

AIMPE SUBMISSION

regarding

Inquiry into the practices of the labour hire industry in Queensland



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INTRODUCTION

The Australian Institute of Marine and Power Engineers is the registered organisation which represents qualified Marine Engineer Officers throughout Australia. AIMPE came together as a national body in 1881 after several years during which local organisations were formed in the various colonies of Australia and New Zealand. AIMPE members operate, maintain and repair marine vessels of all sorts including commercial ships of all types and sizes as well as vessels dedicated to the offshore oil and gas sector, tugboats, dredges, ferries, defence support craft, research vessels and Border Force vessels.

AIMPE appreciates the opportunity to make a submission to the Committee about the labour hire industry in Queensland because it has very significant potential impacts on the various sectors of the Australian maritime industry including the harbour towage and other near coastal and inner harbour operations. Therefore the tender process for services in the maritime industry and modes of engineer engagement on vessels is of great concern for AIMPE members.

AIMPE submissions to the Inquiry are restricted and focus on the following aspects of the terms of reference for the Committee's consideration on page 5 of the Issues Paper:

"...undercutting of conditions by labour hire companies and their impact on the labour market and business; and

Allegations that labour hire and sham contracting are being used to avoid workplace laws and other statutory obligations, such as:

- i. Underpayment of wages and entitlements, including superannuation; and*
- ii. Avoidance of payroll tax and WorkCover premiums; and*

Whether tendering and employment practices create an uneven playing field for competing business."

The Committee's inquiry in this section of the Issues Paper will be addressed:

"Does the current regulatory scheme adequately preventunder cutting of conditions by labour hire companies? If not, why, and how can this be improved?"

What evidence is there of undercutting of conditions by labour hire companies? How can this be prevented and addressed?"

Do tendering practices and employment practices impact on businesses ability to adequately compete? Why? How? How can this be improved?"

EXECUTIVE SUMMARY

AIMPE has concerns that the use of partnerships to crew vessels traditionally crewed under direct employment as employees will erode standards in the industry – safety, industrial relations and professional. This misuse of the partnership structure should be seen by the Committee as another form of labour hire which deserves equal attention to other forms of labour hire.

In addressing the Committee’s questions at page 5 of the issue paper, AIMPE advises that:

- The use of sham partnerships to avoid the employment relationship in contracts that are mainly for the purpose of the provision of “labour only” in substitution of employee crewing of vessels is not adequately addressed by the Partnership Act of 1891.
- The contemporary control test should be applied to ascertain the true nature of a contract under the Partnership Act 1891.
- Incidence of crews being replaced by “supply of labour only” under subcontracts to partnerships has increased in Australia during the past 18 months.
- Threats to replace employee crews with partnership as the basis for tender processes for harbour towage work in Queensland are common (e.g. BMA tender for Hay Point towage services);
- Tender processes used in exclusive and non-exclusive license ports are used to ratchet down conditions or place downward pressure on wages and conditions.

The use of sham partnerships in the “supply of labour” contracts can be addressed by Queensland amending the Partnership Act 1891 and other complimentary Acts as required.

To prevent the ratcheting down of entitlements, protections and rights, tendering processes for port services in Queensland could also be addressed by a number of amendments:

1. The successful tenderer will not be permitted to subcontract the purpose of “supply of labour only” to another entity (including a partnership);
2. The tenders must not avoid or evade the rights for workers established under the Queensland Industrial Relations Act 1999 or the Fair Work Act 2009 including rights to collective bargaining and an enterprise agreement; and
3. The requirement of the Tender evaluation process to include the requirement to consult and involve bargaining representative/s covered by a current/or similar agreement that applies to the work subject of the tender.

Of immediate concern to AIMPE is the current tender process for the labour supply arrangements for tug boat crews at Hay Point in Queensland.

Specific Labour Hire Arrangements

AIMPE members have traditionally been engaged through direct employment in the various sectors of the Queensland maritime industry. This sector encompasses:

- Harbour towage in 13 ports (including emergency response)
- Marine Tourism
- Border protection
- Marine Research and Heritage protection
- Near coastal shipping (including cargo and barge services to islands and remote communities)
- Inner harbour contracting and construction
- Dredging
- Coastal shipping

Employment in the Queensland sector has in large survived casualisation through long term direct employment with the shipowner/charterer or long term secure employment via ship management and manning agencies (for example, ASP Ship Management manage and crew four out of five Rio Tinto vessels on the Weipa to Gladstone coastal shipping task).

Despite this, recent tenders and labour supply contract arrangements in West Australian ports signal a move away from traditional engagement in the harbour towage sector via the vehicle of only engaging partnerships to run vessels.

Specifically the trend in the harbour towage sector has been the use of the exclusive and non-exclusive licences in tenders to either:

- i. Reduce or ratchet down conditions of employment in the sector; and/or
- ii. Encourage the avoidance of industrial regulation, taxation, safety and maritime laws through the vehicles of contracting to sham partnerships.

These will be addressed separately in this submission, however, it is relevant to make the Committee aware that:

- The use or abuse of the port licensing system has gradually gained momentum since the ports of Gladstone and Townsville were granted exclusive licenses over a decade ago AND
- The use of sham partnerships have existed in Queensland in the Far North Queensland/Torres Strait Island trades, marine research, Island barge services and Brisbane River extraction industries for some time.

The link between the two issues is that recent tenders for the task in Gorgon, Port Hedland and the Prelude Field is for the tender to be won by a principal (such as Riverside Marine subsidiary Rivtow ACN 601 268 115) which in turn subcontracts to partnerships as the only means of crewing the vessels to carry out the harbour towage task.

Assets in the primary delivery of the contract obligation, (i.e. vessels), are not required to be supplied by the contractor or sub-contract partnerships – vessels are supplied by the principal.

The purpose is to undercut established operators on labour cost and avoid various entitlements, protections and rights conferred under the Queensland Industrial Relations Act 1999 and the Fair Work Act (2009) with the additional avoidance of payroll tax, workers compensation, long service leave, National Employment Standards (including annual leave, personal and carers leave), liabilities and safety laws (both workplace and maritime).

Maritime Industry Employment Conditions:

Employment conditions vary in the maritime industry according to the sector.

Except for local operations in tourism and ferry services, industry conditions under enterprise agreements are dominated by:

- 24 hour/ 7 day operations which require workers to undertake regular 12 hour shifts;
- Fixed salaries that aggregate all predictable overtime, penalties and allowances based on periods of duty and leave;
- Salaries vary on the sector within the industry except for harbour towage;
- Leave ratio of between 0.953 and 1:1 for each day worked that factor in shift leave entitlements, weekends, public holidays, allowance for a 35 hour week and bargained efficiencies/trade offs.
- Harbour towage salaries have historical relevance to a port and utilisation of crews resulting in each port having different salaries, rosters, hours of work and predictable leave periods.

The national system Awards do not account for bargained arrangements which dominate the harbour towage sector.

Labour Hire Sham Partnerships

It is AIMPE's view that the sole reason for the existence of the "partnership" in the maritime industry (in particular the harbour towage sector) is the primary purpose of crewing a vessel.

There is no extraordinary or significant capital burden, expense or investment by the partners in the provision of the service – that is no assets, vessels are the primary means of performing the service which are provided by the principal contractor and the partners' only responsibility is the provision of labour.

The Principal controls what service is provided, when it is provided and screens new members of the crew partnership. The freedom of choice to service or venture with other principals is not available to the partners under the exclusive tenders.

The partnerships have little or no control over any aspect of the running of the operation – despite a liability for fines for a failure to provide the service as required by the principal.

It is the AIMPE's view the crew partnerships are a sham labour hire arrangement to avoid any industrial entitlement, protection or right as well as the taxation, superannuation and safety liabilities.

Extent of Partnerships and Emergent Issues

Known companies that promote partnerships and the relevant operations in Queensland are as follows:

- Riverside Marine: A Brisbane river company established in 1920s has engaged partnership crews on the sand barges from Stradbroke Island, to crew bunker fuel vessels, light purpose dredges, work boats, ferries/barges and tugs. Riverside also contract to the Australian Institute of Marine Science for crews.
- Sea Swift ceased the use of partnerships following major incidents (including a fatality) on vessels in its FNQ operations.

Recent substitution of employee crews to partnership crews outside of Queensland include:

- At BHP Port Hedland approximately 220 employee tug crew members were substituted with partnership crews. No assets are supplied by the partnerships and the contracts are for labour supply. The principal Contractor to BHP is Riverside Marine's subsidiary Rivtow that subcontracts to the partnerships for labour supply. BHP supply the tugs. Year 2015.
- At greenfields LNG operation in Gorgon, 8 tug crews (32 members) were engaged as labour supply partnerships in substitute of employee crews. Svitzer is the contractor and supplier of the tugs. Year 2015.
- Prelude field – the principal has engaged KT Marine Services to establish partnership crews for the LNG “inner field” towage service for the floating LNG facility. Vessels are supplied by Prelude. Number of crew approximately 48. Tenders sought for partnerships in 2015.

Whilst the latest arrangements for partnerships are not within Queensland, there is concern that the recent activity in significant operations may extend to Queensland port operations.

Extent of Tenders and Emergent Issues

The primary vehicle for the changes from direct employment to labour hire arrangements has been via the tendering process for port services. The tender process has also been the vehicle for changes or reductions in employment conditions.

A recent tender for towage service for Hay Point is of significant concern to AIMPE due to all participants indicating a predetermined outcome of the preferred tender for Rivtow to supply labour via sham partnerships.

The following is an overview of recent port tenders for the Committee's information.

Recent Tenders:

- North Queensland Bulk Ports:

- i. Mackay: Svitzer lost contract to PB Towage (Now Smit Lamnalco). Most crew were not reemployed. Smit claim that the tender was approved on a lower cost model that does not sustain old port rosters, relief for crew absence and predictable leave. Crews received a wages pause and reductions in predictable periods free of duty by 50% and increased on call availability. This represents a reduction in conditions overall.
- ii. Weipa: Svitzer lost contract to PB Towage (Now Smit Lamnalco) Jan 2015. Supply of labour only – crews engaged as employees. This resulted in loss of employment of long serving crew members, changes to rosters and wages pause.
- iii. Townsville: In 2008 an exclusive license granted to PB Towage. Protracted negotiations settle arrangements for the port.

- Port of Bundaberg (GPCL/Queensland Sugar):

Svitzer service terminated from port following excessive service charge in August 2014. Wide Bay Shipping Services take over the harbour towage arrangement and subcontract to Brisbane based Pacific Tug P/L. Protracted negotiations on salaries and allowances has not resulted in an Agreement. Reductions in allowances proposed and crewing of the port casualised.

- Gladstone Port Corporation Limited (GPCL):

In 2010 an exclusive license is granted to a division of Smit Lamnalco (Smit Marine). Enterprise agreement negotiations protracted as the company seeks to reduce conditions.

Upcoming Tenders:

AIMPE is concerned that the tenders for towage services in the following Queensland ports will be subject to the ratchetting down of entitlements, protections and rights for crews in ports. This has occurred in the Queensland ports identified above.

AIMPE has significant concern for the recent closed BMA contract tender for labour supply of tugs crews at Hay Point. All participants and unions in the process have the genuine concern that BMA will follow the BHP Port Hedland model of seeking partnerships for Hay Point tugs.

March 2016 - Hay Point:

- Closed tender process by BHP Mitsubishi Alliance (BMA) based around the Port Hedland tenders for supply of crews only. Only a limited number of companies were invited to tender including the incumbent Teekay Shipping Australia, **Rivtow**, Daltug, Smit Lamnalco and Pacific Tug. The incumbent Company Teekay Shipping Australia, Smit and Pacific Tug have sought reductions in allowances and salaries in the order of \$50,000 and reductions in super. All companies are sceptical about the process and that Rivtow will succeed in the tender establishing partnerships for the supply of labour only at the operation.

2017

North Queensland Bulk Ports

- License for Abbott Point Coal Terminal.

2018

Gladstone Ports Corporation:

- Exclusive license tender to be sought during 2017.

North Queensland Bulk Ports/Cairns Port Corporation:

- License for Ports of Cairns, Mourylian and Lucinda to be aligned with Townsville
- License for Townsville available for tender.

Issues Paper Questions/Conclusions

The Committee's inquiry at Page 5 of the issues paper can be addressed as follows:

Does the current regulatory scheme adequately preventunder cutting of conditions by labour hire companies? If not, why, and how can this be improved?

AIMPE has outlined that there are not adequate protections to prevent undercutting by labour hire companies. Tender processes promote the lowest bid options, including moving away from employment models that retain entitlements, protections and rights as employees.

What evidence is there of undercutting of conditions by labour hire companies? How can this be prevented and addressed?

The extent of the undercutting of conditions by the labour hire model in the maritime industry has been outlined in the foregoing sections.

This can be prevented and addressed by legislating that the relevant tests be applied to ascertain the proper relationship firstly.

Secondly that tender processes include a requirement to match minimum conditions of employment (i.e. salaries, leave etc) that currently applies under the contract or for existing labour arrangements.

Do tendering practices and employment practices impact on businesses ability to adequately compete? Why? How? How can this be improved?"

Tendering practices have significant impact on whether a business can compete particularly when the tender process open to legitimising sham labour hire arrangements that do not have the same regulation. This impacts on cost structures including liabilities as indicated above.

This can simply be improved by requiring tender processes include the requirements that:

1. Arrangements are not made to avoid the employment relationship – to clarify whether direct or via a labour hire company.
2. Minimum conditions under current enterprise agreement arrangements for salary and leave, etc) on a reasonably comparable basis.
3. Where established agreement/s are in operation that the relevant bargaining representative/s covered by an agreement are included in the development of tender evaluation criteria relevant to the conditions.