LABOUR HIRE LICENSING SCHEME QUEENSLAND

CONSULTATION PAPER 2: POSSIBLE TREATMENTS TO REFINE THE SCOPE OF THE LABOUR HIRE SCHEME

Queensland Government

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Labour Hire Licensing Scheme Queensland

The *Labour Hire Licensing Act 2017 (LHL Act)* was passed by Queensland Parliament on 7 September 2017. The Queensland Labour Hire Licensing Scheme will commence on 16 April 2018.

The LHL Act establishes a mandatory labour hire licensing scheme to protect labour hire workers from exploitation and promote the integrity of the labour hire industry. The scope of the LHL Act is cast deliberately wide to cover a variety of labour hire arrangements. It covers all arrangements that are commonly understood to be labour hire services. The LHL Act provides for regulations to be made to clarify the scope of the scheme if considered necessary.

Stakeholders are invited to provide detailed feedback on the proposals addressed in this consultation paper.

Please provide written feedback that clearly indicates which parts of this paper your comments relate to and/or clearly indicate any other approaches or categories.

Submissions can be emailed to the Office of Industrial Relations at labourhirereg@oir.qld.gov.au.

Submissions will close on Friday 2 February 2018. A template has been provided to assist your comments. This can be found at: https://s3.treasury.qld.gov.au/files/Template-for-responses-consult-paper-2-FINAL.docx

All responses will be treated as confidential and will not be published.

Further information on the LHL Act, including Frequently Asked Questions, is available at https://www.treasury.qld.gov.au/fair-and-safe-work/industrial-relations/regulation-labour-hire-industry/

Please note: A separate consultation paper has been provided to discuss the development of operational regulations to accompany the scheme. This paper can be found at https://www.treasury.qld.gov.au/fair-and-safe-work/industrial-relations/regulation-labour-hire-industry/consultation-labour-hire-licensing-act

Possible limitations or clarifications

Sections 7 and 8 of the LHL Act provide definitions for the meaning of provider and labour hire services and the meaning of worker. Read together, these provisions set out the application of the legislation.

Section 7(3)(c) of the LHL Act provides that a regulation may be made to provide certainty that a person, or class of person, do not provide labour hire services 'merely because' they supply workers under prescribed arrangements. However, section 7(4) also makes clear that for a regulation to be made under this section of the LHL Act, the supply of workers must not be the dominant purpose of the business.

Section 8(2) provides that a regulation can be made to prescribe certain individuals, or a class of individuals, who are not taken to be workers for the purposes of the LHL Act.

The following proposals seek feedback on whether the supporting subordinate legislation can, or is necessary to, clarify the scope of the scheme in relation to activities which are not commonly understood to be labour hire, but which might otherwise be caught by the scheme due to the similarity of the arrangements involved.

In particular, feedback is sought on the following arrangements for regulation treatment:

1. Genuine secondments
2. Consultants
3. Where the worker is 'director' or owner of business
4. Corporate group/employing entity
5. Specific circumstances where workers are supplied to a person in a domestic setting (not to a business or undertaking).

Your feedback is also sought on any other potential treatments considered necessary or desirable. However, please note that the Queensland Parliament has endorsed a broad scheme applying to all industry sectors and occupations. Prescription by regulation is intended to help clarify scope for limited and specific arrangements not commonly understood to be labour hire.

Furthermore, if a business is prescribed out of scope under section 7(3)(c) or is out of scope to the extent that it provides a worker prescribed by regulation under 8(2), that business will be subject to the scheme to the extent that it provides labour hire services other than under the specific detail of the prescription. For example: if a labour hire provider provides another class of workers or if the provision of a worker for which they have been prescribed under 7(3)(c) becomes the dominant purpose of the business, they will still require a licence.

The LHL Act's avoidance arrangement offences could also apply if a business that is in fact providing labour hire services under arrangements which would be in scope but disguising these arrangements as arrangements which are prescribed by regulation.

The following arrangements are not considered to fall within the scope of the scheme. Some of these have already been clarified in extrinsic material accompanying the LHL Act. These include:

- temporary transfer of apprentices;
- volunteer work; and
- student/education internship.

1: Secondments

Genuine professional secondments either within corporate groups or external entities have been raised by stakeholders as arrangements which may fall within the scope of this scheme as defined by sections 7 and 8 of the LHL Act but are not what is commonly understood to be labour hire arrangements.

It is proposed that genuine secondments are not intended to be captured by the scheme. These arrangements may not need regulation treatment for clarification. For example, a published policy (based on the definition of a worker) may be able to clarify that genuine secondments are not intended to be within scope.

If more certainty is desired, clarification could alternatively be achieved through the regulations. A risk in doing so arises in clearly defining genuine secondments in a way that clarifies those arrangements but does not give rise to the possibility of limiting the reach of the scheme to arrangements which are in fact labour hire.

A possible treatment is using the regulation making power at section 8(2). The effect of the regulation would be to prescribe that a worker on a genuine secondment to an associated entity and a worker on a genuine secondment for professional services are classes of individuals who are not workers for the purposes of this scheme.

Please provide feedback on:

- If it is appropriate that genuine secondments are considered arrangements that are not intended to be captured by the scheme?
- If the proposed policy treatment is effective in clarifying the scope of the scheme in respect of genuine secondments?
- If the alternative regulation treatment is necessary and, if so, effective in clarifying the scope of the scheme in respect of genuine secondments?
- If there are possible unintended consequences of this treatment?
- Could any unintended consequences be overcome through a different treatment?

2: Consultants

Some stakeholders have raised concerns that consultants are incidentally captured by the scope of the scheme. In particular, it has been argued that the supply of workers by their business to provide professional consulting services to third parties is not a labour hire arrangement. For example, an expert consultant who from time to time goes into another business to review internal processes and provide specialist advice. It has been suggested that regulations could be used to clarify that these arrangements are not intended to be captured by the scheme.

Stakeholders have also queried if a labour hire arrangement exists where a consultant engages another person to assist them in completing the service. For example, a consultant could engage another person to prepare a technical or statistical report.

It is considered that the type of consultancy arrangement described above is not what would be commonly considered to be a worker for a labour hire provider. However, there are consultancy arrangements, even for professional services, which could be labour hire for the purposes of the scheme. For example, where a team of 'consultants' are placed in another organisation to complete work which is core work of the other organisation. Therefore, a risk to be managed lies again in clearly defining the consultancy arrangements in a way that clarifies those arrangements but does not give rise to the possibility of limiting the reach of the scheme to arrangements which are in fact labour hire.

A treatment may be possible using the regulation making power under subsection 7(3)(c). The proposed effect of the regulation would be to prescribe consultants as a class of person who do not provide labour hire services. The rationale behind this treatment is that in these types of arrangement, the dominant purpose is not the supply of workers but the provision of a consultancy service to a third party, most commonly for expert professional advice.

Please provide feedback on:

- If it is appropriate that consultants/consultancy arrangements are considered arrangements that are not intended to be captured by the scheme?
- If the proposed treatment is effective in clarifying the scope of the scheme in respect of consultants?
- If there are any unintended consequences of this proposed treatment?
- Could any unintended consequences be overcome through a different treatment?

3: Worker is 'director' or 'owner' of business

Some stakeholders have provided examples of arrangements in which an owner of a business also 'hires' themselves out. The most common example of this type of practice is where a medical practitioner sets up a business entity and is both the director of that business and the sole employee. It is proposed that this type of arrangement is not intended to be captured by the scheme.

A treatment may be possible using the regulation making power under section 8(2). The effect of the regulation would be to prescribe that in such instances as described above that a 'director' or 'owner' of a business is not considered a worker for the purpose of the labour hire scheme. This would apply in very limited instances where the director/owner is the only person being supplied and only when the person has control over that business.

A risk in this proposed treatment arises in clearly defining and limiting the prescribed arrangements to specific examples (such as the medical practitioner example given above) and ensuring that the treatment does not give rise to the possibility of limiting the reach of the scheme to arrangements which are in fact labour hire.

Please provide feedback on:

- If it is appropriate that a 'director' or 'owner' of a business who hires themselves out are considered as a class of individual who are not considered a worker for the purposes of the scheme?
- If the proposed treatment is effective in clarifying the scope of the scheme in respect of these arrangements?
- If there are any unintended consequences of this proposed approach?
- If there are any alternate means to achieving this effect?

4: Corporate group/employing entity

Stakeholders have provided examples of where companies employ their employees through a single entity and then have those employees work for multiple group entities. For example, shared payroll arrangements within corporate groups. It has been argued that many of these arrangements are not what is commonly understood to be labour hire and therefore not what is intended to be captured under the scheme.

However, stakeholders have also provided examples where corporate groups sets up a similar internal employing entity structure which operates as an internal labour hire provider and may even be contracted out to an external labour hire company to run. These arrangements are clearly labour hire and intended to be captured by the scheme.

Because of this complex matrix of corporate group and employing entity arrangements, some of which are used to provide labour hire services, a specific regulatory carve out for corporate groups and employing entity is considered particularly problematic.

There is a need to both ensure that there is a consistent application in the scope of the scheme but also that arrangements which genuinely are not labour hire are not caught.

To deal with these arrangements which are not what is commonly understood to be labour hire (for example when only for ease of payroll processing or book keeping) alternative ways to effectively address these arrangements outside of regulations are being canvassed.

One suggestion is that corporate groups or associated entities/participants/joint ventures who believe that their corporate arrangements are not what is commonly understood to be labour hire should be able to apply to the Chief Executive for a published policy ruling/determination that their arrangements are not within the scope of the legislation. The onus would be on the applicant to establish and provide relevant information. Critically, the application would need to provide evidence that the arrangement is not labour hire. As such, the treatment merely provides an avenue for corporate groups to clarify if their business practices constitute labour hire arrangements. Some regulatory treatment is likely to be needed to support this approach.

Please provide feedback on:

- If the proposed treatment is effective for dealing with common corporate group/associated entity arrangements such as shared payroll which are not labour hire?

- If there are any unintended consequences of this treatment?
- If there are any alternate means to achieving this?

5: Where workers are supplied to a person in a domestic setting (not to a business or undertaking)

Stakeholders have queried whether common arrangements where workers are supplied in a domestic setting (for example as cleaners, gardeners, nannies and carers) are labour hire for the purposes of the scheme.

Victoria and South Australia in their recent Labour Hire Licensing Bill and Act respectively limit their definition of a provider of labour hire services to where the worker is supplied to do work in and as part of a business or commercial undertaking of the other person.

The definition at section 7 of the Queensland LHL Act does not restrict the application of the Act to where workers are supplied to a business. The LHL Act includes at section 7(3)(b) a provision which provides that a person who engages subcontractors to carry out construction work as defined in the section and within the meaning of the *Building and Construction Industry Payments Act 2004* is not a labour hire provider 'merely because' of those arrangements. At the introduction of the Labour Hire Licensing Bill 2017 the Minister for Employment and Industrial Relations noted that the scheme does not, "intend to cover genuine subcontracting where, for example, a builder subcontracts a plumber to do the plumbing work on a small construction site".[1]

It is also considered that many common arrangements, particularly where a worker is employed by a business and supplied to carry out an ad hoc service in a domestic setting, is not what is commonly understood to be labour hire. For example, where a plumber employed by a plumbing company is supplied to a domestic residence to fix or install plumbing, or where a gardener employed by a landscaping company is supplied to do some tidy up work. The impact of the National Disability Insurance Scheme (NDIS) for home disability and aged care arrangements under which workers may be supplied are also of interest as some of these arrangements may not be what is commonly understood to be labour hire.

There are however other arrangements involving workers being supplied into domestic settings, including through intermediaries, which appear to be labour hire. Cleaners and nannies or au pairs are often supplied to domestic customers through businesses which appear to be what is commonly understood to be labour hire businesses. There are also particular risks around exploitation and mistreatment for workers supplied in domestic settings and these workers are often vulnerable and low paid workers.

A policy may help clarify which services delivered in a domestic setting are not labour hire under the scheme. However, regulation treatment may also be appropriate to provide clarity and is being considered for where workers are supplied to persons who are not a business or

[1] Minister for Employment and Industrial Relations Introductory Speech, Labour Hire Licensing Bill 2017 http://www.parliament.qld.gov.au/documents/tableOffice/BillMaterial/170525/LabourHire.pdf

undertaking, to deal with limited circumstances where workers are supplied to perform work or provide a service in private domestic settings. Those limited circumstances may be in relation to specified ad hoc services, certain arrangements for workers supplied through the NDIS or government funded aged care programs and possibly where the worker is an employee. This could be dealt with via the section 7(3)(c) regulation treatment or section 8(2) treatment.

Please provide feedback on:

- If it is appropriate that the supply of specific instances of workers to persons who are not a business or undertaking (domestic setting) be considered as arrangements that are not labour hire and not intended to be captured by the scheme? And if so, what the specific instances should be and under what conditions?
- If the proposed regulation treatment is necessary and effective in clarifying the scope of the scheme in respect of these arrangements?
- If there are any unintended consequences of considering this treatment?
- If there are any alternate means to achieving this?

Other scope considerations

Your feedback is welcome on any other arrangements that would not be commonly understood as providing labour hire services. Please provide any details of arrangements you propose as being appropriate for possible regulation or policy treatment which would help clarify the scope of the scheme. In your comments, please consider any unintended consequences or different ways to treat the proposed group, again, where the arrangements are not what is commonly understood to be labour hire. Once again, please note the clear policy intention for a broad scheme to apply to all industry sectors and occupations.