-driven labour intensification, many OH&S regulations do not provide very good guidance on how to negotiate these problems.

Individualising risk: competition, 'common sense' and implications for OH&S outcomes and processes

As discussed in previous sections, the organisation of the construction industry favours a culture of independence, encouraged through sub-contracting in a highly competitive environment. To survive, sub-contractors balance the tension between costs, production and their safety (Hager et al., 2001).

The workers who were interviewed are very aware that construction work is dangerous and that the risk of injury is ever present. However they almost universally felt that they were responsible for their own safety. This sense of self responsibility or individualisation of risk is strongly associated with the strong macho-trade culture that characterises the industry. One aspect of this strong culture of independence is that research participants described how they manage risk by applying 'common sense'. In this respect, research participants almost universally used the phrase 'common sense' to describe how they understand safety on the job. This reliance on "common sense" or tacit knowledge encourages workers to perceive safety risks as their own individual responsibility rather than looking at collective processes, behaviours and strategies around OH&S. This is clearly an issue on sites that do not have tight standards over safety practices. This however has several implications for OH&S, including actual injury, denigrating vulnerable workers because they are perceived to lack 'common sense', and a distrust of formal OH&S procedures. Rather, they view such procedures as being administrative burdens, especially where they increase financial pressures on workers.

Sub-contractors place an enormous amount of trust in their own common sense to help inform their safety judgements and decisions. Wadick (2010) suggests that this reliance on 'common sense' is a necessary part of sub-contracting practice because they are constantly required to make context-specific practical judgements in complex and changing workplaces. Learning is therefore developed through experience and is often trade, task and tool-specific. Wadick (2010) describes this as 'reflective practice' and as one research participant, Robert, noted, it often manifests itself in the taking of risk:

I think it comes down to common sense, or if something's dangerous, people should think about it, and just don't do it, or work out another way around it. It boils down to there's too many people relying on other people to think for them.

(Robert, Self-Employed Builder, Cottage)

Learning to work safely through practice based experience and reflection is an important aspect of working in the construction industry, but within the context of production processes and contracting arrangements in some sectors that are increasingly reliant on high levels of competition and where cost-pressures are high, several negative implications for application of OH&S procedures and compliance practice are evident, including sustaining injury. A number of research participants made observations to this effect:

Yeah. A guy hurt his arm, or something. He was off for a few weeks. It was covered by the workers comp though. I assume all went well More like his own doing though. He's still in the workplace though..... Well he shouldn't have been climbing on the rack But he hurt his arm somehow, or his shoulder or something..... He was off for about three months..... He's on light duties, and he's working back up to full time again.

(Wayne, Employee, Forklift Operator, Cottage & Commercial)

I think it comes down to the person. Like it doesn't matter if you are a labourer, or a carpenter, or an electrician, if you are not too bothered about being safe, and not too concerned about what you've been asked to do by your boss, then you are going to be unsafe either way. So I think it's getting better, as it's being pushed harder. Like we've just had a policy brought in our company that you need to wear safety glasses at all times, which is really good, because we've had a lot of eye injuries. But, still guys won't wear them, even though they will get written up, and if you get three warnings, you don't get a job again, so it comes down to the person.

(Jason, Self-Employed Carpenter, Commercial & Residential)

Another implication is that workers who are perceived as not having common sense or who were unsure or put themselves at risk are denigrated. Comments from two of the research participants, Karl and Pete, accurately capture this view:

I don't know whether you could specify dickheads as a group? You're going to get them in every single situation and those guys will always hurt themselves and they could be from our trade or they could be from any other trade yeah.

(Karl, Former Employee, Electrician, Sub-contractor, Commercial)

it depends how you work. Like, I try and teach the blokes as I go. If I feel they're doing something silly or I'll point something out if we're working with another guy, another tradie, about securing something. But it comes down to individuals. There are cowboys out there. You probably know from your own experience. You can't talk sense to a dickhead.

(Pete, Self-employed Maintenance Contractor, Commercial & Civil)

However the issue of vulnerable workers can be understood within this context of relying on expected or accepted tacit knowledge. Vulnerable workers are those who haven't developed the 'common sense' through experience required to work on the job safely. Many research participants stated that inexperienced workers, especially younger workers including new apprentices and labourers were more at risk of injury. One key informant (KII3) stated that many "dodgy" contractors are new to the industry, have low skills or as migrant workers, and therefore do not feel confident or capable of managing OH&S risks.

What causes of a lot of problems is that the younger fellows they don't realise even though you tell them 'we only want you to carry this amount of gear' they will carry double. 'I am young I can carry double.

(Eddy, Employee, Scaffolder, Cottage & Civil)

I think the younger guys normally are, from experience because a lot of them are ignorant and they don't seem to want to listen to you until you say, look, don't do it that way or you'll get hurt. And then they'll hurt themselves and you go, well, now you just learned the hard way. If it's not something serious, if they're going to cop a drill bit into the side of their hand or something like that and give themselves a graze, you let them go and let them bite themselves. They should realise with some of the dangerous power tools or something, we go, no, mate, you're not going to use it that way at all. You put it down and watch me show you how to do it.

(Pete, Self-employed Maintenance Contractor, Commercial & Civil)

Some research participants suggested that there were also risks associated with workers who had so much experience in the industry that they were resistant to changing their safety practices.

... a lot of the guys that have been around for a long time as well because they tend to get complacent and 'we have been doing it this way for 25 years and I have never fallen off a ladder why should we change' sort of attitude.

(Scott, Employee/Project Manager, Commercial & Civil)

There is also a general attitude of acceptance that construction is dangerous work – 'part of the game ... Younger blokes are more likely to cut himself or do stuff like that but I have still got 40 year old blokes who burn themselves and stuff like that it is just part of the game isn't it.

(Alex, Sub-contractor, Mechanical Plumber, Civil)

Another implication of the reliance on tacit knowledge is a distrust of OH&S regulations and measures. Some research participants recognised that the rules and enforcement of safety on sites has a positive impact on making employers do the right thing, corroborating previous research that has linked the mandatory introduction of Work Plans and risk assessment for sub-contractors and contractors in Queensland to improved OH&S outcomes.

Under Queensland legislation, principal contractors are required to produce Workplace Health and Safety Plans. Prior research has identified that these plans have led to improved OH&S outcomes (Mayhew and Quinlan (2001) citing Mayhew & Quinlan, 2000a; Johnstone, 1999; Mayhew et al, 1997). The Workplace Health and Safety Plans are a formalised risk assessment and control checklists that are specific to industry sub-sectors. The Queensland Government website provides information on the plan including its key aspects. The contents of the plan is included in Appendix Four.

....if they're not doing the right thing, they'll be hounded more by the government contractors, or someone will get hurt and then the last thing that they want to be doing is site management and then their superiors need to have to do all this paperwork if somebody gets hurt. And they're just not interested, so it doesn't happen. So they are right onto it.

(Geoff, Employee, Excavator, Sub-contractor, Cottage & Commercial & Civil)

The privileging of practice and experience can also mean a distrust of safety courses or regulations that according to the perception of workers, elevates procedure over practice. Procedures that seem too time-consuming or not useful are often side-lined in favour of working methods based on 'common sense'. Several research participants provided examples of preferring 'common sense' over mandated safety practices. An example, from Simon, has been provided below:

There are things that when you're doing jobs where people have to wear a hard hat for example, that might be inside a finished building where anyone else inside the building doesn't have to wear a hard hat, but because we're a construction worker we have to wear a hard hat. And it might be someone doing something inside a cupboard, so every time he bends down to look inside a cupboard his hat falls off and then if an inspector walks past and he hasn't got his helmet on then he's in trouble and liable for a fine. So it's when does the point of common sense kick in? And so I don't enforce things like that, I use

common sense to enforce things. So I run the risk then of not complying all the time on my sites because I'm using common sense, rather than sticking to the letter of what's required.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

One example of this is resistance to compliance measures and regulatory practices, for example OH&S inspectors. As workers' knowledge of safety is embedded in their work practices and their experience on the job, many research participants resented being told what to do by "outsiders":

It's out of control. I don't want to be crude but you can't fart without a ticket these days. There are all these people working for the government that don't seem to have anything better to do..... It's a joke. A bloody joke.

(Andy, Sub-contractor, Blind & Curtain Installer, Cottage)

The result is that OH&S strategies are sometimes seen not as being about producing safer workplaces, but merely about regulatory compliance and administration. These perceptions appear to persist despite the effectiveness of OH&S policies and procedures in reducing injuries and fatalities. What is salient in these discussions is, from the worker perspective OH&S rules and regulations need to incorporate practical safety knowledge if it is to be accepted and improved.

As discussed earlier in this section, production processes encourage high levels of competition and cost-cutting. In combination with a culture that encourages individualisation of responsibility, this can have perverse effects on the level of resources that are devoted toward safety. Many sub-contractors understood compliance OH&S measures as financial risks. Reluctance to spend money on OH&S is related to the individualisation of risk and the extreme competitive pressures within the industry, with tight profit margins resulting from the competitive tendering process undercutting sustainable work practices. Therefore, it is not surprising that several research participants complained that industry was over-regulated and that different aspects of OH&S procedures were a poor use of their time.

On workplace safety in QLD "Over regulated to buggery. Look I totally support the need to have safety, but the way that it's enforced at the moment is just to the point where the loss of productivity is increasing the cost of production to the point where it's not affordable for most people ... [the site inductions] are pretty well a waste of time. The site inductions aren't conducted to make the site safe, the site inductions are conducted to comply with the law. And most people treat them as an evil necessity that you get 20 people in a room who all listen to the same stuff that they hear on every job and most people sit and do crosswords and have conversations and no one pays any attention. As long as they've signed the form at the end no one cares. And most people in the construction industry understand that the regulation is in case there's an accident people have got their arse covered, so if you go to jail you go hang on he signed that form to say he understood the risk. So it's not actually there to make people safe, it's there to stop litigation.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

Therefore, financial risk is often viewed by construction workers as more important than personal safety. This is despite the role of training being emphasised as important by some of the research participants.

... a bloke got killed working on an elevated work platform and he'd only been on the site a couple of days and he hadn't really had the full training or site training on this elevated work platform and so after he got killed they made everybody do a course on it .

(Warren, former employee, Electrician, Civil)

Serious injuries or fatalities did serve to bring home the importance of workplace safety to a number of research participants. Where serious injuries, and fatalities, occurred, we found evidence that changes could be implemented to improve OH&S practices. Ideally, preventing injury and fatality by designing out hazards (according to Hazard of Control models) is the most effective practice. However the capacity to review and learn from workplace injury incidents is reliant upon an organisational commitment to change and having appropriate processes in place to systematically assess the underlying causes for its occurrence.

It is important to note that the effectiveness of OH&S measures, especially enforcement and compliance measures, are weakened in a context where risk is individualised through increased reliance on the production process, and where there already exists a culture that promotes experienced based knowledge and individual responsibility. Wadick (2010:113) points out that "sub-contractors feel that they would be able to negotiate an OH&S compliant workplace if they were treated with respect, consulted, and their knowledge, opinions and experiences validated". But to this we would also add that OH&S compliance measures are seen as irrelevant and an impediment unless they contribute to the more fundamental challenges posed by the production process, including cost pressures to meet safety requirements, poor organisation of the construction process, poor coordination and communication between trades and unclear areas of responsibility. 'Sham contracting' is both an expression of and a contributing factor to the poor organisation and poor coordination of construction projects.

Participation and Voice

Workplace safety on construction sites relies on the opportunities of workers and industrial parties to participate and represent their interests around OH&S issues. Australia is in the process of harmonising its national OH&S laws but OH&S representation under State and Territory legislation generally relies on health and safety committees, input from trade unions and mechanisms such as tool box meetings. The need to promote worker involvement in OH&S is accepted at international level. For example, International Labour Organisation Convention Number 155 concerning Occupational Safety and Health and the Working Environment enshrines worker participation in OH&S (ILO internet). The emphasis on workplace participation in international conventions and domestic law is an acknowledgement that workers are best placed to identify risks that potentially impact them on the job and that worker involvement in OH&S is a strong determinant of improving OH&S outcomes. For example, the involvement of workers in OHS is recognised in the *Workplace Health and Safety Act 1995* (Qld). Section 87 of the Act provides that workers must make up half of the participation in OHS committees.

The individualisation that occurs through the process of contracting as well as the culture of independence that is facilitated through competitive arrangements within the industry also has important flow on effects for the participation in safety. Sub-contracting promotes the fragmentation of workers into isolated individuals who operate in a dispersed array of workplaces. Structurally, this works against the possibilities of collective voice and action around workplace safety.

The protective mechanisms of normal labour process do not always apply to sub-contractors. Contractors are not well covered by employment regulations or union negotiated collective agreements and retain minimal bargaining power. Like safety practice on sites, we also found evidence of workers voicing their concerns through individual behaviours and decisions, rather than participating in more formal OH&S consultation systems, such as OH&S committees. In some cases this plays out in the following way where workers will stay off site until a safety issue has been resolved:

Well, if anything did present itself, you stop working on it until the problem was sorted. On that particular site (housing site) there was risk of ceiling collapse and sliding roofing tiles and things like that and, basically, we stayed off site until the builders had sorted it out and made it all safe. So even though it was a private job, the communication was pretty good.

(Brett, former employee, Electrician, Commercial & Civil)

While this could be seen as a positive, we also know that risk prevention is also most effective when designed out of work and where those responsible for overall coordination ensure safe work practices. It is at these more strategic roles that more organised forms of coordination among workers tend to be most effective.

Paul, for example, who had worked in construction for over 20 years, indicates how safety participation is premised on having supportive systems and organisations to encourage and promote worker participation:

Q: I know that's for sure and you talked about how you always speak up if you are worried about the potential for an accident, what do you actually do? Do you go to the site supervisor or is it...

A: Oh no if I see something there and then I will pull it up there and then. If I see if somebody said 'no, I don't take the time in doing that' I mean I will bring it up at the next toolbox the next day or if it is important I will ring up safety and ask them to come down and have a look at the site and get things changed but I don't walk away from the site and 'oh gee I will see you tomorrow about that' if it is not right and somebody can be hurt or either I will just pull it up there and then.

(Paul, Employee, Crane Driver & Rigger, Civil)

OH&S statutes have built the principal institutions for workplace participation – OH&S representatives and OH&S committees – around the presumption of an identifiable and relatively stable group of employees located together or in very regular contact, and working for a single employer. Many contingent work arrangements break this nexus or weaken it to the point where it

would be extremely difficult for these mechanisms to be used effectively. There are few structured systems for OH&S consultation and because of the individualisation of work processes and high levels of competition within the industry, people are often labelled as “whingers” if they speak up around safety issues (Wadick, 2005). According to one key informant the role of unions is therefore critical in maintaining safety standards:

We should be paid by the contract the amount of time that we spend on these jobs fixing them up and bringing them up to the standard that they should be, we should be able to put in a bill at the end of it, you know I mean it is fucking disgraceful and that is who it is left up to, it is left up to the unions to manage safety on the jobs. (KII2)

Some research participants also discussed the importance of union presence on site for maintaining safety and speaking up about issues:

I think if you had a site and there were no union members or anything like that, I think in this day and age a lot of it could fall by the wayside. I mean, as I said to the fellas at work, if you don't feel like saying something for yourself and you think something is wrong, go to your safety rep, you don't have to mention your name and if you don't even feel like doing that if you don't feel safe, ring the union up and we have got organisers, we have got delegates that will come out at the drop of a hat. I mean nobody has to be, if they don't want to say their name or anything like that, they don't have to so I think a union presence is quite important myself.

(Paul, Employee, Crane Driver & Rigger, Civil)

Self-employed workers are unlikely to be able to collectively address OH&S hazards and risks, precisely because the market mechanism has divided them from each other. Outsourced building workers were in competition with each other and hence did not routinely have contact with each other.

Return to Work after Injury

Previous research conducted by Mayhew et al. (1997) found that not only did self-employed subcontractors take less time off work if injured, about half of all subcontractor builders interviewed had chronic back pain and few worked in the industry after the age of 50. Wadick (2005) drawing on previous research undertaken by James et al. (1992) found that injured self-employed workers frequently tried to “soldier on” after workplace incidents such as cuts, abrasions, sprains or strains. This was found to contribute to a greater incidence of chronic disability among self-employed workers and earlier retirement. This attitude of “soldiering on” was held by many of the workers we interviewed.

This key informant, (KII3), consistent with what some of the older workers interviewed told us, comments on the long-term wear and tear on the body associated with the speeding up of the production process:

... the older blokes obviously if there's a position as a maintenance man they'll get them or basically they move on out of the industry because they can't compete with the younger blokes that can maybe wack up 50 sheets a day, so they have to move out. It's a young

man's game, it's wear and tear on the body and what basically then happens is the young fella's obviously they just go flat chat mate ...(KII3)

Five of the self-employed research participants did not believe they were covered for the purposes of workers' compensation. Text Box 11 provides an example where Troy, working as an independent contractor, has decided against taking out workers' compensation coverage. The *Workers' Compensation and Rehabilitation Act 2003 [QLD]* provides that if a person is considered to be a 'worker', then that person has rights and obligations under the Act, including the cover of a workers' compensation policy. It bears noting here that perceptions of whether a worker is eligible for coverage may differ from actual eligibility. So there is a possibility that some or all of the five self-employed research participants who stated that they were not covered by workers compensation may in fact be covered without their knowledge. Confusion about eligibility is highly likely to result in a substantial group of workers not lodging claims, should they suffer a work-related injury or illness. The flow-on effect is that workers compensation premiums may be paid for a substantial group of workers who are not aware premium contributions are being paid on their behalf. This is a different problem to workers who are aware that they are covered but either they or their employer opt not to make claims.

There is a strong risk that if people such as these are not covered and perhaps more importantly, perceive themselves not to be covered either by workers compensation, sick pay or income protection insurance, then they will work even if they are injured or sick. Anecdotal evidence of working while injured emerged during discussions with the research participants:

I've had one bloke come back, he broke his arm, and when he still had a cast on his arm he came back to work before the cast even came off. He had fallen off a two-storey roof, so yeah slipped right out under the handrails.

(Joshua, Employee, Carpentry Sub-contractor, Commercial)

In addition, a number of them expressed reluctance to lodge claims as this may jeopardise future work or negatively impact on premiums. Sub-contractors are often required by head contractors to take out their own workers' compensation policies:

Well we have workers compensation policy that's paid for all our workers that are directly employed and all other contractors have to provide details of their workers comp policies as part of signing a contract at the start of the job.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

Others spoke of the risk attached to contractors making claims only to later find the head contractor no longer gave them work:

The people that I work for pay for insurance for us, but I also pay for my own insurance, because at the end of the day, it's quite well known in the industry that if you go for workers comp, even if it's a fair smash, a lot of the time you won't get a company (contract?) with that company again, because you're a liability, I guess, in a way, even if you've got three, or five, years or whatever... I know quite a few guys that have hurt themselves, and they recover, and they get paid to recover, but when they want to come back to work there's no position for them.

(Jason, Self-Employed Carpenter, Commercial & Residential)

This research participant, Jason, also expressed a reluctance to lodge an incident form when he suffered an injury at the end of a job, clearly worried that lodging a workers' compensation claim might jeopardise future work with the head contractor:

Well that actually happened to me two weeks ago, I popped my knee out on a Friday, and I've never done it before in my life, and it's quite a common injury, like it's just when you turn the wrong way, and squat down, so I reported that last thing on a Friday, the job was coming to an end, which is a bad time to report anything anyway, like people might think, "Oh is he going to take us, because he thinks he's got no work." That wasn't the case. That started getting better, and then only on the Monday after that I hurt my shoulder lifting this decking I was talking about earlier. It's really heavy stuff. I just twisted it the wrong way because there wasn't many guys on site, and we were kind of struggling just to get a couple of us to move it, and I didn't report it on the Monday. And then the Tuesday I went to another job, and I was just lifting a paintbrush, and my shoulder was killing me, and I'm like, "No. I should've reported it." But I rang up – like you say, I didn't think that I could report it.

(Jason, Self-Employed Carpenter, Commercial & Residential)

Mayhew, et al (1997) found that the post-injury time-off work differences may be explained by variations in insurance cover eligibility, with self-employed workers having far less insurance coverage than employees. They also found that those who do not have insurance cover are less inclined to take time off work in the event of an injury on-the-job, may not have their injuries recorded on workers' compensation claims data banks, seek treatment irregularly, and many may go on to develop chronic conditions. No workers compensation, paid holidays or sick leave means that contractors take few breaks and often work with injuries that other employees would normally take paid time to recuperate.

In the following quotes from construction workers, they describe how waiting for workers compensation paper work to be finalised and living on a week to week income are factors which motivate workers to return to work too early or work through injuries

Because the compo doesn't sometimes pay them straight away. Sometimes they might have to wait for the paperwork to get through. Some live on week to week, some don't.

(Allan, Small Business Owner, Painting Sub-contractor, Civil)

..... Someone had moved some planking and scaffolding and he didn't fall far, he fell a metre or so, but it was enough to cause some sort of injury. So there was a workplace health and safety investigation and he would have paid workers comp. And who actually paid it; sometimes it's not worthwhile to actually use the insurance, you're better off just paying the wages of the person directly, rather than invoking an increase in your premium ... Yeah rather than have them lodge a complaint to workers comp and then the next time you get your premium it's gone up twice as much as the amount of wages was sort of thing. So yeah sometimes you're better off just paying that. Especially like in a company like ours where we don't have a lot of claims.

(Simon, Employee, Project Manager, Head Contractor, Commercial & Civil)

The heavy lifting and physical nature of work in the construction industry makes workers particularly open to exacerbating their injuries if they return to work early and are not given suitable work to undertake in light of their injuries. Again, this goes back to the importance of safety policies and procedures, their enforcement and addressing work intensification to enable workers to work in a safe manner.

There was one instance, one bloke ... this was early on in my time with this bloke, he'd actually broken his collarbone, but that wasn't a workplace injury, that was actually a sports injury, but he was off and he actually did come back to work too early, reinjured it and then he was off again for a longer period of time. But the reinjuring was definitely done at work with coming back too soon and lifting weights and like that, so

(Brett, former employee, Electrician, Commercial & Civil)

Conclusion

Some of the structures and processes that characterise the construction industry exert significant pressures towards individualising risk management. Despite a general commitment to OH&S, competitive pressures, work intensification complex contracting arrangements are factors that may contribute to compromising OH&S. This is evident in several ways. Resourcing OH&S and complying with OH&S policies and procedures were sometimes seen as an add-on cost and in a competitive market with tight operating margins the resources committed to appropriate OH&S conduct could be undermined.

Work intensification and long hours exacerbate the risk of injury. Complex contracting environments can lead to uncoordinated work sites where responsibility for OH&S is unclear and fragmented work tasks resulting from multiple sub-contracting arrangements can create hazards. The individualisation of risk also results from a culture of independence within the industry. The reliance on tacit knowledge encourages workers to perceive safety risks as their own individual responsibility, increases the risk of injury, marginalises workers who are inexperienced and therefore vulnerable and leads to a distrust of OH&S measures and processes.

OH&S participation frequently involves individual workers voicing their concerns, as the fragmentation and competition within the industry, and government action against unions work against more collective forms of participation around OH&S issues. The individualisation of risk also affects issues around workers compensation. The research suggested that some workers believed they were not entitled to Workers Compensation, which may mean that some workers not lodging claims they may be entitled to, and may continue to work even if they are injured or sick, or return to work prematurely.

Text Box 11 Pathways into Contracting

Troy is a self-employed draftsman. He mainly undertakes drafting for building projects mainly in the residential sector of the industry.

Troy worked for wages with a building company for around four years but has been contracting his drafting services to different builders for around ten years. When asked about what prompted his move into self-employment, he explained that it was not necessarily a choice, it just happened.

The building company that he was working for promoted him into a management role and he was not satisfied with the pay he was offered upon promotion. This led him to decide to establish his own business. Even though some contractors talk about 'choice', often context in which they make the choice to move from employee to contractor was because they felt that they were being squeezed by their employer in the first place. In terms of winning work, sometimes builders will negotiate with Troy on price and he either charges a fixed price or an hourly rate.

Troy does not have workers' compensation coverage or income protection insurance. When asked what would happen if he was unable to work due to illness or injury or if his plans were found to have contributed to a safety problem, he said that he would have to look after himself. Neither does Troy pay into a superannuation fund. His view is that at this point in his life, he needs the money now more so than later.

Troy mentions the volatility of work and how he sometimes works long hours because he needs to take the work when he can get it. This is consistent with the situation where many workers in the Construction Industry are either not financially literate or are unable to make decisions about their future because their current working arrangements are so precarious and their incomes fluctuate.

Conclusion

This research aims to inform consideration of the factors that may be giving rise to the growth of 'sham contracting' arrangements in the construction industry, the potential size of 'sham contracting' and the possible effects of 'sham contracting' on health and safety and workers compensation. There is a large body of existing research on contracting arrangements and health and safety in the construction industry, both internationally and in Australia. The positions of key industry stakeholders on the research topic are also well established. However, for a variety of institutional and political reasons dialogue between stakeholders about the issues has proven to be quite difficult.

The Industry Reference Group of Workplace Health and Safety Queensland has brought together most of the key stakeholders and is therefore an important venue for improving dialogue about some key issues facing the industry.

While the project is informed and framed by existing research, the key findings of this research, outlined below, are based on key informant interviews with leading people in the industry, and most importantly are drawn from detailed interviews with construction workers and managers in the Queensland construction sector. This is important new evidence. The report has presented the views of key informants and interviewees both through many direct quotes and by summaries and short life histories.

Although our analysis has made some estimate of the potential range of 'sham contracting', and compared these to existing estimates, it was our conclusion that for at least two reasons any such measures are fraught. It is difficult to find an unambiguously clear set of criteria that will apply across all industries, or even in the case of construction between say residential and commercial construction. Also, there are many potential aspects in the way work is undertaken in the construction industry that may have elements of 'sham contracting' (so deciding where the cut-off is between 'sham' and non-sham contracting is likely to be somewhat arbitrary). Despite the existing estimates producing quite a wide range potential 'sham contracting' it is clear that there is a problem, and that it needs attention.

We made the case that the changing forms of engagement of workers and their implications for occupational health and safety are associated with broader structural issues within the construction industry. It is these broader processes and structures which are driving trends in 'sham contacting' and may be undermining health and safety on construction sites. Rather than concentrating on estimating the size of 'sham contracting' per se, the research focussed on identifying the structures and processes that are driving downward pressure on working arrangements in some parts of the industry (one aspect of which is manifesting in 'sham contracting' arrangements). The research was therefore conducted on the basis of a need for open categories to understand the complex reality of work on construction sites in Queensland and more generally.

Given our brief, and this finding, we adopted far more open categories than those customarily used in labour law and public policy. In order to build toward a more open understanding of the issues, the analysis of the research was undertaken along four broad themes:

- Sectoral and intra-sectoral characteristics of the industry;
- The production process in construction;
- Competitive and cyclical pressures, and
- Contractual and employment relationships.

The next section of the conclusion summarises each of these themes in turn, and provides a discussion on some of the implications for future research and for policy makers.

Sectoral and Intra-sectoral characteristics

Sectoral Factors

The building and construction industry covers a diverse range of activities and outputs. The nature of contracting arrangement and specific OH&S characteristics and risks need to be considered in the light of the way the industry is structured. Research has shown that there are three discrete but overlapping areas of activity: residential building, commercial or non-residential building and civil construction.

Residential construction

Residential construction is dominated by the construction and renovation of mostly single or two storey dwellings. The sector is thus characterised by small-scale projects, and a large number of small sub-contractors who work for private clients and project builders. Interviews with workers in the sector reveal a low-touch regulatory environment, so that self-regulation around safety was internalised and individualised as related to the trade skill and judgement of the worker. Compliance with some regulation was perceived as onerous or impractical, and undermining of income earning potential. Expenditure and time spent on training was low.

Commercial Construction

This sector is characterised by medium to large scale office, hotel and shopping complexes, as well as public buildings. Key clients in the sector include property developers, property trusts and the government (local state and federal). Clients who used to build to own (rather build to assemble into property portfolios or to on-sell) had grown and public sector clients have reportedly less capacity (less engineers etc) to monitor building projects. The sector is characterised by a relatively small number of large head contractors, a middle but shrinking tier of medium sized sub-contractors, and a large number of smaller sub-contractors, including many effectively labour-only contractors.

Interviews with workers in the sector confirmed a growth in sub-contracting and sub-sub-contracting and revealed a mixture of pressures for cost and output focus associated with a deepening sub-contracting system.

Evidence was also found of some employment forms, as well as occupational health& safety and site governance arrangements moving toward the more individualised arrangements that characterise the residential sector.

Civil Construction

This sector is characterised by large-scale projects such as infrastructure and resource development works, and includes roads and bridges. The sector tends to have high involvement of clients, and project management approaches based around Master Agreements that structure sub-contracting and employment relationships.

Intra-sectoral factors

Trades

Workers in the industry, especially the on-site industry that was the focus of this study, have a wide range of trade qualifications and tickets, as well as varying levels of experience. Research participants reported that degrees of contracting, and different abilities to resist pressures for lower standards of employment and health and safety were influenced in part by the type of trade and length of industry experience.

Clients

Although the role of client is developed later in more detail in subsequent themes, the role of clients in project management within sectors warrants noting. Clients can have a strong influence over momentums of contracting and approaches to site governance and OH&S practices. Large and regular clients like governments and resource development companies can play a key role in setting industry standards. Research participants reported that the nature of client appeared to be a factor influencing contracting momentums and OH&S outcomes within sectors of the construction industry, especially in the commercial sector, where more variability in client roles in project management and compliance seem to be occurring.

Implications for 'Sham Contracting' and health and safety

Given that there was a fairly consistent view that sectoral differences exist in the construction industry, there would seem to be considerable value in drawing out those differences and their implications for 'sham contracting' and health and safety. Much of the attention around "sham contracting' has come from the commercial sector, and it would clearly be of value to try to understand the way for instance such contracting is occurring there, and not in say resource development.

A study that looks at health and safety issues in each sector in some detail and follows a project in each of the three or so sectors would therefore be an incredibly powerful study. We were told by research participants that there are differences between residential, commercial and civil and resource sectors. In our own study, we were not able to conduct interviews with workers in the resource development sector, or with representatives of the main resource development companies and the head contractors. There is considerable merit in undertaking that follow-up research.

The production process

Joint production

The production process in on-site construction comprises a diverse range of tasks, requiring different skills at different times of the construction process. Typically, the tasks are organised by a head contractor who sub-contracts out the work to many specialist firms, who actually undertake the construction work.

This is a form of joint production by many firms and creates complex interactions (co-operation and competition), between firms up and down the construction supply chain. Joint production presents challenges to many conceptual and regulatory agendas because it sits somewhere between what are thought to be two clear models of production – production by individual firms, or arm’s length exchange by two discrete firms. Construction contains elements of both of these relationships, but with the growing role of finance in the industry, calculations about risk are enabling the unbundling of attributes of both employment and contracting and their transfer up and down the sub-contracting pyramid. In general, there is an impression that risks and costs are being driven down the pyramid, so that margins get slimmer the closer one gets to the production site. The rise of ‘sham contracting’ needs to be seen within this broader momentum.

Existing research has established that especially in the commercial sector changes have been occurring within head contracting firms, and how and who finances construction. Increasingly property markets are integrated into financial markets and are globally integrated (for example the rise of property trusts), and clients are less interested in the end use than the role of the project in property portfolios. This puts risk-return calculations at the centre of construction activity in the sector with implications for the construction process and head contractor business models.

Pyramid sub-contracting

The particular way joint production on construction sites is organised is through pyramid sub-contracting. There are two main dimensions of sub-contracting in terms of work. These relate to how ‘contracts of’ and ‘contracts for’ service are designed to address the division of labour in production, and how contracting drives the competitive pressures downward in the industry. Work is broken down into discrete activities undertaken by specialist workers at particular stages of the production process, and there has been an increasing trend to shift toward contracts for service (ie output based contracts) as ways of organising production. This has well known implications for risk bearing and for incentives around intensification and OH&S outcomes.

Financing by task and output rather than time

Organising production through a myriad of output based contracts leads to a financing model that costs and pays for tasks rather than time. Research participants noted that the growth of sub-contracting has changed the balance of risks and rewards now being borne by head and sub-contractors, sometimes this is being expressed in explicitly contractual terms, while generally this is being expressed by the low bid tendering and re-tendering of work by head contractors. This logic is consistent with the growth of contracting at the level of workers (including ‘sham contracting’), and with processes that may compromise OH&S (posed as an additional or discretionary cost)

Fragmentation in the division of labour

The way production is co-ordinated contractually tends to fragment the division of labour with potential to de-skill workers. This means that broad skill sets that tradespeople once had may not be needed and narrower task based skills become more common. Most trades include knowledge about safe work practices and approaches so this may set up a cycle where as skills atrophy, investment in skill upgrading becomes less attractive. It also sets up processes whereby many people new to the industry and even to the country may come onto sites with little or no experience, with obvious implications for safety.

Site governance

Our interviews confirmed existing research that joint production poses special challenges for governance, so that for instance the growth of sub-contracting in commercial construction was experienced on-site often as differences in the personal attributes or attitudes of site managers. Whatever its other merits, multiple levels of contracting widens the gap between project managers and workers on the ground. Just as the construction industry has identified risk as a factor to be allocated in contracting, site governance arrangements can influence how those risks are absorbed in practice. Many key informants contrasted the systematic approach characteristic of resource developments in general, with those of many commercial sites where it had been individualised, with obvious implications for the scope for 'sham contracting' and adverse OH&S outcomes.

Quality and Depth of Project Management Expertise

It was noted that the scale and complexity of many projects meant that a good head contractor project manager needed not just good educational attainment, but extensive experience in the industry. However, the intensity of large projects that run for 60 or more hours a week and take up to eighteen months means that it is hard to retain top level project managers. It was reported that one reason workers experience differences in site governance related to the fact that head contractors simply don't have enough top level site managers, and therefore have 'A' and 'B' teams of project managers.

Worker Voice

Trade unions have been the main vehicle in the industry for providing collective voice for workers in both pay and conditions and site safety. Some key informants reported that on resource projects, where the head contractor negotiates a master agreement, whether or not workers coming to the sites are union members, conditions are consistent and this has flow-on effects on safety. On commercial sites, government policies aimed at regulating 'rogue' union behaviour may have been having the paradoxical effect of undermining a key role in site governance.

Implications for 'Sham Contracting' and Health and Safety

We found that while there are significant differences in scale and production processes in the industry as a whole, the industry is characterised by joint production of projects, by head contractors co-ordinating an extensive sub-contracting network usually specialist firms, and a complex interaction between on-site workers, off-site design and planning, and materials suppliers. Also important to the production process are the structure of relations between clients and financiers. It was reported by many of our research participants that processes that drive or prevent 'sham contracting' and poor approaches to health and safety tend to occur quite high up the contracting chain, at the level of clients, the way projects are financed and the way head contractors organise and contract the work. If that is indeed the case, and the evidence in this report would suggest it is, then the appropriate level at which interventions should occur are probably best directed at those levels.

Client and owner responsibility for setting standards, especially big and regular clients like governments and resource developers have a big impact on industry standards. They therefore affect the standards of safety and the extent to which workers are engaged in ways that are essentially about avoiding normal obligations to workers, or transferring risks to them. Issues like

codes for public procurement and much greater involvement in monitoring construction of public works are therefore matters to be given serious attention.

Head contractors (especially in commercial construction) have become less and less involved in the actual direct production of building but play a key role in determining how the production process is structured, and how risks and costs are allocated into the network of firms that undertake the work. A number of key informants suggested that one way of understanding production is to understand how risk (financial and other) is conceptualised and distributed throughout the firms that undertake construction - a project risk management approach to production. If some risks are being distributed inappropriately in some sectors or in some situations, and those risks result in 'sham contracting' and poor health and safety outcomes it would seem that regulation of contractors responsible for that distribution might be sensibly considered. Key informants noted how the current codes have changed behaviour, so it seems clear that a code that gave priority to health and safety and 'sham contracting' would have immediate impact on contractor behaviour. Workers interviewed reported that where collective voice was permitted, safety concerns were much more likely to be addressed, and corner cutting more likely to be resisted.

Competitive and Cyclical pressures

Sub-contracting as a cost and risk management system

High levels of sub-contracting may be seen as a technical solution to the complex task of assembling and co-ordinating a range of specialist trades required in undertaking a construction project. But existing research and our research participants reported that it was also an important response to competitive pressures. The conclusion follows that sub-contracting is also a way of allocating risks and rewards up and down the contracting chain. This feeds directly into momentums for shifting forms in which labour is engaged, and into changing the way OH&S risks are managed.

A key finding of this study is that important developments have been occurring at the top of the industry, in the structural (as opposed to cyclical) balance of power, with direct implications for the way competitive pressures were being transmitted through the industry. The typical large head contracting firm may have very few on-site workers employed directly, and instead now specialises in contracting, supervising, certifying and paying others who do the work. This is a business model which depends on managing risks and payment streams, and is more akin to a hybrid project manager and hedge fund. This specialisation also means that they have a special ability to allocate risks, and it was noted by research participants that some head contractors were using that advantage to extract additional income from projects at the expense of workers, sub-contractors, and clients.

Client and head contractor relationships

It was noted that there seems to be a significant difference in construction site governance and other arrangements where clients were resourced and active in the production process. Mining companies for instance tend to deploy an owners' team during construction with engineers and relevant technical staff. The role of governments as clients was also the subject of considerable discussion during interviews. There was a strong consensus that government projects played a key role in establishing industry standards, although many key informants noted a decline in the involvement in site level governance, with the greater reliance on build and construct contracts with head contractors.

Different Head contractor business models

The mining and commercial construction sectors are now dominated by a few very large international head contracting firms. With the emergence of several very large internationally oriented head contractors in commercial construction, they now exert a very powerful influence over contracting, site governance and OH&S. Many research participants noted that head contractors had much more power than in the past, and how that power was used (through tendering, contracting and site management – such as defect management) made a significant difference to the extent to which pressure to lower standards, cut corners and undermine safe work practices were experienced.

A culture of corner cutting

It has already been established that construction has some unique characteristics (joint production, extensive sub-contracting, itinerant labour engagement etc) which mean that it does not fit neatly into standard labour and contractual regulatory categories. In this gap lies a potential for regulatory arbitrage (using whatever combination of formal arrangements maximise returns or minimise costs). In general a mix of professional, ethical and countervailing forces in the industry keep these gaps policed. However, a number of research participants noted that once employers/firms start to try to make money from regulatory avoidance rather than construction a 'culture' of corner cutting started to pervade decision making.

Rights of workers to act on safety

While Robens style OH&S legislation like Australia's incorporates an expectation (and a responsibility) for workers to be involved in preventing unsafe practices, many workers felt concerned that doing so may compromise their ongoing employment. Site safety committees that are seen as legitimate by workers were reported to an important indicator of a space for worker voice. So too were forms of employment tenure.

Size of Construction Projects

One of the clear attributes that differentiates site governance was size of project. Clearly, this in part reflects the risks and consequences of safety issues on large complex projects.

Risk and competitive, fragmented and hierarchical production systems

There is a growing body of research and policy that attempts to regulate the allocation of risk and rewards in fragmented and hierarchical production systems like construction. One such set of guidelines (the Abrahamson principles) sets out guidelines about linking risk with control, whether the risk can be transferred (via insurance), linking the risk with the main economic benefit flowing from the risk, whether risk bearing by the party is in the interests of efficiency, and if the risky event happens who bears the consequences.

It has been noted that in many areas of the construction industry in Australia, that those principles are not being followed, and instead contracting is being used to shift risks and maximise rewards by powerful actors in the industry. In this sort of set-up, conflict, distrust, 'sham contracting' and compromised OH&S practices are entirely understandable consequences.

Volatility in Industry Activity

The construction industry is an especially volatile sector, and this often creates a boom-bust culture, in which maximising individual gains is one general outlook. Collective responses and strategies to manage that volatility can affect the way volatility is expressed in contracting and OH&S practices.

Construction activity in the south-east corner of Queensland (Brisbane and the Gold and Sunshine Coasts) was reported to have been in a particularly bad slump and this had created a range of special tensions for building firms and workers.

Research participants reported many examples of how this was playing out from extreme low-bid tendering and subsequent pressures on-sites, to the use of defect clauses to extract even more work out of or cut payments to sub-contractors.

Implications for 'Sham Contracting' and health and safety

Many research participants noted how competitive and cyclical pressures were impacting on their work, especially how cost pressures were experienced. This was often occurring in terms of trade-offs in working conditions, including safety. The question for regulation then becomes how to prevent safety and working conditions from being vehicles for absorbing competitive and cyclical pressures.

Contractual and employment relationships

Rich insights into the factors associated with the prevalence of, and problems associated with, a diverse mix of different types of employment and contracting arrangements were gathered from this research.

Evidence of Pervasive Contracting

The construction industry in Queensland, consistent with national and international experience, is characterised by pervasive contracting. In general, it is more likely that individuals in the residential sector work via contracting, but that this was also quite common in the commercial and civil construction sectors. It is clear also that there are many people who work in a contractual relationship with one sub-contractor for a significant proportion of the time or for sustained periods.

Many of the 28 workers we interviewed would be better categorised as supplying labour to firms who use the labour (ie as employees) and nearly as many may be better categorised as contractors. A number of the workers, however, while employed under commercial contracts for service, had work arrangements that appeared more consistent with them being employees.

Our interviews with workers and key informants confirm that both supply-side and demand-side factors are driving contracting. Contracting is viewed by some workers as offering the *potential to* earn a much higher income than working 'on staff' and being paid wages or a salary. One of the common reasons given by construction workers for their preference for contracting was the sense of independence they derived from working for themselves. Other potentially attractive elements of contracting include the ability to minimise (or avoid) taxation and flexibility over working hours. However it also means taking on liabilities, risks and overheads.

Supply side factors

A number of problems were revealed with workers being engaged as contractors. This includes the perceived benefits of contracting, in particular the attractiveness of earning significantly higher

wages, not always materialising when shifting from employee to contracting status. The workers we interviewed recognised that benefits arising from contracting usually also come with some costs or risks. The contractor must arrange for their own ABN and keep records and books, and often work out quotes and plan jobs to ensure continuity of work. This is not only time consuming but involves tasks and skills that not many building workers possess, nor wish to have. They must also pay for their own superannuation, workers compensation and public liability insurance and make provision for their own leave. Many research participants reported that taking all this into account, the benefits of contracting were not as great, even if they are fully compensated for the costs and risks that they assume by shifting their legal form of working. Indeed, many of the costs and risks are probably not well managed at the individual level.

In addition, despite the common notion that the ‘freedom’ of being self-employed would facilitate greater flexibility, many of the contractors acknowledged that in reality, they usually had no choice but to work long hours, because they needed to take work when they could get it and because they were paid on results not on the number of hours worked.

A number of employees, when asked whether they had considered contracting, explicitly acknowledged that while they might earn more, they did not feel equipped to manage the administrative and regulatory requirements of self-employment, such as preparing business activity statements and organising the relevant insurance coverage. Others were either not able to, or not willing to, absorb the risks associated with working for themselves. It was found that competition among firms and contractors around price means that some unscrupulous contractors can take out the costs of safety and/or use unlicensed workers.

There was also a sense among some research participants that risk in relation to public liability was being unfairly transferred onto small contractors. Provision of tools and other equipment is perceived as another cost pressure on contractors. Some research participants said they lacked the capital necessary to run their own business, such as to fund the purchase their own tools, machinery and vehicles.

Just as construction workers identified a number of perceived benefits of contracting, they also readily acknowledge a number of perceived benefits attached to being engaged ‘on staff’ as employees. Not surprisingly, the main advantage related to security. Many of the employees stated a strong preference for stability of work in lieu of forgoing higher potential earnings. It was also noted that workers with employee status were generally more receptive than contractors to taking OH&S seriously. This was linked to the cost pressures faced by contractors to complete work on an output-basis as opposed to a time-taken basis. Ultimately, individual workers make constrained choices, largely based on where the work is available and much less on their actual preferences for type of work arrangements.

Demand side factors

A central finding of these results is that understanding the drive towards greater sub-contracting and away from direct employment, requires consideration of wider changes taking place within the construction industry. The drive toward greater sub-contracting is connected to the changing balance of power in the construction industry, with the growing power of head contractors in the construction supply chain driving costs and risks downward and sub-contractors responding by attempting to keep their own costs and risks manageable.

Changing balance of power in the industry

Some head contractors were using contingent and precarious forms of employment as one way to minimise or outsource costs and risks.

Evidence of two site governance models for managing pyramid sub-contracting

Evidence was found of two site governance models for managing pyramid sub-contracting. The first, which could be categorised as the 'high road' involves systematic and collaboratively-managed arrangements. While commercial construction used to have strong association with the systematic approach to site governance, our interviews provide evidence of a transition in some parts of this sector to more individualised and fragmented arrangements.

The other approach, by contrast, conceptualises construction as a series of discrete tasks and manages each as a separate transaction. In more fragmented and transaction-oriented governance systems, contracting can be used as a cost reduction/risk-shifting tool by head contractors. As already discussed in earlier sections of this report, competitive pressure seems to have encouraged some head contractors establishing arrangements that can lead to a culture of 'corner cutting'. Cost pressures arising from head contractors pushing risk downwards in the production chain were also identified by workers as negatively impacting on safe work practices.

What are the characteristics of Queensland construction contractors and Queensland construction employees?

Trends in contracting in the construction industry are highly related to the cyclical nature of the industry. Between 2008 and 2010, changes in forms of employment within the industry were marked. The most cyclically sensitive forms of employment were employees entitled to paid leave and independent contractors. The proportion of the 'standard' permanent employees fell in the downturn and then rose in the recovery, while the proportion of independent contractors was counter cyclical. During the same period, the decline in the proportion of 'other business operators' as a total of all employment in the industry was also large.

ABS data indicates that the single largest group of contractors are trades level workers and the second largest group is labourers. This seems to suggest that the growth of labour-only contracting is being, to a significant extent, driven by attempts to avoid the responsibilities of the employment relationship. That is, labour-only contracting is clearly one potential space where 'sham contracting' is most likely to exist.

In terms of the characteristics of the 28 workers we interviewed, eighteen of them identified as 'employees' and ten identified as 'self-employed'. Whether they would be deemed employees or self-employed in terms of employment law or for the purposes of workers' compensation and/or superannuation is another matter (as discussed throughout the report). Some of the construction workers undertake all or most of their work in one sector, while others work across two or three of the sectors (cottage, commercial and civil). In some ways, this reflects the blurring of work within and between the three sectors of the construction industry.

Are contractors dependent on a single or small number of employers?

While the revised ABS Forms of Employment Survey provides an improved basis for obtaining estimates of different forms of employment in the sector, the ABS does not publish estimates of the level of 'dependent contractors' or potentially 'sham' contractors. On the basis of the information

provided, however, it is possible to say they are most likely to be located amongst workers classified as either 'employees with no paid leave' and 'independent contractor'. Over the three years of these surveys these two groups comprised just under half of the construction workforce (43.6, 47.5 per cent and 43.9 per cent respectively in 2008, 2009 and 2010).

Using the Australia at Work data we found that just under four-fifths of self-employed construction workers contract to do work for other businesses and in the last financial year, less than a quarter (24.7 per cent) of self-employed construction workers received the bulk of their income (i.e. 80 per cent or more) from one client. The vast majority of self-employed construction workers complete Business Activity Statements (BAS) or Income Activity Statements, however, the majority of self-employed Construction workers do not operate under incorporated businesses. Working in unincorporated business entities is much higher for dependent contractors compared to independent contractors. Many of the self-employed construction workers employ others, but approximately one-fifth of them are very small business operators, employing between 2 and 4 employees.

Based on a typology of dependence, it is estimated that approximately one-in-ten construction workers, or approximately one-quarter of construction contractors, are working under arrangements that are more akin to an employee than an independent contractor. It is likely that the main ground for 'sham contracting' is amongst 'casual employees' and 'dependent contractors'.

What are the perceived advantages and disadvantages of working as either contractors or employees?

Contracting is viewed by some workers as offering the *potential to* earn a much higher income than working 'on staff' and being paid wages or a salary. Contracting was also seen as providing workers with a sense of independence they derived from working for themselves; even if this was more illusionary than real. Other potentially attractive elements of contracting include the ability to minimise (or avoid) taxation and flexibility over working hours. However it also means taking on liabilities and overheads.

A number of problems were revealed with workers being engaged as contractors. This includes the perceived benefits of contracting, in particular the attractiveness of earning significantly higher wages, not always materialising when shifting from employee to contracting status. The workers we interviewed recognised that benefits arising from contracting usually also come with some costs or risks. The contractor must arrange for their own ABN and keep records and books, and often work out quotes and plan jobs to ensure continuity of work. This is not only time consuming but involves tasks and skills that not many building workers possess, nor wish to have. They must also pay for their own superannuation, workers compensation and public liability insurance and make provision for their own leave.

Many research participants reported that taking all this into account, the benefits of contracting were not as great, even if they are fully compensated for the costs and risks that they assume by shifting their legal form of working. Indeed, many of the costs and risks are probably not well managed at the individual level. In addition, despite the common notion that the 'freedom' of being self-employed would facilitate greater flexibility, many of the contractors acknowledged that in reality, they usually had no choice but to work long hours, because they needed to take work when

they could get it and because they were paid on results not on the number of hours worked. There was also a sense among some research participants that risk in relation to public liability was being unfairly transferred onto small contractors. Provision of tools and other equipment is perceived as another cost pressure on contractors. Some research participants said they lacked the capital necessary to run their own business, such as to fund the purchase their own tools, machinery and vehicles.

Contractors were viewed by some research participants as less likely to raise concerns around OH&S. This was seen by one key informant as something that head contractors were cognisant of, and sometimes even exploited, in order for jobs to be completed on time:

A number of employees, when asked whether they had considered contracting, explicitly acknowledged that while they might earn more, they did not feel equipped to manage the administrative and regulatory requirements of self-employment, such as preparing business activity statements and organising the relevant insurance coverage. Some employees, however, recognised that they may not be sufficiently motivated or just not willing or able to absorb the risks associated with working for themselves.

Just as construction workers identified a number of perceived benefits of contracting, they also readily acknowledge a number of perceived benefits attached to being engaged 'on staff' as employees. Not surprisingly, the main advantage related to security. Many of the employees stated a strong preference for stability of work in lieu of forgoing higher potential earnings. A number of workers felt fortunate to have changed from being ABN workers to 'on salary' with the same company, as they felt that contractors were hardest hit during downturns.

Ultimately, individual workers make constrained choices, largely based on where the work is available and much less on their actual preferences for type of work arrangements.

Do workers in Queensland construction transition between employment as a contractor and as an employee? If so, how often and why does this occur?

We found evidence of some construction workers moving between contracting and employee status. While it is difficult to quantify how many workers transition, perhaps the more important question that we attempted to answer was why this transitioning occurs.

Some of the push towards contracting is certainly coming from the workers themselves. As already mentioned, the potential to earn a much higher income and the perceived sense of independence derived from working for themselves makes contracting attracting to many construction workers. It is not surprising that during downturns in construction activity, workers were more attracted to the security of being directly employed by a company. In fact, some of the research participants felt fortunate to have been offered permanent jobs, as they were aware of contractors who were struggling to make ends meet when activity in the sector was depressed.

Ultimately, individual workers make constrained choices, largely based on where the work is available and much less on their actual preferences for one type of work arrangement over another.

A number of research participants described their movement from ABN worker to employee. In these instances, head contractors appear to have re-assessed the viability of the cost structure for contractors. The apparent ease with which head contractors can switch a broad range of construction workers from contractor to employee and vice-versa must raise a question about the legitimacy or genuineness of such practices and therefore, of regulatory gaps that are being exploited.

We found that understanding the factors that drive transitions between contracting and employment needs to take account of wider changes taking place within the construction industry. In particular, there is evidence to suggest that some of the drive toward greater sub-contracting is connected to the changing balance of power in the construction industry, with the growing power of head contractors in the construction supply chain driving costs and risks downward and sub-contractors responding by attempting to keep their own costs and risks manageable.

The fierce competitive pressures faced by employers and the fragmentation of the production process act as strong drivers for companies to use, to their advantage, a continually changing mix of different types of employment and contracting arrangements. In particular, we have developed a view that 'sham contracting' needs to be understood as one manifestation of the changing power structures at play in the construction industry.

Most head contractors operating in the industry are sound. Some, however, do seem to be shifting risks through contracting arrangements. The use of 'sham contracting' appears to be linked to the larger issue of different approaches to labour management. Employers with culture of 'corner-cutting' are also those more likely to adopt fragmented and individualised site governance and in so doing, create the space for 'sham contracting'. In this context, we found 'sham contracting' to be one by-product of a broader cost-driven, risk-shifting approach to construction.

Do workers perceive a difference in the OH&S risk exposure of employees as opposed to contractors?

The discussion of injury risk and compliance and implementation of OH&S practices indicates that the structure and processes that characterise the industry exert significant pressures towards individualising risk management. OH&S control measures often focused on individual workers and individual responsibility rather than on the risk avoidance or mitigation processes themselves. Conversely better practice was evident where there was a coordinated commitment to policies, procedures and systems, for example on public work sites and where principal contractors exerted coordination of OH&S practice on a worksite. As a consequence stringent safety requirements flowed on down the chain so that contractors and sub-contractors were required to meet higher safety standards in order to win the work, including greater use of OH&S participation systems and monitoring of compliance.

In terms of the structural characteristics of the industry, several pressures that undermine OH&S were evident. We found that because of the financial pressures exerted through competitive tendering OH&S is not always a high priority, often viewed as an "add-on" cost. Safety was sometimes traded off because competitive pressures are intense. Time pressures resulting from the payment-by-results system leads to work intensification and long hours that increase the likelihood of crude forms of work intensification exacerbating the risk of injury. The complexity of multi-

employer worksites and complex contract networks result in lack of coordination for OH&S, where demarcation and responsibility for OH&S are unclear, resulting in workers and sub-contractors negating responsibility for others or individualising responsibility for OH&S. As a result of and precariousness of economic position that characterises most contractors and employees within the industry, Principal building contractors are also in a position to externalise OH&S onto sub-contractors. This shifting of responsibility results in OH&S practices being compromised. Fragmentation of tasks associated with sub-contracting also has safety effects because self-employed workers, teams or small employers do not have the resources to devote to OH&S that is the case with larger organisations.

These structural factors also influence workplace practices and behaviours by promoting a culture of independence, where safety is reliant more on tacit knowledge than conforming to policy and procedure. The reliance on tacit knowledge encourages workers to perceive safety risks as their own individual responsibility, increases the risk of injury and marginalises workers who are inexperienced and therefore vulnerable. Many sub-contractors understood compliance with OH&S measures as a financial risk and an administrative burden to be avoided. The result is that OH&S strategies are sometimes seen not as being about producing safer workplaces, but regulatory compliance and administration. These perceptions appear to persist despite the effectiveness of OH&S policies and procedures. Furthermore individualisation and competition between workers makes it difficult to organise collective responses around safety. Hence participation frequently involves individual workers voicing concerns or taking it upon themselves to stop work, rather than more collectively organised responses or action.

Together these practices shift the management of risk away from collective processes, behaviours and strategies around OH&S. The effectiveness of OH&S measures, especially enforcement and compliance measures, are weakened in a context where risk is individualised. However the continued integration of effective OH&S policy into worker practices requires that the financial pressures that undermine safety are taken into account and OH&S rules and regulations build on and incorporate practical safety knowledge.

Do contractors take out workers' compensation policy, income protection insurance or other forms of insurance to protect their income during absence from work due to illness or injury?

The individualisation of risk also affects issues around workers compensation. Of concern is that a number, albeit a small number, of workers did not believe they were covered for the purposes of workers' compensation. This may have the effect that some workers not lodging claims that they may be entitled to, should they suffer a work-related injury or illness. Consequently if workers perceive they are not covered they may continue to work even if they are injured or sick, or return to work prematurely. The latter is especially likely for contractors. Related to this, workers compensation premiums may be paid for a substantial group of workers who are not aware premium contributions are being paid on their behalf. We also found evidence of workers being reluctant to lodge claims as this may jeopardise future work or negatively impact on premiums. Others spoke of the risk attached to contractors making claims only to later find the head contractor no longer gave them work.

What superannuation arrangements do construction workers in Queensland have?

Of the eighteen employees, all of them reported that their employer made superannuation contributions on their behalf. Of the ten workers who identified as self-employed, two did not have their own superannuation arrangements and one reported that his 'employer' paid superannuation on his behalf. The remaining six of the self-employed paid into their own superannuation schemes. Only one of the self-employed mentioned using his spouse's superannuation to salary sacrifice. Given that we found evidence to suggest that workers move between contracting and employee status, it is likely that some construction workers would experience broken patterns of contributions, may have multiple superannuation accounts and as such, incurring multiple account fees due. We did not explore the issue of adequacy of superannuation, as this is a complex issue. We believe that this would be better dealt with via separate research, perhaps under the broader banner of financial literacy among construction workers.

The conclusion has summarised the analytical approach of the research and the key findings, and addressed the specific questions posed for the research project. The final section of the conclusion offers some additional comments on the issue of 'sham contracting' and health and safety implications in the context of the key findings of the research.

Changing employment arrangements driving 'sham contracting'

While the category of 'dependent contractor' might be useful in helping us understand what is happening in reality, it is a different question as to whether a new legal category of 'dependent contractor' needs to be created. The undermining of employment conditions can be better understood by looking at the combined factors of what is happening with the award system, the growth in the prevalence of 'hourly contract rates', the use of intermediaries such as labour hire agencies and the confusion that is sometimes associated with workers shifting between contractor and employee status and vice versa.

Minimal reliance on award system

The increase in the number of workers who fall in the contracts for service category means that many construction workers are not covered by industrial instruments and as such are protected by a much narrower range of matters than is the case in relation to employees. Work sites, especially building sites, now often combine people working alongside one another on range of different employment and contracting arrangements and engaged by a number of enterprises (Durham, et al 2002).

Growing prevalence of 'hourly contract rates'

Our interviews suggest that virtually no-one, other than apprentices, is employed on award-only pay and conditions. Key informants confirmed that workers who may have been employed on award rates in the past are now employed as contractors on the basis of a 'loaded hourly rate'. This rate is considerably higher than the relevant award rate and usually covers workers' compensation but employer contributions to superannuation are not necessarily made on behalf of workers. In some companies, the use of ABNs now extends to workers all the way along the production process.

Vulnerability of precarious workers

There is a range of reasons why head contractors might opt for using contractors and labour hire arrangements. Labour hire was specifically mentioned by some research participants as being the most vulnerable form of construction work.

Shifting between employee and contractor status

Our interviews with workers provided evidence that construction workers do move in and out of contracting. If sub-contracting is only used for genuine reasons, we would not expect to see such a high incidence of workers moving between contracting and employment arrangements.

Despite the *Fair Work Act* containing a provision (section 358) prohibiting employers from dismissing an employee in order to re-engage that worker for the 'same or substantially the same' work under a contract for services, our interviews provided evidence of this during our interviews. A number of research participants described their movement from ABN worker to employee. In these instances, head contractors appear to have re-assessed the viability of the cost structure for contractors.

There is evidence that different forms of engagement affect the way skills are used and developed. Extensive sub-contracting tends to be linked to task fragmentation and thus the way skills are used.

As result, training is one aspect that can be cut or minimised. Finally, sub-contracting is also associated with the proliferation of small firms with little working capital, let alone fixed capital, and therefore investment in training is difficult in capital-starved small businesses. Furthermore, contracting tends to encourage a short-term view of the industry and result in high churn labour flows, including the use of temporary migrants.

The fierce competitive pressures faced by employers and the fragmentation of the production process act as strong drivers for companies to use, to their advantage, a continually changing mix of different types of employment and contracting arrangements. In particular, we have developed a view that 'sham contracting' needs to be understood as one manifestation of the changing power structures at play in the construction industry.

The use of 'sham contracting' appears to be linked to the larger issue of different approaches to labour management. Employers with culture of 'corner-cutting' are also those more likely to adopt fragmented and individualised site governance and in so doing, create the space for 'sham contracting'. In this context, we found 'sham contracting' to be one by-product of a broader cost-driven, risk-shifting approach to construction.

If improving workplace safety is an important goal, we strongly believe any future debate should focus on identifying practices, procedures and laws that will apply to all workers across the industry. There is a danger that setting off in the direction of developing statutory responses for new categories of workers runs the risk of perpetuating an uneven playing field and is not likely to lead to improved workplace safety in the industry.

Implications for 'Sham Contracting' and Health and Safety

We noted that just as our understanding of relations within and between firms as legal entities tends toward a dichotomy (arm's length exchange or internal relations within a firm), so our understanding of work is also structured around a dichotomy between employee and contractor. But in joint production systems like construction, and especially ones where contractual relations

can and are used to allocate financial risk and rewards, it is possible that those dichotomies are being challenged by the 'arbitraging' of the employee-contractor relationship. While we have become used to small scale residential construction being undertaken by contractors with little more than a ute and a tool box, the emergence of cottage industry style labour –only contracting in larger scale commercial construction is significant. Many key informants noted that this was the outcome of changes in production and financing systems, and in the way competitive pressures in the industry are translating into on-site arrangements. But it is also made possible because legal forms (employment and common law) have not been able to keep up with developments in industries like construction, while other areas of law (tax law in particular) provide incentives for workers to sell their labour in a small business form rather than through the labour market . This is in part a question of wider public policy (what does the public think about the scope of protections to be offered through employment law, and what sorts of tax concessions do we want to make available to individuals who are essentially in the same economic relationship with an employer, but with different tax status). While we can agree for instance with the ATO that in its words it, "...does not have a role to regulate or control labour arrangements" it is significant that tax policy may be one area affecting the relative incentives toward employee-contractor status (Haseldine 2010).

In as much as this research was asked to relate consider the links between ' sham contracting ' and the occupational health and safety, however, it seems clear that there are differences in incentives and ways of thinking and acting between labour-only dependent type contracting and wage employment that may deserve regulatory attention. If there is considered no capacity to regulate this as a health and safety issue, the burden for regulation is shifted back to the level of preventing competitive pressures from undermining working conditions and safety more generally, and ensuring that head contractors and clients do not out-source risks that should be borne by them.

References

- Andonaskis, N and Loosemore, M, (2006), 'Barriers to implementing OHS reforms – the experience of small subcontractors in the Australian Construction Industry', Faculty of Built Environment, University of New South Wales, Sydney.
- Australian Chamber of Commerce and Industry (ACCI) (2011) 'ACCI Submission', 'Submission to ABCC Inquiry into Sham Arrangements and the use of Labour Hire in the Building and Construction Industry', downloaded from <http://www.shamcontractinginquiry.gov.au/submissions.php> [last accessed 19 July 2011].
- Australian Industry Group and Australian Contractors Association (2011) 'Response to the ABCC's Discussion Paper on Sham Arrangements and the use of Labour Hire in the Building and Construction Industry', Submission to ABCC Inquiry into Sham Arrangements and the use of Labour Hire in the Building and Construction Industry, downloaded from <http://www.shamcontractinginquiry.gov.au/submissions.php> [last accessed 19 July 2011].
- Australian Bureau of Statistics (ABS), Forms of Employment, Australia, Catalogue 6359.0, November 2008, released 12 June 2009.
- Australian Bureau of Statistics (ABS), Forms of Employment, Australia, Catalogue 6359.0, November 2009, released 29 April 2010.
- Australian Bureau of Statistics (ABS), Forms of Employment, Australia, Catalogue 6359.0, November 2010, released 29 April 2011.
- Australian Bureau of Statistics (ABS), (2008), Australian Economic Indicators, ABS Catalogue 1350.0, , Feature on Construction Industry, August 2008, released 29 August 2008.
- Australian Bureau of Statistics (ABS), (2010), Australian Economic Indicators, ABS Catalogue 1350.0, , October 2010, released 30 September 2010
- Australian Bureau of Statistics (ABS), (2010), Year Book Australia, 2009-10, ABS Catalogue 1301.0, , Chapter 21, Construction, pp589-595, released 4 June 2010.
- Australian Bureau of Statistics (ABS), (2011), Australian Economic Indicators, ABS Catalogue 1350.0, , Feature on Construction Industry, August 2011, released 28 July 2011
- Australian Bureau of Statistics (ABS), (2011), Building Activity, Australia, ABS Catalogue 8752.0, , March Quarter 2011, released 20 July 2011.
- Australian Bureau of Statistics (ABS), (2011), Building Approvals, Australia, ABS Catalogue 8731.0, , June 2011, released 2 August 2011.
- Australian Bureau of Statistics (ABS), (2011), Construction Work Done, Australia, ABS Catalogue 8755.0, March Quarter 2011, released 25 May 2011.
- Australian Bureau of Statistics (ABS), (2011), Engineering Construction Activity, Australia, ABS Catalogue 8762.0, March Quarter 2011, released 6 July 2011.
- Australian Capital Territory Government (2011), Compliance with Industrial Relations and Employment Obligations Strategy for ACT Government Capital Works Project, ACT Government, Canberra.
- Bentley, T, Tappin, D, and Legg, S, (2004), 'An exploratory analysis of falls in New Zealand small business residential construction', *Journal of Occupational Health and Safety – Australia and New Zealand*, Vol. 20, pp. 539-45.
- Biernacki, R, (1995), *The Fabrication of Labor: Germany and England 1640 - 1914*, University of California, Berkeley.

- Biggs, H., Sheahan, V. and Dingsdag, D. (2006), 'Improving industry safety culture: the tasks in which safety critical position holders must be competent', paper presented at *International Conference on Global Unity for Safety and Health in Construction*. Beijing, China.
- Biggs, H., Dingsdag, D., Sheahan, V. and Stenson, N. (2005), London, The role of collaboration in defining and maintaining a safety culture: Australian perspectives in the construction sector, paper presented at *Association of Researchers in Construction Management 21st Annual Conference*, London.
- Bryant, D, Mackenzie, M, and Amos, W, (1969), 'The Role of the Client in Building', Tavistock Institute of Human Relations, Report Number IOR/355/2, London.
- Buchanan J and Allan, C, (2002), 'The Growth of Contractors in the Construction Industry: Implications for Tax Revenue', *The Economic and Labour Relations Review*, Volume 11, Number 1.
- Burgess, J, Rasmussen, E, and Connell, J, (2003), *Temporary Agency Work in Australia and New Zealand: Out of Sight and Outside the Regulatory Net*.
- Construction, Forestry, Mining and Energy Union (CFMEU) Construction and General, (2011), 'Race to the Bottom: Sham Contracting in Australia's Construction Industry', a report by CFMEU Construction and General, March 2011, downloaded from: <http://www.cfmeu-construction-nsw.com.au/pdf/RacetothetBottomShamContractinginAustralia%27sConstructionIndustry2011CFMEU.pdf>, [last accessed 4 July 2011].
- Chamber of Commerce and Industry, Western Australia (ACCI WA) ((2011) Submission to ABCC Inquiry into Sham Arrangements and the use of Labour Hire in the Building and Construction Industry, downloaded from <http://www.shamcontractinginquiry.gov.au/submissions.php> [last accessed 19 July 2011].
- Cherns, A and Bryant, D (1984), 'Studying the client's role in construction management', *Construction Management Economics*, Volume 2, Number 2, pp177-184.
- Collins, H, (1990), 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws', *Oxford Journal of Legal Studies*, Volume 10, Number 3, pp.353-380.
- Commonwealth of Australia, (2002a), 'Overview of the Nature and Operation of the Building and Construction Industry', Royal Commission into the Building and Construction Industry (the Cole Commission), Discussion Paper One, May 2002.
- Commonwealth of Australia, (2002b), 'Working Arrangements – Their Effect on Workers' Entitlements and Public Revenue', Royal Commission into the Building and Construction Industry (the Cole Commission), Discussion Paper Eleven, September 2002.
- Costantino, N and Pietroforte, R (2002), Subcontracting practices in USA homebuilding – an empirical verification of Eccles's findings 20 years later', *European Journal of Purchasing & Supply Management*, Volume 8, pp15-23.
- Dawson, S, William, P, Clinton, A, and Bamford, A, (1988), *Safety at Work: The Limits of Self-Regulation*. Cambridge University Press, Cambridge.
- Deakin, S, (2001), 'The changing concept of employment in labour law', *Industrial Law Journal*, Volume 30, pp 72–84
- Deakin, S and Wilkinson, F, (2005), *The Law of the Labour Market: Industrialization, Employment and Legal Evolution*, Oxford University Press, Oxford
- Department of Industrial Relations Queensland, (2005), 'Labour Hire and Contracting', Submission to House of Representatives Inquiry into Independent Contracting and Labour Hire Arrangements, Department of Industrial Relations Queensland, Submission Number 66, downloaded from:

<http://www.aph.gov.au/house/committee/ewrwp/independentcontracting/subs/sub66.pdf>, [last accessed 4 July 2011].

Dinsdag, D, Sheahan, V and Biggs, H, (2006), Safety Culture in the Construction Industry: Changing behaviour through enforcement and education? In proceedings clients driving innovation: moving ideas into practice 2nd international conference of the CRC for the Construction Industry.

Dubois, A and Torvatn, T, (2002) 'Towards a Network Theory of the Firm', *Journal of Customer Behaviour*, Volume 1, Number 1, pp433-448.

Durham, B, Culvener, J and Rozen P, (2002) Workplace Health and Safety in the Building and Construction Industry, Discussion Paper 6, Royal Commission into the Building and Construction Industry, Commonwealth of Australia, Canberra, July.

Dwyer, T. (1991) *Life and Death at Work: Industrial Accidents as a Case of Socially Produced Error*. Plenum, New York.

Eccles, R, (1981a), 'Bureaucratic versus craft administration: the relationship of market structure to the construction firm', *Administrative Science Quarterly*, Volume 26, pp. 449–469.

Eccles, R, (1981b), 'The quasifirm in the construction industry', *Journal of Economic Behaviour and Organization*, Volume 2, pp. 335–357.

Engineers Australia, Queensland Division Task Force (2005) 'Getting it Right the First Time: A Plan to Reverse Declining Standards in Project Design Documentation within the Building and Construction Industry', October 2005

Forde, C, MacKenzie, R and Robinson, A, (2009), 'Built on shifting sands: Changes in employers' use of contingent labour in the UK Construction Sector', *Journal of Industrial Relations*, Volume 51, Number 5, pp653-657.

Fraser, L, (2007), 'Significant Developments in Occupational Health and Safety in Australia's Construction Industry', *International Journal of Occupational and Environmental Health*, Volume 13, Number 1, Jan/Mar.

Freedland, M, (2003), *The Personal Employment Contract*, Oxford University Press, Oxford

Gonos, G, (1997), 'The Contest over "Employer" Status in the Postwar United States: The Case of Temporary Help Firms', *Law and Society Review*, Volume 31, Number 1, pp.81-110.

Hager, P., Crowley, S. and Melville, B. (2001), *Changing Conceptions of Training for Evolving Workplaces: The Case of the Australian Building and Construction Industry*, UTS Research Centre for Vocational Education and Training.

Hampson, K.D., and Brandon, P. (2004), *Construction 2020: A Vision for Australia's Property and Construction Industry*, Co-operative Research Centre for Construction, Brisbane.

Housing Industry Association (HIA) (2011) 'Sham Contracting', Submission to ABCC Inquiry into Sham Arrangements and the use of Labour Hire in the Building and Construction Industry, downloaded from <http://www.shamcontractinginquiry.gov.au/submissions.php> [last accessed 19 July 2011].

International Labour Organisation, (2009) Committee on the Freedom of Association, *Report of the Committee of Experts on the Application of Conventions and Recommendations* International Labour Conference, 98th Session, 2009, downloaded from: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103484.pdf [last accessed 14 July 2011].

International Labour Organisation Convention Number 155, Occupational Health and Safety Convention, 1981, downloaded from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C155> [last accessed 14 July 2011].

- Johnstone, R, (1999) 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking', *Australian Journal of Labour Law*, Volume 12.
- Johnstone, R., Quinlan, M. and Walters, D. (2004) Statutory OHS Workplace Arrangements for the Modern Labour Market, *Working Paper 22*, National Centre for OHS Regulation, Australian University, Canberra.
- Loosemore, M (1999), 'Responsibility, power and construction conflict', *Journal of Production Management and Economics*, Volume 17, pp699-709.
- Lloyd, B, (2010), 'Common Claims and Risk Allocation Under Construction Contracts: The Challenging Role Of Section 52 Of The Trade Practices Act Society of Construction Law Conference', Proceedings of the Society of Construction Law Conference, 2010
- Master Builders Australia (MBA) (2005) Submission to the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, Independent Contracting and Labour Hire – Are they Working? MBA, Canberra, March 2005.
- Mayhew, C and Quinlan, M, (2001), 'Occupational violence in the long distance transport industry: A case study of 300 truck drivers', *Current Issues in Criminal Justice*, Volume 13, Number 1, pp36-46.
- Mayhew, C. Quinlan, M. Ferris, R. (1997) 'The Effects of Subcontracting/Outsourcing on Occupational Health and Safety: Survey Evidence from Four Australian Industries', *Safety Science*, Vol. 25 (1-3), pp. 163-178.
- McGrath-Champ, S, Rosewarne, S and Rittau, Y (2011f), 'From one skill shortage to the next: the Australian construction industry and geographies of a global labour market', *Journal of Industrial Relations*.
- Mead, P, (2007), 'Current Trends in Risk Allocation in Construction Projects and Their Implications for Industry Participants', *Construction Law Journal*, Volume 23, Number 1, pp 23-45.
- Miles, M, and Huberman, M, (1984), *Qualitative Data Analysis*, Beverly Hills, Sage, 1984.
- Morris, P, (1973), 'An organisational analysis of project management in the building industry', *Build International*, Volume 6.
- Pocock, B, Prosser, R and Bridge, K (2004), *Only a Casual... How casual work affects employees, households and communities in Australia*, University of Adelaide.
- Polanyi, K, (1944), *The Great Transformation: The Political and Economic Origins of Our Time*, Beacon Press, Boston (1957 imprint).
- Productivity Commission, (1999), *Work Arrangements on Large Capital City Building Projects*, Labour Market Research Report, AusInfo, Canberra.
- Queensland Government, Queensland Workplace Health and Safety Strategy, Industry Action Plan 2008-2010, Construction Industry, Queensland Workers' Compensation and Rehabilitation Act 2003,
- Queensland Government, Queensland Workplace Health and Safety Strategy, Industry Action Plan 2009-2010, Construction Industry, State of Queensland, Department of Industrial Relations, Brisbane, March.
- Quinlan, M. & Mayhew, C. (2001) 'Evidence versus ideology: Lifting the blindfold on OHS in precarious employment', School of Industrial Relations and Organisational Behaviour, University of New South Wales, Working Paper Series 138.
- Quinlan M, Mayhew C & Bohle P (2001), 'The global expansion of precarious employment, work, disorganization, and consequences for occupational health: A review of recent research', *International Journal of Health Services*, Volume 31, Number 2, pp335-414.

- Quinlan, M, Johnstone, R and Mayhew, C (2002) 'Outsourcing Risk? The regulation of OHS where contractors are employed,' *Comparative Labor Law and Policy Journal*, Volume 22, pp351-393.
- Quinlan, M. (2003) 'Flexible Work and Organisational Arrangement – Regulatory Problems and Responses', Presented at Australian OHS Regulation for the 21st Century, National Research Centre for Occupational Health and Safety Regulation & National Occupational Health and Safety Commission, Gold Coast, July 20-22, 2003.
- Quinlan, M and Bohle, P (2003), *Contingent Work and Occupational Safety: The Psychology of Workplace Safety*, APA Books, Washington, pp81-106.
- Rebitzer, J, (1995) 'Job safety and contract workers in the petrochemical industry.' *The Journal of Industrial Relations*, Volume 34, Number 1, pp40-57.
- Ryan, N, Charles, M and Hampson, K (2006), 'Collaboration and Engagement Throughout the Supply Chain: The Role of Government' in L. Adams and K Guest (eds) *Clients Driving Innovation: Moving Ideas into practice*: Proceedings of the CRCCI 2nd International Conference, Gold Coast, 12-14 March 2006.
- Safe Work Australia, (2010), *National OHS Strategy 2002-2012: Priority Industries*, downloaded from: <http://safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/233/National%20Strategy%20Industry%202008-09.pdf> [last accessed 11 July 2011].
- Safe Work Australia, (2011), *Construction: Information Sheet 2008-09*, downloaded from <http://safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/430/ConstructionInfoSheet2008-09.pdf> [last accessed 11 July 2011].
- Shinn, J and McGrath-Champ, S, 'Pyramid Subcontracting and OHS in the Sydney Construction Industry', mimeo Faculty of Economics and Business, University of Sydney.
- Smith, P, (2010), *Go with the flow: Labour power mobility and Labour process theory* in P. Thompson & C. Smith (Eds.), *Working life – Renewing labour process analysis*, Houndmills, England, Palgrave Macmillan, pp269-298.
- Stewart, A, (2011), *Stewart's Guide to Employment Law*, Third Edition, Sydney, The Federation Press.
- Stewart, A, and Role, C. (2011b) Submission to ABCC Inquiry into Sham Arrangements and the use of Labour Hire in the Building and Construction Industry, downloaded from <http://www.shamcontractinginquiry.gov.au/submissions.php> [last accessed 19 July 2011].
- Stewart A, (2005), Submission on Independent Contracting and Labour Hire, for House of Representatives' Standing Committee on Employment, Workplace Relations and Workforce Participation, downloaded from: www.aph.gov.au/house/committee/.../independentcontracting/subs/sub69.pdf [last accessed 19 July 2011].
- Swedish Construction Forum, (2006), *The Role and Mission of the Construction Client – Information for universities and others interested in the significance of the construction client's role for a profitable and attractive built environment*, Swedish Construction Forum, Stockholm.
- Teuber, G ,(2011), *Networks as Connected Contracts*, Hart Publishing, Oxford (with introduction by Hugh Collins).
- Toner, P, (2005), 'Long run shifts in industry and workforce structure of the Australian Construction Industry: Implications for a sustainable labour supply', proceedings of AIRAANZ Conference, 2005, pp503-510.
- Toner, P and Coates, N, (2006), 'Competition and the growth of non-standard employment: the case of the Australian construction industry', *Labour and Industry*, Volume 17, Number 2, pp 99-118.

Underhill, E, (1991), 'Unions and contract workers in the New South Wales and Victorian building industries', in M. Bray and V. Taylor (eds), *The Other Side of Flexibility, ACIRRT Monograph 3*, ACIRRT, University of Sydney, pp115-142.

Underhill, E, Worland, D and Fitzpatrick, M, (2000), 'Self-employment in the Victorian construction industry: Working lives and employment practices', Proceedings of the 14th AIRAANZ Conference, AIRAANZ, Wellington, 2000.

United Kingdom Health and Safety Executive ACT (2007) *Want Construction Work Done Safely? Quick Guide for clients on the Construction (Design and Management) Regulations 2007*, ULHSE, London.

Vrijhoef, R, and Lauri Koskela (2005), 'Revisiting the three peculiarities of production in construction', Proceedings of the International Group for Lean Construction (IGLC) IGLC-13, July 2005, Sydney Australia

Vosko L (ed) (2006), *Precarious employment: Understanding Labour Market Insecurity in Canada*, Montreal, McGill-Queen's University Press.

Vosko, L, McDonald, M and Watson, I, (eds), (2009), *Gender and the Contours of Precarious Employment*, Routledge, London.

Wadick, P, (2010), Safety culture among subcontractors in the domestic housing construction industry, *Structural Survey*, Vol 28, No 2, pp108-120.

Wadick, P. (2005), *Learning Safety in the Construction Industry: A Subcontractors' Perspective*, University of New England.

Waite, M and Will, L, (2001), Self-employed Contractors in Australia – Incidence and Characteristics, Productivity Commission Staff Research paper, downloaded from: <http://www.pc.gov.au/research/staffresearch/secia> [last accessed 11 July 2011].

Williamson, O, (1975), *Market Hierarchies*, Free Press, New York, USA.

Winch, G.M (1985), The construction process and the contracting system: a transaction cost approach, *Proceedings BISS*, 7, Vaulx-en-Velin, France.

Winch, G.M (1988), 'The construction firm and the construction project: A transaction cost approach', paper presented at the ARCOM Research Methodology Conference, UMIST, July 1998.

Workplace Express, 'Judge makes call to fix contractor/employee confusion', 19 April 2011, online.

Yates, A and Sashegyi, B, (2001), Effective Risk Allocation to Major Projects: Rhetoric or Reality?: A Survey on Risk Allocation in Major W.A. Construction Projects, Western Australian Chamber of Commerce and Institute of Engineers, Barton, ACT.

Ziggers, G, Gagalyuk, T and Hanf, J, (2010), 'Network Governance at the Firm and Network Level: Goals, Routines, and Social Mechanisms', *International Journal on Food System Dynamics*, Volume 4, pp342-351.

Acts

Fair Work Act, 2009, (Cth).

Workplace Health and Safety Act, 1995, [Qld].

Workers' Compensation and Rehabilitation Act, 2003 [Qld],

Case Law

On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3) [2011] FCA 366, (13 April 2011)

Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

Vella v Integral Energy [2011] FMCA 6

Appendix One Methodology

This research derives from a mixed method approach, which has combined quantitative and qualitative research methods. Given the limited timeframe available to undertake the research, the research design was constructed to maximise the quality of data collection.

Quantitative research

The first part of the research adopted quantitative research methods to explore the incidence of 'sham contracting' in the Construction Industry. Our research brings together information collected from the Australian Bureau of Statistics (ABS) and the *Australia at Work* study.

Using information from the past three data releases (2008, 2009 and 2010) from the ABS Form of Employment statistics, we examined trends in categories of employed persons, including the ABS category of 'independent contractor'. Data for employed persons in the Australian Construction Industry was compared to all employed persons in Australia.

To build on the information from the ABS, the latest wave (2010) of *Australia at Work* data were then analysed in order to provide a deeper picture of the characteristics of Australian construction workers, including their employment arrangements, attitudes to safety and hours of work.

The *Australia at Work* project is a five year longitudinal study tracking the working lives of over 8,000 Australians. The research is being carried out by the Workplace Research Centre at the University of Sydney. The survey gathers information on matters including the worker's employment status, occupation, industry, sector, employment, pay, hours of work, payment arrangements and demographics. The respondents are interviewed annually and to date, four waves of data have been collected. The survey, which started in 2007, and is scheduled to finish in 2011, was designed to be representative of the labour force in March 2006.

In the fourth wave (2010) of the *Australia at Work* study there 5,762 employed persons, of whom were 4,830 employees and a further 932 were self-employed. When the sample is weighted back to the March 2006 workforce (i.e. the 'in-scope' population for the study), this represents almost 8.9 million employed persons; comprised of over 7.3 million employees and over 1.5 million self-employed.

Among these employed persons, there were 312 participants (representing almost 520,000 employed persons when weighted) classified using the ANZSIC Industry code as working in paid employment in their main job in the Construction Industry. Table A1.1 sets out some of the individual worker and workplace characteristics for this group.

Qualitative research

The second part of the project adopted qualitative research methods to gain a deeper understanding of the factors within the Construction Industry that may give rise to 'sham contracting' arrangements. The qualitative research comprised of interviews with key informants including employer and employee representatives as well as one research participant from an OH&S background and 28 interviews with construction workers. A qualitative method was chosen because it allows for a deep exploration of issues on complex research questions such as those guiding this research.

Key informant interviews and protocol development

Prior to conducting interviews with workers, we conducted key informant interviews with employer and employee representatives in the industry. The key informant interviews were also used to gain feedback on the draft interview protocol. A total of 13 key informants from the following organisations were interviewed (listed alphabetically):

- Australian Manufacturing Workers Union (AMWU) (interviews with 3 officials);
- Builders Labourers Federation (BLF) QLD;
- Communications Electrical and Plumbing Union of Australia (CEPU);
- Civil Contractors Federation (CCF);
- Construction, Forestry, Mining & Energy Union (CFMEU) – QLD Construction Labourers Division and National Office;
- Housing Industry Association (HIA) ;
- IPAS (construction industry project advisor);
- Master Builders Association (MBA); and
- a retired OH&S Construction Industry Inspector.

Utilising the insights gained from key informants, the draft interview protocol was slightly amended. The protocol aimed to explore the following information:

- What are the characteristics of Queensland construction contractors and Queensland construction employees?
- Do workers in Queensland construction transition between employment as a contractor and as an employee? If so, how often and why does this occur?
- What do workers perceive to be the:
 - Advantages of working as an employee?
 - Advantages of working as a contractor?
 - Disadvantages of working as an employee?
 - Disadvantages of working as a contractor?
- Are contractors dependent on a single or small number of employers?
- Do workers perceive a difference in the OH&S risk exposure of employees as opposed to contractors?
- Do contractors take out workers' compensation policy, income protection insurance or other forms of insurance to protect their income during absence from work due to illness or injury?
- Do you pay your own superannuation? What superannuation arrangements do you have?

Construction worker interviews

Between 27 June and 21 July 2011, the research team conducted a total of 28 semi-structured, in-depth telephone interviews with people with current or recent work experience in the Queensland Construction Industry. These workers were selected from the *Australia at Work* study. The *Australia at Work* survey includes a question that asks the respondents whether they would be willing to be contacted to participate in in-depth follow-up interviews. The vast majority of respondents indicated a willingness to participate in an in-depth interview, if contacted.

At the end of Wave 4 (2010), there were 67 participants who, when last interviewed, were working in the Queensland Construction Industry. Of those, 63 gave permission for the researchers to contact them at a later stage. Of those, a further 4 were removed from the sample as they had recently either left the study or revoked permission for further follow-up. The sample was further interrogated to identify additional people who were not currently employed in the Construction Industry but who worked in Construction at least once when interviewed during the four waves of the study. Through this process, a further 7 of people was added to the 'in-scope' list of contacts. A total of five women were then removed as they were employed in non-construction support roles. A total of 57 people were identified as being 'in-scope' for the purpose of this study. Attempts were made to contact all of the 57 participants. From the 57 participants, one was not interested or did not have time to participate, one was overseas, and the remaining participants were unable to be contacted or away during the research period.

Table A1.2 sets out the characteristics of the 28 workers including their age group, sector/s of construction, employment status, job title, employer, experience in the industry, their superannuation and workers' compensation arrangements and for the self-employed, whether their business is incorporated. Reflecting the gender composition of the industry, all of the construction workers interviewed are male. Given that the sample was drawn from people participating in the final year of a five-year longitudinal study, the qualitative sample of construction workers is skewed towards older workers. Seven workers are below 35 years of age, fifteen are between 35 and 54 years of age and six are 55 years or older. Related to their age profile, many of the research participants had considerable experience working in the Construction Industry.

Eighteen workers self-identified as 'employees' and ten self-identified as 'self-employed'. Whether they would be deemed employees or self-employed in terms of employment law or for the purposes of workers' compensation and/or superannuation is another matter (as discussed throughout the report). Some of the construction workers who were interviewed undertake all or most of their work in one sector, while others work across two or three of the sectors (cottage, commercial and civil). In some ways, this reflects the blurring of work within and between the three sectors of the construction industry.

Data Analysis

With the permission of the research participants, all of the interviews were digitally recorded and verbatim transcribed by a commercial transcription service. The interview recordings produced a total of 254 pages of interview transcripts from workers, 46 pages from key informants and 37 pages of hand written notes taken from key informant interviews. We de-identified all of the transcripts and allocated each participants a pseudonym to protect their anonymity. Pseudonyms were selected to reflect the Anglo-Saxon male background of the research participants. To further protect anonymity, we do not identify which organisations any of the research participants are employed in or their work or residential location in this report.

The qualitative data were analysed using a coding framework adapted from the evaluative criteria developed by Miles and Huberman (1984)¹⁰. Drawing on previous research by Waite and Will (2001), the transcripts were analysed and coded according to five main (and sometimes overlapping) themes:

- Sectoral and intra-sectoral factors;
- Production process;
- Competitive and cyclical pressures;
- Employment and contracting arrangements; and
- Implications for occupational health & safety/workers' compensation.

Piloting of the framework was undertaken by the project team manager and one research team member, both who had undertaken extensive number of interviews. The researchers jointly coded five interviews to develop the initial themes. These themes were then tested by two other team members by coding the interviews, providing comments as to the conceptual clarity. As a result, inter-rater reliability was tested through this process and the coding framework was refined via three iterations. Information gathered from the key informant interviews informed the interpretation of findings and was integrated into the analysis.

¹⁰ Miles, M, and Huberman, A, (1994), *Qualitative Data Analysis* (2nd edition), Thousand Oaks, CA, Sage Publications.

Table A1.2 Characteristics of Construction Industry workers, 2010, per cent

<i>Gender</i>	
Male	85.1
Female	14.9
<i>Age group</i>	
24 years or younger	11.1
25 to 34 years	15.7
35 to 44 years	29.9
45 to 54 years	30.8
55 years or older	12.5
<i>Job tenure</i>	
One year or less	29.7
Two to four years	19.9
Five to ten years	18.3
Ten years or more	32.1
<i>Location</i>	
Metropolitan	52.1
Non-metropolitan	47.9
<i>Workplace size</i>	
One worker	31.1
Two to four workers	19.7
Five to 19 workers	22.9
Between 20 and 100 workers	17.0
More than 100 workers	9.4
<i>Highest education qualification</i>	
Year 12 or below	39.6
Trade qualification	31.3
Diploma/Certificate	19.3
Degree/Post-graduate degree	9.8
<i>Currently doing an apprenticeship or traineeship</i>	
Yes	9.8
No	90.2
<i>ANZSCO Skill level (current job)</i>	
Level 1	17.1
Level 2	8.4
Level 3	48.8
Level 4	19.3
Level 5	6.3
<i>Number of current jobs held</i>	
Single job holder	94.7
Multiple job holder	5.3*
<i>Yearly income</i>	
Less than \$52,000 p.a.	39.9
Between \$52,000 and \$77,999 p.a.	26.2
Between \$78,000 and \$103,999	14.6
\$104,000 or more p.a.	17.8
Refused income details	0.9*
Total	100.0

Population: ANZSIC Construction Industry workers

Weight: Weights10

Source: Australia at Work Wave 4 (2010)

Appendix One Table A1.2, Sample Characteristics for In-depth Interviews

'Name'*	Age group	Sector	Employment status when interviewed in 2011	Job description	Employer	Industry Experience	Super	Workers' Comp/Other insurance	ABN
Scott	45-54	Commercial & Civil	Employee	Project Manager, Energy utility	Energy Utility	20 yrs	Employer pays	Covered under employer WC policy	No
Wayne	45-54	Cottage	Employee	Forklift operator	Pre-fabricated timber roof truss factory	33 yrs	Employer pays	Covered under employer WC policy	No
Eddy	45-54	Cottage & Civil	Employee	Scaffolder	Head contractor company	38 yrs	Employer pays	Covered under employer WC policy and also has personal life insurance	No
Brett	25-34	Commercial & Civil (formerly)	Employee (formerly)	Electrician (now in sales)	Electrical contracting company (formerly)	15 yrs	Employer pays	Covered under employer WC policy and also has personal life insurance	No
Simon	45-54	Commercial & Civil	Employee	Project Manager	Head Building Contractor company	20+ yrs	Employer pays	Covered under employer WC policy (contractors must have own WC). Took out own personal income protection insurance when ABN worker with same company.	No (formerly ABN with same company)
Darren	45-54	Civil	Employee	Construction crew labourer	Local Council	30+ yrs	Employer pays	Covered under employer WC policy	No
Tim	<25	Cottage/Commercial/Civil	Employee (ex-labour hire)	Labourer	Water Treatment Plant	4 yrs	Employer pays	Unsure, he thinks he is covered under is employer's WC policy	No (asked by former employer in different industry to get ABN but refused)
Matt	<25	Cottage/Commercial/Civil	Employee	Labourer	Sub-contractor, shop fit-outs	8 yrs (on & off)	Employer pays	ER Covered under employer WC policy and also has personal life insurance	No
Paul	55 +	Civil	Employee	Crane Driver and Rigger	Government Infrastructure building bridges	20 yrs+ (on & off)	Employer pays into BERT	Covered under employer WC policy and employer also takes out income protection insurance for employees.	No
Joshua	<25	Commercial	Employee	Carpenter	Carpentry sub-contractor	6 yrs	Employer pays	Covered under employer WC policy and also has personal life insurance	No

'Name'*	Age group	Sector	Employment status when interviewed in 2011	Job description	Employer	Industry Experience	Super	Workers' Comp/Other insurance	ABN
Warren	55 +	Civil (formerly)	Employee (formerly)	Electrician (formerly)	Power station (former)/Mine construction (former)	15 yrs (on & off)	Employer pays	When working in construction, was covered under employer WC policy and had private income protection insurance	No
Allan	55 +	Civil	Employee	Painter /Business owner	Painting sub-contractor for government jobs (schools, prisons, etc)	38 yrs	Employer pays	Head Contractor takes out WC and has own personal life insurance policy	No
Mick	55 +	Commercial	Employee	Electrician (supervisor)	Energy supplier	20 yrs+	Employer pays	Covered under employer WC policy (contractors must have their own WC policy)	No
Karl	25-34	Commercial (formerly)	Employee (formerly)	Electrician	Electrical sub-contractor (formerly)	5 yrs	Employer pays	Covered under employer WC policy	No
David	45-54	Commercial (formerly)	Employee (formerly sub-contractor)	Operations Manager (formerly painting sub-contractor/supervisor)	Commercial construction company (formerly painter)	30 yrs	Employer pays (formerly paid own super)	Covered under employer WC policy (had own WC and personal insurance when ABN worker)	No (formerly ABN worker)
Sam	55 +	Cottage	Employee	Salesperson	Builder/Developer	5 yrs+	Employer pays	Covered under employer WC policy	No
Geoff	45-54	Cottage/Commercial/Civil	Employee	Excavator/Bob Cat driver	Excavation Contractor	15 yrs (on & off)	Employer pays	Covered under employer WC policy and has own Personal Income Protection Insurance	No (formerly self-employed landscaper)
Sean	35-44	Civil	Employee	Plumber/Site supervisor	Civil Plumbing Contractor	20 yrs+	Employer pays	Covered under employer WC policy	No (formerly)
Jason	25-34	Cottage & Commercial	Self-employed	Carpenter	Sub-contractor	10 yrs	Pays into own super fund	Head Contractor pays Workers Compensation and has own Personal Income Protection Insurance	Yes
Robert	45-54	Cottage	Self-employed	Builder	Head Building Contractor	25 yrs	Self Pays into own super fund	Private Income Protection Insurance	Yes
Pete	45-54	Commercial & Civil	Self-employed	Maintenance and renovations in government housing (Plumber by trade)	Plumbing and maintenance sub-contractor	20 yrs+	Unsure, doesn't think super is paid by him or on his behalf	Own Workers' Comp Policy and own Personal Income Protection Insurance	Yes

'Name'*	Age group	Sector	Employment status when interviewed in 2011	Job description	Employer	Industry Experience	Super	Workers' Comp/Other insurance	ABN
Craig	45-54	Cottage	Self-employed	Maintenance and renovations	Sub-contractor	38 yrs	None	No Workers' Comp policy or personal insurance policy	No
Ron	55 +	Cottage	Self-employed	Plasterer/tiler/block & bricklayer	Sub-contractor, block work (fences)	40 yrs	Pays into own super fund	No Workers' Comp policy or personal insurance policy	No
Andy	45-54	Cottage	Self-employed	Trade qualified plumber now installs blinds & curtains	Sub-contractor	30 yrs	Pays into own super fund (partner also salary sacrifices additional earnings in her super account)	No Workers' Comp policy (can't get coverage now due to recent ill health)	Yes
Troy	25-34	Cottage & Commercial	Self-employed/Employee	Draftsperson	Sub-contract draftsperson for builders/employee draftsperson	10 yrs+	None	No Workers' Comp policy	No
Alex	35-44	Civil	Self-employed (employer)	Mechanical plumber/air conditioning sub-contractor	27 yrs	25+yrs	Pays into own super fund (and pays for all his employees)	As Employer, takes out Workers Comp policy to cover all employees	Yes
Brian	35-44	Cottage/Commercial/Civil	Self-employed	Carpet layer	Sub-contractor	20 yrs	Pays into own super fund	No Workers' Comp policy (can't get coverage)	Yes
Rod	45-54	Civil (mine construction)	Self-employed (hourly wage worker with ABN)	Safety/Site Trainer	Engaged by Head Contractor Company constructing mine	20 yrs+	'Employer' pays his super	Covered under 'Employer' Workers Comp policy	Yes

Appendix Two ABS Forms of Employment Data

Table A2.1, All Employed Persons, Proportion of type of employment – by gender and age group (years), November 2010, per cent

	Employees	Independent contractors	Other business operators	All employed persons
Males				
15 to 19 years	96.9	2.7	0.4*	100.0
20 to 24 years	91.5	6.9	1.6	100.0
25 to 34 years	84.8	9.8	5.3	100.0
35 to 44 years	74.0	14.3	11.7	100.0
45 to 54 years	70.1	16.1	13.8	100.0
55 to 59 years	66.9	18.4	14.7	100.0
60 to 64 years	60.4	21.9	17.7	100.0
65 years and over	43.0	21.8	35.2	100.0
Total	76.2	13.3	10.5	100.0
Females				
15 to 19 years	98.6	1.4	-	100.0
20 to 24 years	96.6	1.7	1.8	100.0
25 to 34 years	91.0	4.2	4.8	100.0
35 to 44 years	83.4	6.5	10.2	100.0
45 to 54 years	83.2	7.0	9.7	100.0
55 to 59 years	81.9	8.1	9.9	100.0
60 to 64 years	79.3	7.0	13.8	100.0
65 years and over	63.8	13.2	23.0	100.0
Total	86.6	5.6	7.8	100.0
All				
15 to 19 years	97.8	2.0	0.2*	100.0
20 to 24 years	93.9	4.5	1.7	100.0
25 to 34 years	87.5	7.4	5.1	100.0
35 to 44 years	78.3	10.7	11.0	100.0
45 to 54 years	76.3	11.8	11.9	100.0
55 to 59 years	73.7	13.7	12.5	100.0
60 to 64 years	68.2	15.7	16.1	100.0
65 years and over	50.4	18.7	30.9	100.0
Total	80.9	9.8	9.2	100.0

Source: ABS (2011), ABS Forms of Employment, ABS Catalogue 6359.0, Australia, November 2010, Table 3, pp15-17

Table A2.2, All Employed Persons, Proportion of type of employment – by State or Territory of usual residence, November 2010, per cent

	<i>Employees</i>	Independent contractors	Other business operators	All employed persons
Males				
New South Wales	75.7	13.0	11.3	100.0
Victoria	76.0	13.4	10.6	100.0
Queensland	76.7	13.7	9.6	100.0
South Australia	76.0	13.9	10.1	100.0
Western Australia	76.1	13.9	10.0	100.0
Tasmania	76.1	11.3	12.6	100.0
Northern Territory	80.2	13.3	6.6	100.0
Australian Capital Territory	83.9	9.4	6.7	100.0
Total	76.2	13.3	10.5	100.0
Females				
New South Wales	85.7	5.9	8.4	100.0
Victoria	87.2	5.6	7.2	100.0
Queensland	86.2	6.1	7.7	100.0
South Australia	86.6	5.5	7.9	100.0
Western Australia	87.7	4.4	7.9	100.0
Tasmania	87.8	3.0	9.2	100.1
Northern Territory	89.7	5.1	5.1	100.0
Australian Capital Territory	91.6	3.8	4.7	100.0
Total	86.6	5.6	7.8	100.0
All				
New South Wales	80.2	9.8	10.0	100.0
Victoria	81.0	9.9	9.1	100.0
Queensland	81.1	10.2	8.7	100.0
South Australia	80.9	10.0	9.1	100.0
Western Australia	81.1	9.8	9.1	100.0
Tasmania	81.5	7.5	11.0	100.0
Northern Territory	84.6	9.4	6.0	100.0
Australian Capital Territory	87.7	6.7	5.7	100.0
Total	80.9	9.8	9.2	100.0

Source: ABS (2011), ABS Forms of Employment, ABS Catalogue 6359.0, Australia, November 2010, Table 3, pp15-17

Table A2.3, Employed Persons by Form of Employment by control over start and finish times, Australia, 2009 and 2010

	Had some say '000(%)	Did not have any say '000(%)	Total '000(%)
<i>Employees</i>			
2009	3,533.4 (40.8%)	5,127.5 (59.2%)	8,660.9 (100.0%)
2010	3,699.1 (40.4%)	5,466.6 (59.6%)	9,165.7 (100.0%)
<i>Independent contractors</i>			
2009	855.2 (83.1%)	173.8 (16.9%)	1,029.0 (100.0%)
2010	938.4 (84.5%)	172.1 (15.5%)	1,110.5 (100.0%)
<i>Other business operators</i>			
2009	862.5 (88.5%)	112.5 (11.5%)	975.0 (100.0%)
2010	942.7 (90.0%)	104.3 (10.0%)	1,047.0 (100.0%)
Total			
2009	5,251.1 (49.2%)	5,413.8 (50.8%)	10,664.9 (100.0%)
2010	5,580.2 (49.3%)	5,743.0 (50.7%)	11,323.2 (100.0%)

Source: ABS Forms of Employment, ABS Catalogue 6359.0, Australia, November 2008, 2009 & 2010

Table A2.4, Employed Persons by Form of Employment, Construction Industry and All Industries, Australia, November 2008 to 2010, thousands & percent

	2008 ('000s)	2009 ('000s)	2010 ('000s)	Change 2008 to 09 ('000s) (%)		Change 2009 to 10 ('000s) (%)		Change 2008 to 10 ('000s) (%)	
<i>Construction</i>									
Employees	548.4	510.4	608.5	-38.0	-6.9	98.1	19.2	60.1	11.0
With paid leave	429.9	399.3	491.4	-30.6	-7.1	92.1	23.1	61.5	14.3
Without paid leave	118.5	111.2	117.1	-7.3	-6.2	5.9	5.3	-1.4	-1.2
Independent contractors	312.0	335.8	340.8	23.8	7.6	5.0	1.5	28.8	9.2
Other business operators	128.3	94.3	93.2	-34.0	-26.5	-1.1	-25.6	-35.1	-27.4
Total	988.7	940.5	1,042.5	-48.2	-4.9	102.0	10.8	53.8	5.4
<i>All Industries</i>									
Employees	8,619.6	8,660.9	9,165.7	41.3	0.5	504.8	5.8	546.1	6.3
With paid leave	6,584.4	6,545.9	6,975.5	-38.5	-0.6	429.6	6.6	391.1	5.9
Without paid leave	2,035.2	2,115.1	2,190.2	79.9	3.9	75.1	3.6	155.0	7.6
Independent contractors	967.1	1,029.0	1,110.5	61.9	6.4	81.5	7.9	143.4	14.8
Other business operators	1,064.4	975.0	1,047.0	-89.4	-8.4	72.0	7.4	-17.4	-1.6
Total	10,651.1	10,664.9	11,323.2	13.8	0.0	658.3	6.2	672.1	6.3

Source: ABS Forms of Employment, ABS Catalogue 6359.0, Australia, November 2008, 2009 & 2010

Appendix Three Australia at Work Data

Table A3.1 Contract for services status of Construction industry self-employed, Australia, main job, self-reported, 2010

Contract to do work for another business/es	Sample (<i>n</i>)	Weighted Population (N)	Weighted %	All industries Weighted %
Yes	116	211,502	79.4	61.1
No	32	54,726	20.6	38.9
Total	148	266,228	100.0	100.0

Population: ANZSIC Construction Industry self-employed (self employed all industries)

Weight: Weights10

Source: Australia at Work Wave 4 (2010)

Table A3.2 Contract reliance of Construction industry self-employed, Australia, main job, self-reported, 2010

Last financial year, one client provided 80% or more of income	Sample (<i>n</i>)	Weighted Population (N)	Weighted %	All industries Weighted %
Yes	35	64,339	24.2	22.7
No	112	200,611	75.4	76.5
Don't know	1*	1,278*	0.5*	0.7*
Total	148	266,228	100.0	100.0

Population: ANZSIC Construction Industry self-employed (self employed all industries)

Weight: Weights10

Source: Australia at Work Wave 4 (2010)

Table A3.3 Incorporation status of Construction industry self-employed, Australia, main job, self-reported, 2010

	Sample (<i>n</i>)	Weighted Population (N)	Weighted %	All industries Weighted %
Incorporated/limited liability	54	102,296	38.4	42.4
Unincorporated	93	106,973	60.5	55.5
Don't know	1*	2,958*	1.1*	2.2
Total	148	266,228	100.0	100.0

Population: ANZSIC Construction Industry self-employed (self employed all industries)

Weight: Weights10

Source: Australia at Work Wave 4 (2010)

Table A3.4 Tax reporting status of Construction industry self-employed, Australia, main job, self-reported, 2010

BAS or IA completed for business	Sample (<i>n</i>)	Weighted Population (N)	Weighted %	All industries Weighted %
Yes	138	249,464	93.7	85.8
No	10*	16,764*	6.3*	13.3
Don't know	-	-	-	1.0*
Total	148	266,228	100.0	100.0

Population: ANZSIC Construction Industry self-employed (self employed all industries)

Weight: Weights10

Source: Australia at Work Wave 4 (2010)

Table A3.5, Self-employed by incorporation status, tax status and workplace size, Construction, Australia, 2010, per cent

Agreement level	Independent Contractor	Dependent Contractor	Other business operator	Total
<i>Business Incorporated</i>				
Yes	43.3	*30.7	*31.0	38.4
No	54.8	69.3	69.0	60.5
Don't know	*1.8	-	-	*1.1
<i>Complete BAS/IAS for business</i>				
Yes	95.6	89.9	91.8	93.7
No	*4.4	*10.4	*8.2	*6.3
<i>Employs others</i>				
Yes	48.2	*36.4	*32.4	42.7
No	51.8	*63.6	67.6	57.3
Total	100.0	100.0	100.0	100.0

Population: Self employed ANZSIC Construction Industry workers

Weight: Weights10

Source: Australia at Work Wave 4 (2010)

Table A3.6 Workplace size, Construction industry, Australia, main job, 2010

	1	2-4	5-19	20 or more	Total
Employee	*3.6	13.0	26.8	56.6	100.0
Independent Contractor	51.4	*28.0	*19.0	*1.6	100.0
Dependent Contractor	64.7	*28.2	*5.6	*1.6	100.0
Other business operator	*67.6	*18.2	1*4.2	-	100.0
Total	31.1	19.7	21.9	100.0	100.0

Population: Self employed ANZSIC Construction Industry workers

Weight: Weights10

Source: Australia at Work Wave 4 (2010)

Table A3.7, Construction worker attitudes, Australia, agreement levels, 2010, per cent

Agreement level	Employee	Independent Contractor	Dependent Contractor	Other business operator	Total
Control over <i>when</i> hours are worked	50.4	72.9	65.7	90.5	63.0
Control over <i>number</i> of hours	61.7	72.1	*62.7	87.7	67.7
Job security*	81.4	95.2	92.2	87.5	87.3

* Disagreement level as question is phrased negatively

Population: ANZSIC Construction Industry workers

Weight: Weights10

Source: Australia at Work Wave 4 (2010)

Appendix Four QLD Construction Safety Plans

In Queensland, a principal contractor is required to prepare a construction safety plan before construction work starts. The plan must state:

- workplace address
- name and address of the principal contractor
- principal contractor's ABN
- whether there is a WHS committee
- whether there is a WHS Officer appointed
- expected start date
- estimated duration of the work
- type of construction
- plant provided for common use
- site rules
- the risks the principal contractor is obliged to manage
- proposed control measures for the risks
- how the controls will be implemented
- arrangements for monitoring and reviewing controls
- emergency procedures
- public safety strategies.

The plan must be written so it is easy to understand, signed and dated by the principal contractor. It must be available for the length of the project.

The principal contractor must sign and date work method statements that have been received and keep them with the plan, as well as monitor their implementation.

The principal contractor cannot allow work to start unless:

- the plan has been discussed with or a copy given to all relevant people
- the plan is available or readily available for inspection.

The plan must be amended if there are changes in how risks will be managed. The principal contractor must inform any affected person of the change.¹¹

¹¹ <http://www.deir.qld.gov.au/workplace/business/construction/methods/plans/index.htm>

MORE INFORMATION
Workplace Research Centre
The University of Sydney Business School
T +61 2 9351 5626
F +61 2 9351 5615
E sally.wright@sydney.edu.au
<http://sydney.edu.au/business/workplaceresearch>

THE UNIVERSITY OF SYDNEY
BUSINESS SCHOOL



THE UNIVERSITY OF
SYDNEY

Accredited by



Australian member of



ABN 15 211 513 464
CRICOS 00026A