



21 May 2013

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

By email to: lacsc@parliament.qld.gov.au

Dear Committee Members

Master Builders is pleased to be able to make a further **supplementary submission** as requested by the committee on Monday 20 May 2013 specifically in relation to the *Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Bill 2013* proposed "worker" definition amendments. Whilst on the surface the proposal seems to have merit, it is the view of Master Builders that the proposal does not go far enough to clarify who is a "worker" for the purposes of workers compensation in Queensland.

The catalyst for the proposed change before the parliament was that employers deserve to know if the compulsory workers compensation insurance applies before they engage individuals. The proposed Bill has failed to achieve this by relying upon the ATO definition that in turn relies upon the common law.

The GST registered exclusion promoted by Master Builders and the HIA would provide employers the level of certainty, clarity and simplicity needed in the workers compensation scheme. We strongly urge the Queensland Government to amend the current Bill to include an exclusion for all individuals who are charging GST.

Master Builders is available to make further verbal submissions if the committee requires.

Regards

A handwritten signature in blue ink that reads 'John Crittall'.

John Crittall
Director Construction & Policy

**Master Builders
Head Office**
417 Wickham Terrace
Brisbane Queensland 4000
Telephone (07) 3225 6444
Facsimile (07) 3225 6545
ask@masterbuilders.asn.au
www.masterbuilders.asn.au



The proposed Bill fails to deliver a clear definition of who is a “worker”

Following on from Master Builders previous submission on 14 May 2013, the building and construction industry requested a clear and workable definition of who is a worker. The Queensland government’s current Bill before parliament fails to deliver such a definition and simply replaces one complex definition with another complex definition being the common law.

The proposal will provide little support to the industry other than aligning with the ATO definition being the common law. The current worker definition has long been hijacked by narrow and unintended judicial interpretation causing a significant impact on the scheme by repeatedly including groups of individuals retrospectively that were previously thought to be excluded. This problem will remain under the proposed changes without a firm statutory hand guiding the courts.

We submit the proposed common law worker definition is misleading and damaging for small business in Queensland as they will not fully understand their obligations.

Small business operators lack the capacity to seek detailed legal advice on who is a worker at common law. To simply rely upon the ATO decision tool may find an employer ‘uninsured’ or ‘underinsured’ when an individual is injured and the common law test is applied by judicial review of the facts retrospectively.

Insurers like WorkCover Queensland will be required to apply the common law indicia to the best of their ability. These administrative decisions will be the subject of considerable litigation and appeals to Q-Comp, QIRC and the Queensland Industrial Court. When on appeal a category of individuals are found later to be insured, the insurer will collect premiums based upon this judicial interpretation simply perpetuating the current problem that there is no definitive guaranteed definition of who is a worker in Queensland.

The common law provides no certainty to Queensland business or workers as it is reliant upon a significant amount of interpretation and weighting of indicia in its application. In any dispute there will be an employer’s opinion, the insurer’s opinion, and the injured person’s lawyer’s opinion that are all subject to judicial review retrospectively post injury.



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The GST registered exclusion promoted by Master Builders and the HIA would provide employers the level of certainty, clarity and simplicity needed in the workers compensation scheme. We strongly urge the Queensland government to amend the current Bill to include an exclusion for all individuals who are registered and or charging GST.

Pre-start due-diligence is important

Builders operating in the building and construction industry are required by *Queensland Building Services Authority Act 1991 (Qld)* to ensure that contractors who are engaged are 'Licenced Contractors' prior to engaging or contracting with them. While acknowledging that not all subcontractors are required to be licenced with the BSA, including Plant Operators, these licencing requirements perpetuates a culture of pre-start due-diligence checks before engaging a contractor including:

- ✓ BSA online licence check at www.bsa.qld.gov.au
- ✓ ABN & GST status online check at www.abr.business.gov.au
- ✓ Public Liability Insurance check
- ✓ Accident and Income Insurance check
- ✓ If they are engaging others a WorkCover policy check

The current proposed Bill would require an additional check being the ATO Building and Construction Decision Tool that will not provide a clear determination of who is a worker.

All business are required to check an entity's ABN and GST status prior to making any payments to that entity or are liable for 45% of the amount paid in withholding tax.

Master Builders further notes when starting an employee they are required to provide their Tax File Number and complete a Tax File Declaration form (NAT 3092) on engagement in addition to any contracts of employment, Awards, Enterprise Agreements or letters of engagement.

Employees do not register for GST.



How quick is it to register or deregister for GST?

The committee inquired as to how quick an individual could register or deregister for GST when considering this proposal on 20 May 2013. An individual can change their status through a simple phone call to the ATO on 13 28 66, online or through a tax agent. The registration or deregistration for GST will be effective that day. Alternatively an individual can complete the 'application to cancel registration (NAT 2955) form and return it to the ATO.

The ATO require the following information to process the request:

- ✓ your ABN
- ✓ your current contact details and postal address
- ✓ the reason for your cancellation
- ✓ the date you want the cancellation to take effect.

Master Builders considerable experience has been that individuals simply earning a wage under an ABN are not registered for GST due to the additional reporting obligations, the additional accounting expenses and significant liability to the ATO if the GST is not remitted or applied incorrectly. Individuals that cease to operate their business are required to advise the ATO within 21 day to cancel the GST registration. That is an individual that stops trading to work as an employee is required to advise the ATO and cancel their GST registration.

Why does registered and or charging GST provide the most clarity?

The industry has recently undergone a significant move away from the 'ABN Worker' due to compulsory increased ATO reporting in the construction industry from 1 July 2012 forcing thousands of workers onto withholding tax. Further Master Builders, representing 8,000 contractors, experience is that the small number of remaining ABN Workers who are supplying labour only are not charging GST. ABN Workers who are under \$75,000.00 turnover or have entered into a tax withholding arrangement through a voluntary agreement do not charge GST and therefore would still be included in the scheme if they are found to be an employee under the common law test utilising the ATO decision tool.



Examples for working on-site in the building, engineering and civil construction industry	Included as a worker subject to the common law test	Excluded not a worker as they are registered and or charge GST
Bricklayer on \$32.00 an hour labour only on ABN doesn't charging GST	Included	
Bricklayer Gang of three workers organised by a person in business on a rate per thousand blocks does charge GST		Excluded
A Carpenter working directly for a builder may charge \$38 per hour for majority labour only doesn't charge GST	Included	
A Carpenter in business with an Apprentice does charge GST		Excluded
Excavator or Concrete Pump Operators are in business supplying labour and machinery charge GST		Excluded
Two Tilers in partnership working for a builder are in business and does charge GST		Excluded
A Cleaner working for a builders under an ABN earning less than \$75,000.00 doesn't charge GST	Included	
A building consultant providing inspection services to a builder are in business and charge GST		Excluded
A sediment control barrier installer supplying labour, machinery and materials are in business and charge GST		Excluded
A Plaster or Painter working under an ABN for a Plastering or Painting Contractor doesn't charge GST	Included	
A Concreter or Steelfixer working under an ABN for a subcontractor doesn't charge GST	Included	

A self-evident truth is that contractors who are 'in business' and engage others or have significant plant charge GST. Workers that are not 'in business' don't charge GST.

ATO On-Line Decision Tool is misleading.

The Department continues to promote the ATO on-line decision tool as a resource to assist business in determining who is a worker. However the ATO decision tool entitled '*Building and construction industry – employee/contractor decision tool*' is clearly a complex decision tool with significant anomalies and contradictions. The unwitting employer may use this tool to determine whether a worker is an employee or contractor. It will simply give you a decision based on your answers to some questions with no assurance that the outcome is correct.





The following are reasonable observations of flaws in the decision tool as supported by Appendix A:

- a) The decision tool has a predetermined bias against 'trades assistants' and 'labourers'.

The building and construction industry engages many different types of unskilled and semiskilled individuals through complex arrangements to perform tasks. The *Building and Construction Industry General On-Site Award 2010* provides some indication of these unskilled and semiskilled tasks:

The Award clarifies the following tasks as labourers tasks on Construction Worker Level 1 and all of these classifications are regularly independent contractors when the common law indicia is applied:

Owner Operators - Concrete cutting or drilling machines; Concrete floater; Concrete formworker; Concrete pump operator; Demolition labourer; Drilling machine operator; Dump cart operator (bobcat); Fencer; Insulator; Ironworker on construction; Kerb and gutter layer; Landscape labourer; Mixer driver (concrete); Mobile crane operator; Steel erector;

The Award continues to define the following semiskilled classification that are regularly engaged as independent contractors:

Owner Operators - Scaffolder; Steelfixer; Traffic controller; Crawler tractor; Dumper; Mobile hydraulic platform operator; Operator, drilling machine; Roof fixer; Excavator Operator; Grader Operator; Loader Operator; Mobile concrete boom pump operator; Mobile crane; Pile driver operator; Road roller operator; Scraper operator

The ATO decision tool when assessing these Owner Operator engagements fails to identify that 'Plant Operators' are unskilled labourers (eg a \$22,000.00 Dingo Digger Owner Operators or Concrete Saw Owner Operators) or ticketed semiskilled labours (eg Scaffolder providing scaffolding, \$40,000.00 Bobcat Owner Operator, \$110,000.00 Backhoe Owner Operator).



The decision tool fails to acknowledge these persons supply significant plant and fails to apply any of the other common law indicia making them independent contractors when correctly applied. As a result the decision tool incorrectly identifies these owner operators exclusively as Employees.

- b) The decision tool has a further predetermined bias or inappropriate blind weighting in regards to an individual's ability to subcontract due to an express term.

Master Builders acknowledges this is significant common law indicia for the building industry. However care must be taken in applying the correct weight to this indicia including if the ability to subcontract is in writing, or only with the permission of the principal if the provision has been relied upon. A Judicial officer utilising all the indicia of the common law test will never place the same blind weight as the decision tool on this indicia. All the aspects of the relationship will be considered during an administrative or judicial review.

Master Builders continues to argue that a Judicial officer or administrative review officer may have little or no regard for the ATO decision tool opting to apply the common law test alone with their self-determined list of indicia and weighting. It is the self-determined indicia and weighting of them that cause Master Builders alarming concerns for employers and provides no certainty or clarity for the workers compensation scheme.

When a Judicial decision includes a category of person as a worker under the insurance the insurer, WorkCover, will be forced to recover premiums on individuals would normally be found to be a contractor under the ATO decision tool.

ATO On-Line Decision Tool will not last the test of time.

Master Builders predicts that WorkCover will be forced to move away from using the ATO decision tool within twelve months. The nature of workers compensation insurance is that many claims are rejected and these claimants have rights of review. Master Builders highly anticipates that as a result of an Administrative Review Decisions or Judicial Review Decisions WorkCover will be required to provide coverage to individuals that are outside the ability of the ATO decision tool to determine.



This predicament, as experienced over the past ten years, will require WorkCover to collect premiums on these additional categories of workers and thus introduce a modified decision tool on the WorkCover site. Once again the industry will be left with two tests, the ATO tool and the modified WorkCover interpretation.

What would the proposed change to Schedule 2 look like?

Schedule 2, Workers' Compensation and Rehabilitation Act 2003 (Qld),

Part 2 Persons who are not workers

1 A person is not a worker if the person performs work under a contract of service with—

- (a) a corporation of which the person is a director; or*
- (b) a trust of which the person is a trustee; or*
- (c) a partnership of which the person is a member; or*
- (d) the Commonwealth or a Commonwealth authority.*

2 A person who performs work under a contract of service as a professional sportsperson is not a worker while the person is—

- (a) participating in a sporting or athletic activity as a contestant; or*
- (b) training or preparing for participation in a sporting or athletic activity as a contestant; or*
- (c) performing promotional activities offered to the person because of the person's standing as a sportsperson; or*
- (d) engaging on any daily or other periodic journey in connection with the participation, training, preparation or performance.*

3 A member of the crew of a fishing ship is not a worker if—

- (a) the member's entitlement to remuneration is contingent upon the working of the ship producing gross earnings or profits; and*
- (b) the remuneration is wholly or mainly a share of the gross earnings or profits.*

4 A person who, in performing work under a contract, other than a contract of service, supplies and uses a motor vehicle for driving tuition is not a worker.

5 A person participating in an approved program or work for unemployment payment under the Social Security Act 1991.

6. A person working on-site in the building, engineering and civil construction industry who is registered for GST and or charges GST is not a worker.

As stated previously, Master Builders is available to canvass these issues further with the Committee.

Yours sincerely

John Crittall
Director Construction & Policy



APPENDIX A



Building and construction industry – employee/contractor decision tool
Employee/contractor report

Version 1.1.0

DECISION: The worker is an EMPLOYEE

Today's date: 21/5/2013

- This decision outcome is limited to the specific working arrangement you described (see 'Information you provided'). The decision cannot be:
- rolled upon if the working arrangement changes, or
 - applied to different working arrangements with other workers.

Information you provided

Do you pay a company, partnership or trust (other than a labour hire firm) for the services of the worker?	No
Do you pay a labour hire firm for the services of the worker?	No
Is the worker an apprentice?	No
Is the worker a trades assistant?	No
Is the worker a labourer?	Yes
The worker's main activity or trade	Site preparation services Backhoe owner/operator
Does the worker have an ABN?	Yes

Basis of decision

Whether a worker is an employee or contractor is determined by considering the whole working arrangement and examining the specific terms and conditions under which the work is performed.

Based on the information you have provided, we consider your worker is an employee (for Commonwealth tax and superannuation purposes). This decision has been reached by applying the key indicators the courts use in determining whether a worker is an employee or contractor.

Apprentices, trades assistants and labourers are required to work under the direction, control and supervision of their employer to learn their trade. By their very nature, they are considered employees for Commonwealth tax and superannuation purposes.

Keeping a record of this decision

[Personalised details](#)

Although it is optional, we recommend you:

- enter some personal details by selecting the 'Personalised details' button
- save or print this page so you can keep a copy of this decision for your records.

None of this information is recorded by the ATO.

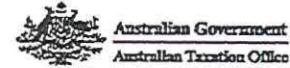
Commonwealth tax and super obligations

When your worker is an employee, there are certain things you need to do.

Pay as you go (PAYG) withholding

Your PAYG withholding obligations include:

- registering for PAYG withholding if you have not already



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Do you pay a labour hire firm for the services of the worker?	No
Is the worker an apprentice?	No
Is the worker a trades assistant?	Yes
Is the worker a labourer?	No
The worker's main activity or trade	Site preparation services Backhoe owner/operator
Does the worker have an ABN?	Yes

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Australian Government
Australian Taxation Office

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Employee/contractor report

Version 1.1.0

DECISION: The worker is a CONTRACTOR

Today's date: 21/5/2013



This decision outcome is limited to the specific working arrangement you described (see 'Information you provided').

The decision cannot be:

- relied upon if the working arrangement changes, or
- applied to different working arrangements with other workers.

Information you provided

Work agreement

Do you pay a company, partnership or trust (other than a labour hire firm) for the services of the worker?	No
Do you pay a labour hire firm for the services of the worker?	No
Is the worker an apprentice?	No
Is the worker a trades assistant?	No
Is the worker a labourer?	No
The worker's main activity or trade is:	Carpentry services
Does the worker have an ABN?	Yes
Who does the work?	
Can the worker pay another person to do the work instead of them?	Yes
Is this because of an express term included in a written contract between you and the worker?	Yes
Has the worker paid another person to do any of the work under this contract?	Unsure

Basis of decision

Whether a worker is an employee or contractor is determined by considering the whole working arrangement and examining the specific terms and conditions under which the work is performed.

Based on the information you have provided, we consider your worker is a contractor. This decision has been reached by applying the key indicators the courts use in determining whether a worker is an employee or contractor.

Keeping a record of this decision

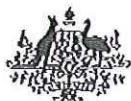
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Commonwealth tax and super obligations



Australian Government
Australian Taxation Office

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Version 1.1.0

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Information you provided

Work agreement

Do you pay a company, partnership or trust (other than a labour hire firm) for the services of the worker?	No
Do you pay a labour hire firm for the services of the worker?	No
Is the worker an apprentice?	No
Is the worker a trades assistant?	No
Is the worker a labourer?	No
The worker's main activity or trade is:	Carpentry services
Does the worker have an ABN?	Yes

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Can the worker pay another person to do the work instead of them?	Yes
Is this because of an express term included in a written contract between you and the worker?	Yes
Has the worker paid another person to do any of the work under this contract?	No

Basis of decision

Whether a worker is an employee or contractor is determined by considering the whole working arrangement and examining the specific terms and conditions under which the work is performed.

Based on the information you have provided, we consider your worker is a contractor. This decision has been reached by applying the key indicators the courts use in determining whether a worker is an employee or contractor.

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Commonwealth tax and super obligations