

Submission to

**Queensland Government
Office of Industrial Relations**

in response to

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

by

Anti-Discrimination Commission Queensland

2 February 2017

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Introduction

1. The Anti-Discrimination Commission Queensland (the Commission) is an independent statutory authority established under the Queensland *Anti-Discrimination Act 1991*.
2. The functions of the Commission include promoting an understanding, acceptance, and public discussion of human rights in Queensland, and dealing with complaints alleging contraventions of the *Anti-Discrimination Act 1991* and of whistle-blower reprisal. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal for hearing and determination, or, for work-related complaints, to the Queensland Industrial Relations Commission from 1 March 2017.
3. The Commission has been dealing with complaints of discrimination and sexual harassment for twenty-five years. Our work also includes engaging with stakeholder groups, providing training, and receiving feedback on human rights issues, such as discrimination in workplaces and applying for work.
4. This submission is based on our experiences and knowledge acquired in carrying out our functions, and focuses on allegations of exploitation, harassment, and other mistreatment of workers employed by contractors, particularly in the horticultural industries of Queensland.
5. Since 2013, the Commission has worked intensively in the Lockyer Valley region in a Community Engagement Strategy. The Commission's aim is to facilitate relationship-building, and to empower the community to act together to address local human rights issues. Lockyer Valley community members have often raised concerns with Commission officers about poor working and living conditions for seasonal farmworkers, including specific issues that could constitute unlawful discrimination and sexual harassment. Often, these concerns have been associated with unscrupulous labour hire contractors who employ working holiday visa holders (417 visas), refugees, and other temporary visa holders.
6. Working holiday (417) visa holders have a right to extend their visas by an extra year, providing they work for 88 days during the first year doing regional work, usually in agriculture. These visa holders are mainly young people under the age of 30. Most are from the UK, Korea, Ireland, Taiwan, and France.
7. Sometimes, people who have overstayed their visas, or who are working in breach of their visas, are employed in horticultural industries. These workers are often referred to as 'undocumented workers'.
8. Many of these people are very susceptible to exploitation. Young people who are away from their usual support networks, and who are unfamiliar with local laws and labour rules, and who are wishing to extend their visa, are vulnerable to exploitation by unscrupulous individuals. People who are working in breach of their visas (undocumented workers) are also highly unlikely to complain about their working conditions. Many are unaware of Australia's labour, workplace health and safety and other laws, and are not familiar with what constitutes a law-abiding employer and workplace under Australian or Queensland laws.

9. The Commission has been invited to make a submission on the Issues Paper prepared by the Office of Industrial Relations (the OIR).¹ The Paper outlines some of the Government's concerns arising from the report of the Queensland Parliamentary Finance and Administration Committee into the practice of the labour hire industry in Queensland, released on 30 June 2016.²
10. The Commission will not provide comment on questions 3, 4, or 5 of the Issues Paper.

Question 1

What do you think are the important features of a system to effectively regulate the labour hire industry in Queensland?

11. The Commission submits that the United Kingdom's *Gangmasters (Licensing) Act 2004* licencing model (UK GLA licencing model) provides the best protection for workers, and this is the model that ought to be the benchmark in Queensland (and in Australia, if a national scheme is adopted).
12. A scheme to effectively regulate the labour hire industry in Queensland should, as a bare minimum, include the elements recommended by the Victorian Inquiry in its final report delivered to the Victorian Government in October 2016,³ many of whose recommendations appear to be based on the UK *Gangmasters (Licencing) Act 2004*. Their recommendation was that the scheme would initially target the horticultural, meat, and cleaning industries, but could be increased in scope over time.
13. Under the UK GLA licencing model, operating as a labour hire provider without a license is a criminal offence, with a maximum penalty of 10 years in prison and/or a fine. It is also illegal to enter into arrangements with an unlicensed labour hire provider. This carries a maximum sentence of 6 months in prison and/or a fine.
14. As outlined in the Office of Industrial Relations' Issues Paper, the scheme would impose an obligation on licence applicants to provide a statutory declaration and information demonstrating their compliance with the following criteria:
 - 'fit and proper person' including no past convictions for offences involving fraud, dishonesty or violence, and no past involvement in insolvent businesses or breaches of workplace or occupational health and safety laws;
 - the business must demonstrate that it pays its employees in accordance with the minimum rates, and affords its employees all other employment conditions;
 - the business must be registered with the ATO and complying with taxation laws;
 - if accommodation is provided, that the accommodation meets the standards required under law;

¹ Queensland Office of Industrial Relations, *Regulation of the Labour Hire Industry 2016*, Issues Paper (2016).

² Finance and Administration Committee, Queensland Parliament, *Inquiry into the practices of the labour hire industry in Queensland*, Report No. 25, 55th Parliament, (2016).

³ Victorian Inquiry into the Labour Hire Industry and Insecure Work 2016, *Final report* (2016).

- the business is registered with WorkSafe and pays required premiums;
- the business details its systems for ensuring compliance with occupational health and safety legislation;
- the business demonstrates compliance with federal migration laws;
- payment of a licensing fee and annual fee for renewal;
- hosts be subject to legal obligations to use a licensed labour hire provider;
- public register of all licensed labour hire operators, operated by the licensing authority;
- civil liability provisions for unlicensed labour hire providers and host organisations using services;
- businesses must not coerce worker's freedom of movement (for example, retention of migration papers or refusal to sign off on the 88-day requirement for obtaining a second year working holiday visa);
- the business must not sub-contract the provision of workers through a non- licensed operator;
- the business must not provide false or misleading information to the licensing authority.

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?

15. In the United Kingdom under the *Gangmasters (Licensing) Act* licencing model, the following factors are considered:

'Whether the Principal Authority, directors or company officers (where the licence holder is a company), partners (where the licence holder is a partnership), members of the association (where the licence holder is an unincorporated association) and any person named or otherwise specified in the licence has:

- intentionally obstructed the Gangmasters Licencing Authority (GLA). This includes preventing an inspection being conducted without reasonable cause,
- been convicted of any unspent criminal convictions. Particular consideration will be given to offences of dishonesty, fraud, violence, forced labour, human trafficking, carrying offensive weapons, fire arms offences, intimidation, blackmail or harassment,
- contravened any of the requirements and standards of other regulatory authorities, including relevant government departments, the Border Agency, Police, local authorities or overseas authorities,

- been an owner, director or partner, or has been concerned in the ownership or management of a business that has gone into insolvency, liquidation or administration whilst the person has been connected with that organisation,
 - been investigated, disciplined, censured or criticised by a regulatory or professional body, court or tribunal, whether publicly or privately in matters relating to any business with which they have been involved,
 - been dismissed from, or asked to resign and resigned from, employment or from a position of trust, fiduciary appointment or similar,
 - been disqualified from acting as a director or disqualified from acting in any managerial capacity,
 - not been candid and truthful in all their dealings with any regulatory body and they have not demonstrated a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards. This includes deliberately under declaring turnover, or
 - been influenced by a third party who the GLA considers not fit and proper.⁴
16. The GLA treats each case individually, taking account of the seriousness of, and circumstances surrounding, the matter in question. The GLA will consider the explanation offered by the person to whom it relates, the relevance of any conviction, rehabilitation, and evidence that the matter will not reoccur. Failure against the standard may lead to a licence being revoked with immediate effect.
17. The Commission agrees with the OIR suggestion that in applying the 'fit and proper person' test, licencing should also be conditional upon ongoing compliance with the *Anti-Discrimination Act 1991*.

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?

18. The Commission submits that the UK GLA licensing model is the most comprehensive in terms of protecting the rights and safety of workers, not only during work, but on their way to work and at home, if accommodation and transport are provided by the labour hire provider.
19. Labour hire providers should provide information on:
- current business address, or current place of residence if no business address;
 - name of provider/s as indicated on official documents such as passport;

⁴ Gangmasters Licencing Authority, *Licensing Standards*, (2012, reprinted July 2015)
<<http://www.gla.gov.uk/media/2743/licensing-standards-may-2012-reprinted-july-2015.pdf>>.

- any convictions or criminal history involving fraud, dishonesty, violence etc;
 - currency of ABN registration and compliance with taxation laws;
 - compliance with industrial relations laws including: appropriate contractual arrangements with workers; relevant awards, and provision of appropriate payslips; occupational health and safety laws; and workers' compensation laws;
 - appropriate systems for recording information in regards to workers' pay and other entitlements, and the reporting of workplace health and safety or other incidents;
 - adequate policies and procedures relating to workplace health and safety, discrimination and sexual harassment, and industrial relations regulations;
 - what information and training is provided to workers on workers' rights and entitlements, workplace health and safety, discrimination and sexual harassment, appropriate channels for assistance, and how and when that information and training is provided;
 - whether the provider is also providing services to workers other than the procurement of work, such as accommodation or transport, and what contractual arrangements exist in this regard;
 - details of any other services provided to workers, such as accommodation or transport, including proof of appropriate licenses/approvals for any services, premises or equipment used or accessed by workers.
20. In the UK, prior to being issued a license, all new applicants for a license are inspected by a GLA officer to make sure they meet the licensing standards. License holders may also have a compliance inspection as part of a random check, or following a risk assessment.
21. The GLA investigates any circumstances where there is a risk of worker exploitation, or other illegal activity, by gathering intelligence, conducting unannounced inspections, and working with other government departments and enforcement agencies.
22. All decisions are evidence-based, so labour hire providers may be asked to give details of any current contracts with labour users. Their premises may also be inspected and the officer may interview several of the workers. The labour hire provider may be required to provide documentary evidence (such as wage books or workers' terms and conditions) to demonstrate they meet the standards.
23. Following the inspection, the GLA decides whether further inspections or investigations are necessary. They review the inspection report, along with information from government departments and agencies, to check the business meets the licensing standards. Each of the standards has a number of points attached to it. The points of any standards that have not been met are added together. If the labour hire provider's score is less than 30, they will pass the inspection, but may have Additional Licence Conditions (ALCs) added to their licence. These conditions are the areas that need to be corrected within an agreed time.

24. If a licence holder fails a critical standard during a compliance inspection, their licence may be revoked. Depending on the standard failed, this may be with immediate effect, and the business must stop operating in the regulated sectors.
25. Ideally, an inspection process should also be part of the procedure of obtaining and retaining a licence in Queensland. The Commission is aware of, and appreciates the different roles various agencies (for example, Fair Work and Workplace Health and Safety Queensland) have in ensuring compliance with a number of laws, and recognises that any process would need alignment between agencies to ensure there is no confusing or unnecessary duplication of roles and responsibilities.
26. Under the UK GLA licensing model, labour hire providers are required to renew their licenses annually, and are required to update the information they provided when they obtained their license. This should be the case under the Queensland scheme.

Question 7

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

27. As outlined in the OIR Issues Paper, lack of employee awareness of workplace rights and entitlements was common in a number of instances of exploitation uncovered in the labour hire industry. The Issues Paper suggests the types of basic information that should be provided to workers, including information on where to go for help when a breach of these obligations is suspected.⁵
28. Relevant information ought to be readily accessible to labour hire firms/providers so that they can provide this information to their workers, and to ensure labour hire firms themselves are fully aware of their legal obligations. Such information should include:
 - relevant legislation and regulations that labour hire firms/providers need to comply with in regards to workers' rights and responsibilities, lawful payment of wages, workplace health and safety, discrimination and sexual harassment, taxation and immigration, and visa requirements;
 - their obligation to provide appropriate induction training and information to workers, including on workplace health and safety, workers' rights and entitlements, discrimination and sexual harassment, and appropriate channels for assistance.
29. The Queensland Government Business and Industry Portal provides information for people seeking to establish a business in Queensland.⁶ If a licencing scheme is established for labour hire companies in Queensland, a link to this information ought to be part of the information provided to people seeking a licence. Additional information should also be provided about all relevant legislation and regulations that labour hire

⁵ Queensland Office of Industrial Relations, above n 1, 35.

⁶ Queensland Government, *Legal obligations for business* (14 December 2016) Business Queensland <<https://www.business.qld.gov.au/business/starting/legal-obligations/meeting-legal-obligations>>.

firms/providers need to comply with concerning the appropriate and lawful provision of services, including accommodation and transport.

Question 8

What information do you consider appropriate to be included in labour hire contracts to ensure that workplace regulations are met?

The Commission agrees with suggestion outlined in the OIR Issues Paper that:

‘... to ensure existing obligations for the payment of wages and other entitlements are protected that there be a further requirement for labour hire contracts used by registered labour hire employers to provide contractual obligations for:

- the payment of wages and conditions in accordance with the requirements of employment laws;
- where an employee is unable to seek recovery of unpaid wages from the labour hire employer due to administration, liquidation or an inability to locate the labour hire employer, the employee may recover unpaid wages from the host; and
- the employee can sue upon the terms of the contract.’

30. Information that should be included in labour hire contracts should cover:

- the type of work that the labour hire provider will offer the worker;
- accurate details of wages, whether those wages will be calculated on an hourly basis or by ‘piece work’, and how those calculations will be made;
- how, and at what intervals, wages will be paid;
- minimum amount of hours/work to be offered per week;
- the length of notice the worker is required to give and entitled to receive;
- any conditions attached to the provision of hours of work, or the signing of documentation required by the worker, such as visa extension forms;
- the worker’s freedom to choose whether to use other services provided by the labour hire provider, such as accommodation and transport;
- accurate details of any costs related to any services provided as part of the contractual arrangement, such as accommodation or transport, including any deposits or bond monies required and how they will be reimbursed;
- where to find information about workplace health and safety, workers’ rights and entitlements, discrimination and sexual harassment, and appropriate channels for assistance.

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 e.g., if the host employer was using an unlicensed provider?

31. Between 2013 and 2016, the Commission worked intensively on the Lockyer Valley Community Engagement Strategy. In many conversations with community stakeholders and at forums and workshops, issues were raised time and time again of non-payment or underpayment of wages for farmworkers, and non-compliance with workplace health and safety regulations by unscrupulous labour hire providers.
32. The Commission has also worked closely with the Fair Work Ombudsman to educate the Lockyer Valley community and farmworkers about the obligations of host employers to provide safe workplaces, and to ensure workers are paid in accordance with relevant industrial relations awards, even if those workers are hired by a labour hire provider.
33. Therefore, any labour hire provider licensing scheme should provide:
 - an avenue for workers to recoup wages owed from the host employer in the event that the labour hire provider does not pay them in accordance with relevant industrial relations awards;
 - an obligation on host employers to ensure that any labour hire provider they use is complying with, and training workers on workplace health and safety requirements;
 - an obligation on host employers to only use appropriately licensed labour hire providers, and penalties for those who use unlicensed our hire providers;
 - obligations on host employers to ensure all workers have the appropriate visas to allow them to work in Australia.

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'?

34. Through the Commission's work in the Lockyer Valley and two forums hosted by the Commission on the issue of exploitation of non-resident farmworkers, it has become clear that most of these workers are unaware of Australia's labour, workplace health and safety and other relevant laws, and are extremely vulnerable to exploitation for this and other reasons.
35. There is also significant anecdotal evidence that such workers are posting stories on social media and websites of the poor treatment they are experiencing at the hands of unscrupulous labour hire providers, thereby damaging Australia's international reputation as a safe and friendly place to visit and work.
36. For these reasons, the Commission believes it is critical that such workers are provided with important information about Australia's labour, workplace health and safety, and other relevant laws by entities other than their labour hire provider. This information needs to be provided, either in their own language or in easy English, at critical points of

their interaction with the Department of Border Protection and during their stay in Australia, and through multiple locations and mediums, as well as on appropriate social media and websites, depending on their country of origin.

37. The Commission believes that this can only be achieved through a comprehensive and ongoing communication strategy coordinated by one state government agency tasked with the responsibility. If this communication strategy were to include a one-stop-shop, it should have capacity to link in to the critical points of interaction and multiple mediums and locations as described above.

Question 11

Are there any other issues you would like to raise that are relevant to the Queensland Government's consideration of the labour hire industry and ways to ensure that it operates ethically and meets its legal obligations for workers and the businesses it serves?

38. As already discussed, over a number of years the Commission has been receiving and collecting information about, and anecdotal evidence of, exploitation of farmworkers in the Lockyer Valley and other harvest trail regions in Queensland.
39. A major concern, as perceived by the ADCQ and many community stakeholders, is that labour hire providers exert considerable control over vulnerable non-resident workers by:
- imposing conditions on the provision of work or payment of wages, such as the obligation to use and pay for the labour hire provider's accommodation or transport services, and threatening to withhold work or wages if workers don't comply with these conditions;
 - requesting or demanding sexual favours in return for work, wages, or signing of visa extension forms, often facilitated by easy access to workers in accommodation provided by labour hire providers (The Commission has received multiple reports of sexual assault or rape by labour hire providers occurring in labour hire provider accommodation.);
 - threats of eviction (and eviction with no notice) from accommodation, if workers find employment elsewhere to augment insufficient employment provided by the labour hire provider;
 - withholding of identity documents, such as passports.
40. For these reasons, the Commission submits that any labour hire provider licensing scheme should address acceptable standards, in addition to those associated directly with the provision of work. These should include standards for the provision of services, such as accommodation and transport, and the freedom for workers to choose whether to use services offered by labour hire providers, as addressed in the *UK Gangmasters Licensing Standards*, and proposed by the Victorian Inquiry report.

The Commission thanks the Office of Industrial Relations for the opportunity to provide comment on this important issue.