



Labour Hire Regulation
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Regulation of the Labour Hire Industry 2016: Issues Paper

Thank you for allowing the opportunity to comment upon the **Regulation of the Labour Hire Industry 2016 Issues Paper**. The paper canvasses important issues. Introducing mechanisms to enhance labour hire operators' compliance with legal obligations will facilitate a level playing field amongst employers whilst improving employment outcomes for labour hire employees.

My comments to some of the questions are provided in the attached document.

Yours sincerely

A handwritten signature in black ink, appearing to read "E. Underhill".

Dr. Elsa Underhill

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Question 2: What criteria do you consider appropriate to include in a ‘fit and proper person’ test or otherwise to obtain a licence to operate as a labour hire provider?

The issues paper lists a range of legal obligations that could comprise the ‘fit and proper person’ test to be applied to labour hire licensees. As providers of labour, it is only reasonable that each of the listed obligations of employers towards employees be met, as a condition of holding a license. It is also reasonable to ensure those involved in phoenix companies are prevented from continuing such activities through the imposition of minimum licensing standards. Finally, the mounting evidence of criminal activities linked to labour hire operations in Australia¹ and overseas supports the inclusion of compliance with the *Criminal Code Act 1889*. The Gangmasters Licensing Authority (GLA) submission to the Victorian Inquiry into the Labour hire Industry and Insecure Work is instructive. They note that:

“The GLA has experience of dealing with “start-up” companies, run by individuals with no real knowledge of providing temporary labour, who have all been identified as “fronts” for an individual whose license was revoked. Where a company or individual changes its legal status it must apply for a new licence in that legal status... where such changes occur it is essential that we review whether the old company is significantly in tax debt, and whether the change of status is an attempt to evade those responsibilities. Where this is confirmed a new license may be refused.”

A similar check, for example, could be applied to ensure the 'old' company does not have outstanding wage debts, non-payments of superannuation and that the directors are not been declared bankrupt.

The GLA also notes:

“...there has been a change in the nature of non-compliance with labour market regulation over the last ten years, with a shift from abuses of employment regulation towards increasingly organised criminal activity engaged in labour exploitation. Feedback from enforcement officers suggests that serious and organised crime gangs are infiltrating legitimate labour supply chains across a number of sectors, and that the incidence of forced labour may be growing at a faster rate than other forms of exploitation... the GLA believes that the ability to effectively tackle labour exploitation across any industry where it arises requires an effective combination of civil and criminal investigative powers and sanctions...”

A ‘fit and proper person test’ which is conditional upon ongoing compliance with civil and criminal obligations is necessary.

¹ For example, see Salvation Army *Submission to the Inquiry into Corporate Avoidance of the Fair Work Act, November 2016*

Question 4: What do you consider to be an appropriate amount for the threshold capital requirement and how should it be calculated?

Labour hire operations typically do not require substantial capital, or fixed assets, to establish and begin operations. Indeed, that is one of the reasons why the industry is attractive to small, as well as fly-by-night operators. As such, the calculation of a threshold capital requirement that includes the value of fixed assets such as buildings, plant and machinery appears inappropriate, at least for smaller operators. A threshold capital requirement will need instead to place greater weight on more liquid assets – such as cash, term deposits, investments in shares and the like. The amount should not preclude genuine ‘niche’ small operators from operating. For larger operations, threshold capital should extend to include fixed assets. A reasonable amount may be sufficient to cover three months wages of the organisation’s typical workforce – or the equivalent of 25% of their annual turnover.

Question 5: How should a bond for a labour hire operator be calculated and what would be an appropriate amount for the bond?

The payment of a bond is essential to deter ‘fly-by-night’ operators whilst also ensuring funds are available to pay outstanding wages and employee entitlements should the operations go into administration. The approach taken by the Singaporean government, of increasing or decreasing the amount of bond payment dependent upon past performance provides a positive incentive to organisations to comply with licensing requirements, whilst penalising those who breach requirements. Based on the Singaporean experience (with a similar cost of living as Australia), a starting bond of A\$50,000 appears reasonable.

Question 6: What types of information do you think would be appropriate to be reported regularly by labour hire providers to demonstrate their compliance with their obligations?

Labour hire providers should be required to report financial statements on a 6-monthly basis to a compliance unit. These statements will be completed as part of their normal business operations, and should not therefore impose an additional burden on the organisation. These statements will enable the compliance agency to check that capital threshold requirements continue to be maintained.

The type of additional information required to be reported regularly by labour hire providers, to demonstrate compliance with their obligations, should not be onerous but should be selected according to their end purpose. For example, for the purposes of improving and maintaining health and safety standards, providers could be required to identify the industries and occupations into which their workers are placed (including estimated numbers), their lost time injury rate, and the extent to which their workforce has received OHS training. This information could then guide Workplace Health and Safety Queensland in developing OHS priority practices, and in communicating industry/occupation specific information to the providers.

Labour hire providers should also be required to report on major changes to business structures, and changes in ownership/control when they occur. The latter should, in any case, require a re-appraisal of the application of the ‘fit and proper test’ to new owners and/or business partners (refer comments above from GLA).

The strongest demonstration that labour hire providers are complying with their obligations, however, is through an inspection process which requires labour hire providers to maintain and make available employment related records such as hosts with whom workers were placed, payroll slips, hourly rates of pay, hours worked, visa status, prosecutions for breaches of employment related legislation noted above under the 'fit and proper person test' and the like. Similar documentation should also be maintained and made available to inspections in relation to accommodation provided to workers.

Question 7: What additional information and training do you think labour hire workers should receive on their rights, entitlements and obligations and how should this be delivered?

A critical disadvantage facing temporary migrant workers employed by labour hire operators (such as s417 visa holders) is the absence of information available in their native language. The types of information noted in the issues paper – the Fair Work Information Statement, information on where to go for help (such as the Fair Work Ombudsman, Workplace Health and Safety Queensland, WorkCover Queensland, and the relevant trade union) – should all be provided in a language which the worker can understand. It should also be provided in electronic and paper formats, so that workers can access the information on their mobile phones. Labour hire operators employing young foreign workers on temporary visas should also be required to provide information about relevant community/ethnic groups from whom workers can seek support. Like other employers, labour hire providers should also offer appropriate health and safety training consistent with their legal obligations.

Question 9: Do you think there are circumstances where a labour hire worker should be able to pursue the host employer for their entitlements in the event the labour hire employer does not meet its obligations. Eg. if the host employer was using an unlicensed provider?

Host employers must have an obligation to use a licensed labour hire provider, but they must also not undermine the ability of the labour hire provider to meet their registration requirements by entering into a contract priced too low for the labour hire provider to meet their statutory obligations. Labour hire workers should have the right to pursue the host employer for their entitlements when:

1. The labour hire provider is unlicensed
2. The value of the contract between the host and the labour hire provider is too low to enable the labour hire provider to meet statutory obligations in relation to employee entitlements
3. When they may have a claim for unfair dismissal or adverse action because of the actions of the host.

Question 10: Do you think it would assist the workers, host employers and labour hire operators if there was access to information and referral services by way of a 'one-stop-shop'?

Easy and simple access to information about a labour hire employer is critical for labour hire workers and hosts. A 'one-stop-shop' which covers the provision of information, acts on complaints, refers issues on to other agencies and the like is the simplest way (from a user perspective) of providing that access. The list of licensed labour hire employers should be readily accessible from the same location, along with contact points for workers (such as unions) and

hosts (such as the RCSA) who have concerns about the labour hire providers with whom they are working. The department should develop a Smartphone App that workers can access, particularly those workers who are itinerant, or backpackers, and that do not have access to other online communication. As with information and training (Q7), this information point needs to provide links to the same information in multiple languages to accommodate the needs of workers without comprehensive English.

Question 11: Any other issues

For a licensing system to be effective, it is important that hosts have a legal obligation to only use labour hire providers that are licensed. This is mentioned in the discussion paper, but not in the questions upon which comment is sought. A number of international examples exist where governments have found it necessary to amend licensing arrangements to place responsibilities on host employers. Without this obligation there is insufficient incentive for hosts to use licensed labour hire providers.

The current debates surrounding licensing of labour hire providers have emerged because of the extreme worker exploitation evident in a limited range of industries, particularly those involving temporary migrant workers. It should be recalled, however, that labour hire workers in other industries remain disadvantaged relative to their direct hire counterparts. A licensing system which seeks to mitigate the negative aspects of labour hire employment (such as lower wages than comparable direct hire worker, less access to training, development and career paths, unreasonable short-term notice of rostering and the like) should be developed. Licensing should not only be a means of stabilising businesses operating in the field, but as a means of providing worker protections tailored to the characteristics of labour hire employment. Many international models exist where labour hire licensing is conditional on restricting the duration of placements, on paying wages equal to those of the host employees, on enabling access to enterprise bargaining and the like – overcoming the disadvantages inherent in the Australian model of labour hire employment.

Whilst the Queensland government is to be applauded for initiating the licensing of labour hire providers, it would be unfortunate if the licensing regime was limited to only weeding out the worst operators.