

Ai GROUP SUBMISSION

Regulation of the Labour Hire Industry 2016

Queensland Government Issues Paper

February 2017



About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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1. Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to respond to the Queensland Government's issues paper, *Regulation of the Labour Hire Industry 2016 (Issues Paper)*.

Ai Group is the main industry group which represents the labour hire industry in respect of industrial relations matters. Ai Group has a large number of labour hire companies as members – small and large. We have represented the industry in numerous Federal and State Industrial Commission cases, inquiries and other forums over many years.

Ai Group also has a large membership in industries which use labour hire and it is important that the interests of both labour hire companies and users of labour hire are kept foremost in mind when considering further regulation of the labour hire industry in Queensland. The interests of both groups, as well as the interests of the broader community, are best protected by ensuring that a competitive market is maintained for the provision of labour hire services, and that impediments to competition are removed.

Ai Group opposes unlawful labour hire practices. In Ai Group's experience, however, the vast majority of labour hire companies are reputable in their employment practices and comply with relevant laws and regulations.

Many established labour hire companies have developed progressive and sophisticated employment practices, and often provide superior wages and conditions. Labour hire companies are subject to the same industrial instruments and employment obligations as other employers.

Ai Group provided a detailed submission to the Queensland Parliamentary Finance and Administration Committee Inquiry (**FAC Inquiry**) into the practices of the labour hire industry in Queensland in 2016. In that submission we expressed the following views:

- It is vital that a flexible labour market is maintained in Australia, including the flexibility for employers to employ and engage the types of labour that they need.
- The use of labour hire is an established and essential mechanism to address economic and business challenges faced by employers.
- Labour hire employees enjoy the same level of award and legislative protection as other employees. Modern awards and the National Employment Standards (**NES**) apply equally to labour hire employees as they do to other employees.
- In Ai Group's experience, the vast majority of labour hire companies are reputable in their employment practices and comply with relevant laws and regulations. Many established labour hire companies have developed progressive and sophisticated employment practices, and often provide superior wages and conditions.
- Ai Group is not convinced of the need for a licensing system in the labour hire industry.

- Ai Group is not convinced of the need for an Employment Services Industry Code under the *Competition and Consumer Act 2010 (CC Act)*.
- Changes are needed to the *Fair Work Act 2009 (FW Act)* and to the CC Act to prevent restrictions being imposed on the engagement of labour hire and other contractors through enterprise agreements or awards.
- Ai Group strongly opposes the concept of ‘joint employment’ being established within Australian employment law.
- There have been some problematic recent Fair Work Commission (**FWC**) decisions which have applied the transfer of business provisions to labour hire ‘temp to perm’ arrangements. In Ai Group’s view, these decisions are incorrect. The uncertainty needs to be addressed through legislative changes.

The Issues Paper makes clear the Queensland Government’s intent on establishing a licensing system for the labour hire industry. This is despite the following:

- There is no evidence that the labour hire industry in general exhibits a higher incidence of non-compliance than other industry sectors;
- There is nothing inherent in the nature of the industry which makes it more likely that such a higher incidence is inevitable or more likely to emerge if not subject to special regulation;
- The Fair Work Ombudsman (**FWO**) is successfully investigating and prosecuting rogue operators in the labour hire industry (see for example, Chapter 2 of the Issues Paper);
- The FAC reached an inconclusive outcome with respect to whether a licensing system should be introduced for the labour hire industry (see page 39 of the FAC Inquiry Final Report); and
- The absence of any demonstrated link outlined within the Issues Paper between improved compliance outcomes with workplace laws and the ‘licensing of the labour hire industry’.

Ai Group’s submission to the FAC Inquiry expressed the view that a licensing system for the labour hire industry is unnecessary. We continue to hold this view. Nonetheless, if the Queensland Government persists with its apparent intention to introduce a Queensland licensing system despite the weight of evidence not supporting the view that such a system is needed, Ai Group is keen to participate in the Queensland Government’s consultative process during the development of the system to enable us to represent the interests of our members, being both labour hire industry employers and organisations that use labour hire services.

2. The importance of maintaining a flexible labour market

Whatever the approach of the Queensland Government, it is imperative that the Government keeps in mind the importance of maintaining a flexible labour market.

Flexible workplace relations arrangements are fundamental to the improved productivity that is so important to Australia's national competitiveness and our capacity to further improve Australian living standards.

In recent years, the need to improve Australia's productivity performance has intensified as productivity outcomes across a wide range of industries have trended down and, particularly in the face of demographic factors, the relative importance of improved productivity as a source of growth has risen.

The Australian economy is facing a number of important challenges. The global economy is undergoing a seismic shift as the populous economies of China, India and Indonesia among others have embarked, or are embarking on, their processes of industrialisation. This is profoundly disruptive and is throwing down major competitive challenges to Australian companies.

The pace of technological development is similarly creating far-reaching challenges. It is essential that Australia's workplace relations arrangements enable Australian employers to remain agile and ready to adapt quickly to technological changes.

Demographic developments present other challenges. Australia is set on a course of demographic change that is seeing a steady increase in the proportion of older people. The ageing of our population will put a premium on workplace flexibility. An increase in the ratio of dependents to workers will require increased productivity to maintain prosperity; and retaining older Australians in the workforce for longer, with arrangements that suit their changing capabilities and needs, will be essential.

There are a number of other major economic challenges which Australia is experiencing at this time:

- The strength and extent of the mining investment boom and the surge in commodity prices that were such dominant forces over the past decade have, even though themselves now receding, changed our economy much more significantly than is often credited. The associated lift in the value of our currency substantially weakened significant parts of the domestic economy. It reduced industry's capacity to invest and innovate and it meant that segments of industry were simply unable to compete. As a result, we have lost or are losing some industries (e.g. automotive assembly). Other industries are much weaker than they used to be. For some supply chains there are now lost capabilities; some of these are irreversible.
- Non-mining sources of growth are thin on the ground.

- Australian industry has quite of bit of recovery to achieve and many industry sectors remain cash strapped.
- In addition to lost capabilities, our cost structures have also shifted. While wages growth has been relatively low in the past couple of years, for most of the past decade our wages were growing faster than those in other countries. This has left Australian businesses in an uncompetitive cost position. Increased productivity is the key to restoring competitiveness.
- Energy costs have also risen substantially over recent years. What was once a source of comparative advantage has now been negated.

The World Economic Forum’s (WEF) Global Competitiveness Index and other data sources indicate that Australia’s global competitiveness has slipped in recent years, falling to 22nd in 2014-15 before rising slightly to 21st in 2015-16, from an all-time national best ranking of 15th place in 2009-10. These numbers are the statistical expression of the commonly heard comment from business leaders that “Australia has become a very expensive country in which to make things or to do business” (see **Table 2.1**).

Table 2.1: WEF Global Competitiveness Indexes: Australia’s ranking

Year	Overall competitiveness	Flexibility of wages
2007-	19	87
2008-	18	90
2009-	15	75
2010-	16	110
2011-	20	116
2012-	20	123
2013-	21	135
2014-	22	132
2015-	21	117

Source: WEF Global Competitiveness Reports

The Australian Treasury’s latest Intergenerational Report (March 2015) highlights the urgency of implementing policy that fosters business flexibility and sustainability. The Report calls for a:

“policy agenda [that] will support productivity growth by helping to position Australian businesses to be flexible, competitive and robust in the face of dynamic global conditions.”

Australian productivity growth rates have been trending lower, in a similar pattern to real GDP growth and other key indicators. At a national level, Australian multifactor productivity has flatlined at best since the turn of this century. And compared to our global competitors, Australia has performed especially poorly, with national multifactor productivity falling by an average of 1.2% p.a.

from 2007 to 2011 and by 1.3% in 2012 and 2013, compared with global estimates of an improvement of 0.6% p.a. from 2007 to 2011, 0.2% in 2012 and -0.1% in 2013.¹

These global and domestic factors mean that Australian businesses need to lift their competitiveness and, in particular, they need to raise productivity.

Maintaining or imposing barriers to competitiveness and productivity adversely impact employers and employees. Employees are of course amongst those worst affected when their employers decide to close plants, downsize or relocate offshore because the operating environment in Australia imposes too many inflexibilities and other hurdles.

More flexible workplace relations arrangements are essential.

3. The importance of maintaining flexibility regarding labour hire

It is vital that flexibility is maintained for industry to utilise labour hire.

The following driving factors have had an important influence on labour hire usage:

- Corporate restructuring;
- The need for increased flexibility to meet work fluctuations;
- Greater competitive pressures as a result of globalisation;
- Outsourcing in both the private and public sectors;
- Extended hours of operation;
- Fast changing technology;
- The trend for companies to concentrate on their core business; and
- Growth in new industries.

The FAC Inquiry Report (on p.5) lists the ways in which the labour hire industry can support businesses. These reasons are extracted below:

- *“Providing enhanced numerical flexibility to cope with peaks and troughs in demand, staff absences, or to manage specific work (programmed maintenance).*
- *simplifying recruitment and selection processes and meeting interim or immediate staff needs at short notice*

¹ Productivity Commission estimates calculated from the Conference Board Total Economy Database, in PC 2014.

- *facilitating access to specialist skills from time to time as required*
- *reducing in-house staff and outsourcing non-core business areas, including the management of areas of expertise (e.g. human resources, occupational health and safety)*
- *reducing costs associated with staff overheads and entitlements,*
- *simplifying tax planning, and*
- *“outsourcing risk management and administrative burdens associated with regulatory compliance, including unfair dismissal claims and workers’ compensation”.*

These reasons are reflected in the findings of a 2005 Productivity Commission Staff Working Paper which cites a survey of Australian firms which found that the main reasons why companies use labour hire are:

- To source additional staff (30 per cent);
- To replace temporarily absent employees (17 per cent);
- To outsource the administrative burden of employment (11 per cent);
- To improve recruitment (11 per cent); and
- To overcome skill shortages (9 per cent).

The use of labour hire is an established and essential mechanism to address economic and business challenges faced by employers.

4. The prevalence of labour hire in Australia

Labour hire is a longstanding feature of the Australian labour environment, making up about 1-2.5% of the Australian labour market.² The FAC Inquiry Report reveals that the “*labour hire industry is now a well-established feature of the Australian labour market and a significant player in employment arrangements across the country*”.³

IBIS World indicates that the temporary staff services industry in Australia generates annual revenue of about \$20 billion.⁴ This is supported by the findings of the FAC Inquiry Report which says “*it is estimated that there are approximately 5,800 labour hire businesses in Australia, generating revenue of the tune of \$18.5 billion and distributing approximately \$12.7 billion in wages*”.⁵

² Victorian Government, *Victorian Inquiry into the Labour Hire Industry and Insecure Work – Final Report*, 31 August 2016, page 67.

³ Queensland Parliament, Financial and Administration Committee, *Inquiry into the practices of the labour hire industry in Queensland*, Report No.25, 55th Parliament, June 2016, p 4.

⁴ IBIS World, *Temporary Staff Services in Australia: Market Research Report*, September 2016.

⁵ Ibid.

The data makes clear that the labour hire industry delivers enormous benefit to the national economy.

The labour hire industry, however, is also susceptible to economic downturns as employers find that the need for temporary labour lessens when business demand slows. A Productivity Commission paper from 2013 confirmed that despite the rapid growth in labour hire in the 1990s, casual and fixed term employees were no more prevalent at the end of the decade than at the start, and that labour hire workers probably became less prevalent.⁶

The idea that labour hire is growing because it offers a vehicle for the exploitation of workers is simply not supported by any objective data.

In fact, labour hire provides a number of benefits to the community in enabling businesses to operate more efficiently and by providing pathways to employment for job-seekers.⁷

The Australian Bureau of Statistics (**ABS**), in August 2014⁸ reported that 5% of all employed persons (599,800) had found their job through a labour hire firm/employment agency.

Approximately 124,400 persons, or 21% of those who had found their job through a labour hire firm/employment agency, were paid by a labour hire firm/employment agency. Labour hire workers were most prevalent in the manufacturing industry (19%) and in administrative and support services (16%). Labourers (21%) and Technicians and trades workers (19%) were the most common occupational groups for labour hire workers.

The data indicates of all labour hire workers, about 80% are within the manufacturing, construction, financial and insurance services, and health care and social assistance (see Chart 1 below). The proportion of labour hire workers in agriculture, forestry and fishing is significantly lower, at about 1%. It is thereby clear from the data that most labour hire workers do not work in the industries that the Issues Paper says necessitate closer regulation. This begs the question whether regulation of the entire labour hire industry is necessary and fair.

Other characteristics of employees who had found their job through a labour hire firm/agency were:

- 28% were in the 35-44 year age groups and 27% were in the 25-34 year age groups, representing the highest proportion in all age groups.
- 59% were males, with the highest proportion of males working in manufacturing (21%) and construction (10%).

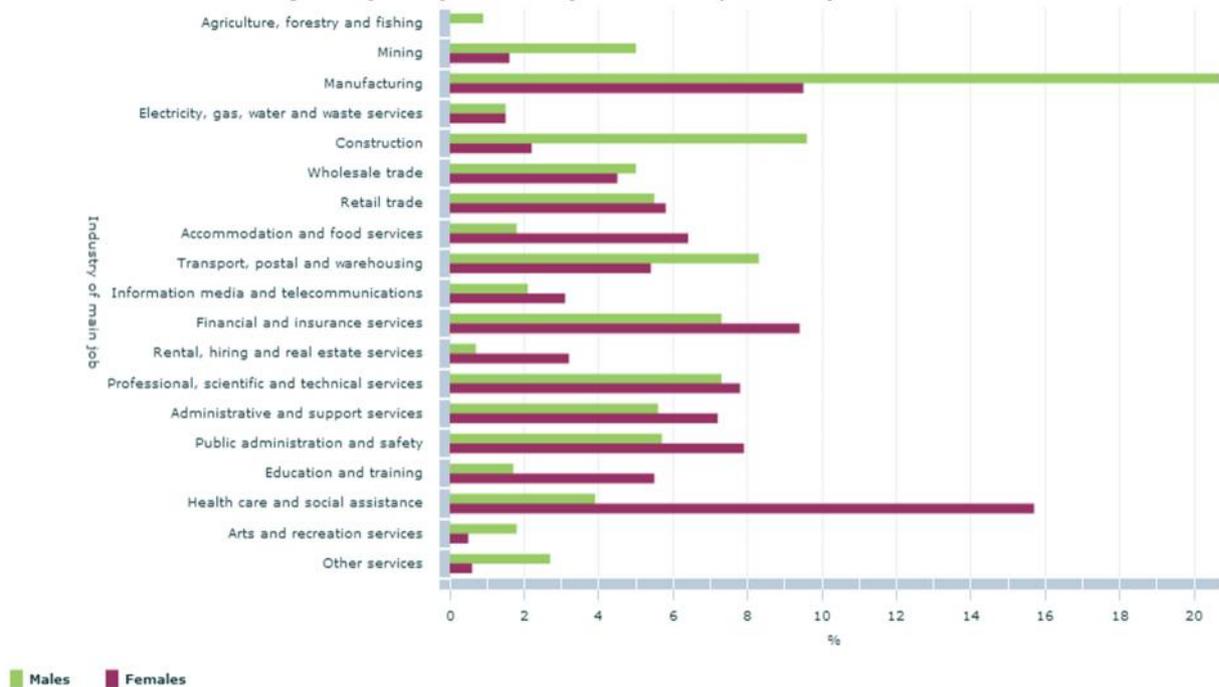
⁶ Shomos, Turner, Will, *Forms of Work in Australia – Productivity Commission Staff Working Paper* (Australian Government, Productivity Commission, April 2013)

⁷ Background Paper, *Victorian Inquiry in the Labour Hire Industry and Insecure Work*, October 2015, p.9

⁸ ABS, 6333.0 *Characteristics of Employment*, August 2014

- The most common occupational groups for males were machinery operators, drivers, professionals, technicians and trade workers (19%).
- Females were most common in health and social assistance (16%) followed by manufacturing and financial insurance services (both 9%).
- The most common occupational groups for females were clerical and administrative workers (35%) and professionals (22%).

Chart 1: Persons who found their job through a labour hire firm or employment agency – By industry of main job – By sex



Source(s): Australian Bureau of Statistics, Characteristics of Employment, August 2014

Of the 599,800 persons who had secured their job through a labour hire or employment agency:

- 161,900 persons had registered with an employment agency in the last 12 months, while 86,000 had registered with a labour hire firm.
- 506,500 persons expected to be with their current business/employer for the next 12 months.
- 169,700 persons had less than 12 months’ service with their current business/employer, but followed by 136,000 persons who had between 3-5 years’ service with their current business/employer.
- Importantly, the highest proportion (181,700 persons) worked between 35-39 hours per week.
- The highest proportion (434,000 persons) had paid leave entitlements, while 168,000 did not.

- A majority (488,900 persons) were guaranteed a minimum number of hours.
- A majority (448,900 persons) had weekly incomes that did not vary from week to week.

The ABS statistics highlight that the labour hire industry is extremely important for employers, employees and the Australian economy. The statistics also show that labour hire arrangements often involve work with paid leave, income stability and regular hours.

5. Benefits of the labour hire industry to workers, businesses, the community and economy

The Issues Paper fails to provide a balanced perspective of the benefits of the labour hire industry to workers, businesses, the community and economy.

Firstly, the Issues Paper appears to characterise labour hire as a form of ‘insecure employment’. This is an unfair characterisation. The labour hire industry is a legitimate, standalone industry.

Secondly, the Issues Paper simply focusses on the practices of a very few rogue operators, all of which have been subject to FWO investigations and prosecutions. We refer specifically to the case studies in Chapter 2 of the Issues Paper. The types of situations those case studies portray is very much the exception rather than the rule.

The FAC Inquiry Report, at pages 12 to 14, identified the following key benefits of labour hire arrangements for workers, businesses, the community and the economy:

- *“Labour hire provides businesses with fast and flexible access to a casual employment workforce for industries characterised by volatility in demand and outputs, including seasonal patterns. For example, the horticultural industry’s demand for labour is tied inextricably to its harvesting cycles, such that the number of workers required at any one time can vary significantly. Submitters also highlighted that the home building industry is prone to volatility in output, with activity in home building (including renovations in real terms changing from over \$19 billion in 2007-08 to less than \$14 billion in 2012-13 and then increasing to more than \$18 billion in the current financial year. In such circumstances, labour hire workers can be used to meet industry labour demand and protect employers against the adverse labour market impacts of industry or economy-wide shocks”.*
- *“Employers can outsource the time-consuming recruitment process of assessment, selection and engagement to human resources specialists, for more cost-effective and efficient hiring processes and potentially, access to higher quality candidates”.*
- *“Labour hire agencies can facilitate job matching and labour hire specialisation, which improves labour market functioning. For example, submitters noted that many small businesses may not generate sufficient work to carry specialised skilled workers as permanent employees, but may engage labour hire workers for specialist projects as a sensible business response to the environment in which they operate. Labour hire*

organisations act as aggregators of the employment opportunities created by these fluctuations, providing an efficient market mechanism to match supply and demand for labour”.

- *“For some workers, labour hire arrangements may be preferred because they provide greater flexibility in hours of work or work contract duration; provide a path to other employment, and/or ongoing employment; or provide access to a greater variety of work and thereby an opportunity to gain skills and experience in an industry where they may not otherwise have been able to secure employment. HIA and CCIQ noted that non-permanent work arrangements are often negatively cast as “insecure” in a way that fails to appreciate the heterogeneity of personal employment preferences. One labour hire operator also stated in a confidential submission to the inquiry that it estimates that approximately 20 to 30% of its employees go on to gain full-time employment over a twelve-month period, while Master Electricians Australia emphasised the important role of labour hire arrangements in supporting apprentices to obtain a greater breadth of experience while working to meet their requirements”.*
- *“Labour hire arrangements can allow host employers to reduce some operating costs, such as payroll tax, costs of compliance with labour regulations and internal human resources costs. This can help to deliver important cost savings that can improve business productivity and sustainability, and prolong prospects for competitive operations. Resources industry stakeholders advised, for example, that the engagement of labour hire operations has helped to reduce the unit costs of the coal sector by an average of 28%. The QRC submitted that where managing such productivity improvements under an enterprise bargaining agreement would have been a difficult and lengthy challenge, the use of labour hire has delivered these benefits in a highly responsive manner, without compromising on safety”.*
- *“In helping to sustain business operations, labour hire-related productivity improvements can also have significant flow-on effects on employment in regional communities and across related industry supply chains, including supporting existing direct hire jobs. The QRC and Master Electricians Australia emphasised that in the midst of a downturn in mining, labour hire arrangements may enable companies to continue to operate in regional areas where they may otherwise have had to close down, arrangements emphasised that a closed mine has no employment opportunities for directly, helping to sustain employment opportunities and continue to contribute to regional economic growth”.*
- *“Labour hire can also ease the management of risks associated with employment related expenses and liabilities and reduce administrative burdens”.*

Furthermore, separate research conducted by the ABS and Ai Group reveals that it is not all gloom for labour hire workers. Rather, as explained in the FAC Inquiry Report, above, there are benefits to labour hire work and the experiences of labour hire workers more generally has been positive.

An ABS *Characteristics of Employment* study in November 2008⁹ found that the most common reasons cited by employees using a labour hire firm were:

- ease of obtaining work (71%);
- a condition of working in the job or industry (9%);
- flexibility (7%);
- the inability to find work in their line of business (7%);
- a preference for short-term work (3%);
- to gain more experience (3%); and
- a lack of experience prevents finding permanent job (2%).

In 2001, Ai Group commissioned ANOP Research Services to conduct research into the changing nature of employment in five industries – one of which was labour hire. As part of the research, focus groups of labour hire employees were conducted. Some of the many benefits of working in the labour hire industry cited by employees who participated in the focus groups are outlined in the following extract from the ANOP report:

- *“Working as a labour hire employee means you can be exposed to a variety of companies, tasks, environments and people. And this variety is often viewed as a key benefit of working in the industry.*

“There’s a good variety of work, especially in my game. Up in Newcastle it was good ‘cause they’d send you to all these great jobs and you’d run into the same guys you worked with six months ago.” (employee)

“The benefit was the variety of work and the skills that you obtained or gained from one place to another doing different work. I used to love it.” (employer)

“You’ve got the flexibility of going different places and meeting different people.” (employee)”

- *“As labour hire employees are a mostly casual workforce, they get an hourly pay loading. Many also say they are offered the overtime that is often denied to full-time workers. For some, this means the money makes it more attractive to remain a “temp”, rather than moving into fulltime employment.”*

“They offered me a full-time job as an employee of Foxtel in the call centres with the customers, but why should I take a drop in pay? I make more money temping.”

⁹ ABS, 6105.0 *Australian Labour Market Statistics*, January 2010.

(employee)

*"When I started working, I was in a situation where I preferred money over holidays. You find yourself in that situation where money is more important than taking time off. If you are a fulltime employee, they make you take your holidays. If you work through Easter and Christmas, at the end of the year you end up with a lot more."
(employee)*

"25% pay loading, casual loading. Yeah, casual loading's good." (employee)"

- *"Working in the labour hire industry also means you can "try out" employment situations. There is the opportunity to experience different industries, and companies, while not feeling committed to having to stay if it doesn't work out. The labour hire industry also allows employees to build up experience on their CVs, which can help them if and when they try to find full-time employment.*

"If you don't fit somewhere, it's not like being in a permanent job, where you get in there and feel terrible. You just put your hand up and say "Hey, I don't like this situation, it doesn't suit me", or " I'm having a personality conflict with the boss or something" – and they'll move you without having a horrible big black mark jammed against your name." (employee)

"You're not trapped in a career ... You can give it a time period where it's manageable, and you can say to yourself 'well in 6 months time, I won't be doing this, so I can deal with how boring it is'." (employee)"

- *"Being in the position of a casual worker with no real obligation to the company you are working within, often means reduced responsibility. Some labour hire employees say they like the fact they can leave at the end of their shift, and not worry about it, or 'take their work home'. There are no obligations to stay back, or to "corporately socialise". Some employees report that attitudes among the 'temps' are often much more positive than among the 'permanents' – in part due to feelings of less responsibility.*

"One of the advantages of temping I find is that with the perms - there's a lot of pressure to socialise after hours and to go to functions etc. But a temp you can say see you later." (employee)

*"There's not a lot of responsibility put on you. You can have the benefit of saying that I can do this to a certain extent, but I can get up and leave if I don't like it."
(employee)"*

- *"Some labour hire employees state that the flexible hours are a benefit of working in the sector – that as casual employees, they have the ability to choose to take days or weeks off when required. Also, often being the first to be offered overtime, means working hours can be increased when required.*

"We put our hand up for all the overtime that's there. It's flexible but we were doing 60 hours a week." (employee) "

The attitudes of labour hire employees are unlikely to have changed since the ANOP report was released.

6. The coverage of labour hire under awards and enterprise agreements

Labour hire employees enjoy the same level of benefits and protection under the fair work system as other employees, including under the NES, modern award system, and enterprise bargaining system. The latter two are considered in more detail below.

Modern awards

Modern awards apply to labour hire employers and employees to the same extent as they do to other employers and employees. This was recognised by the Australian Industrial Relations Commission (AIRC) during the 2008-09 award modernisation process. Ai Group represented the labour hire industry during the proceedings.

During Stage 4 of the award modernisation process, the AIRC inserted a clause into nearly all modern awards clarifying that the awards cover on-hire employees. The following extract from the Full Bench's Stage 4 Award Modernisation Decision is relevant:

"[105] In our statement of 17 November 2009, we set out, for comment, draft model provisions for insertion into each modern award, where relevant, in relation to employees of labour hire (on-hire) companies and employees of group training organisations. In each case variations of the model clause were published and an indication given as to which model clauses would be inserted into each modern award (including the Stage 4 awards then in exposure draft form). We also noted that some modern awards already contain relevant provisions with respect to on-hire employees and may not require a model clause. This decision should be read in conjunction with our statement of 17 November 2009. We now deal with a number of issues which have arisen from the comments we have received. We indicate at this point that the final version of the model provisions is Attachment B to this decision.

[106] Dealing first with the terms of the draft model provisions, Ai Group and Recruitment and Consulting Services Association (RCSA) and others submitted that it was necessary to include the words "This sub-clause operates subject to the exclusions from coverage in this award" in each of the model provisions, in respect of both on-hire and group training employers, to ensure that the coverage of the award in respect to such employers, and their employees, does not extend beyond the general coverage of an award. We agree and have amended the model clauses accordingly."

As such, labour hire employers are subject to the same modern award obligations as any other employer covered by a modern award. Hefty financial penalties of up to \$54,000 per breach apply for breaches of modern awards.

Enterprise agreements

The Issues Paper incorrectly states that “*labour hire workers have no access to collective bargaining*”. This statement is not correct.

Enterprise agreements are common in the labour hire industry. A simple word search, using the phrase “labour hire”, of the Fair Commission’s online database of approved enterprise agreements reveals 641 enterprise agreements. Ai Group has seen no evidence that the coverage of labour hire employees under enterprise agreements is lower than the coverage of employees under agreements generally

In fact, given the large number of enterprise agreements which exist in the labour hire industry and the fact that virtually all of the large labour hire companies have enterprise agreements, it is likely that a higher proportion of employees in the labour hire industry are covered by an enterprise agreement compared to employees across other industries.

7. Existing regulation of labour hire industry

Labour hire are subject to the same laws as employers operating in other industries. For example, the *Fair Work Act 2009 (FW Act)*, work health and safety laws, and anti-discrimination laws equally apply to labour hire industry employers as they do to employers operating in other industries.

There is no evidence that the labour hire industry in general exhibits a higher incidence of non-compliance than other industry sectors; and there is nothing inherent in the nature of the industry which makes it more likely that such a higher incidence is inevitable or more likely to emerge if not subject to special regulation.

Accordingly, Ai Group submits that there is no evident need for a special system of regulation focused specifically on the labour hire industry. If there is reliable evidence that some particular operator in the labour hire industry is not complying with statutory obligations, then the relevant law should be enforced, but the same principle applies to any employer, regardless of the industry in which it operates.

Furthermore, it is unclear how a licensing system would lead to better compliance outcomes with workplace laws by labour hire companies. In particular, it is unclear how a licensing system would deter rogue operators who currently breach the law without fear of adverse consequences, for example by the FWO.

A licensing system for the labour hire industry in Queensland will increase the regulatory burden on the labour hire companies. Ai Group’s National CEO survey of regulatory burden 2014 indicated that Australian CEOs generally expected Government regulation to place a high to medium cost on their

businesses, with the areas of industrial relations, employment, workcover and OHS comprising of the largest burden with 83%.

Furthermore, in Ai Group's recent CEO Survey, 7.9% of businesses nominated government regulatory burden as the number one growth inhibitor and 23.6% of business nominate restrictive labour arrangements as Australia's most problematic factor for doing business.

Ai Group is not convinced of the merits of imposing on the labour hire industry any compliance costs additional to those faced by employers in general when there is no cogent information establishing the need for more intensive scrutiny or regulation of this particular industry.

8. Education of labour hire industry employers and employees

Ai Group agrees with the message in the Issues Paper that education of labour hire industry employers and employees would be a benefit to the industry.

Ai Group is well placed to assist the Queensland Government with providing education and training to the industry and is open to collaborating with the Government on developing educational material to participants within the industry.

In the context of education and training, Ai Group's response to questions 7 and 10 within the Issues Paper is set out below.

Question 7. What additional information and training labour hire firms should receive on their rights, entitlements and obligations and how this should be delivered.

Ai Group is of the view that additional 'formal workplace rights and entitlements training' should be voluntary and not a mandatory requirement placed on labour hire industry employers and employees.

Contrary to the suggestion in the Issues Paper, the FW Act already requires employers to issue a *Fair Work Information Statement* to new employees before they commence employment. Section 125 of the FW Act says:

"Giving new employees the Fair Work Information Statement

(1) An employer must give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.

(2) Subsection (1) does not require the employer to give the employee the Statement more than once in any 12 months.

Note: This is relevant if the employer employs the employee more than once in the 12 months."

The *Fair Work Information* statement is easily accessible from the FWO and is translated in up to 27 languages. Failure to provide the statement to an employee can result penalty of \$10,800 for an individual and \$54,000 for a company.

We also note the work undertaken by the FWO in providing educative materials to employers and employees within the labour hire industry, for example the FWO's employer guide, *Understanding on-hire employee services: A guide for on-hire businesses and host organisations*.¹⁰ This guide is publically available.

Ai Group is open to working with the Queensland Government to develop further educative resources for labour hire companies, businesses which use labour hire, and labour hire employees. For example, information could be developed to assist businesses which use labour hire to exercise due diligence in their choice of labour hire provider; for instance, information on what questions to ask and what information to obtain from labour hire providers.

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'?

If the Queensland Government proceeds to establish a labour hire industry licensing system, an information service for labour hire companies operating in Queensland will be useful. It is important that information about the licensing system is easily accessible and readily available to labour hire companies, and that information is provided in an efficient and commercial manner.

We emphasise the importance of the role of industry bodies like Ai Group in giving information and advice to employers about workplace rights and responsibilities under the FW Act, and the role of the FWO and FWC.

9. Ai Group's views of a licensing system for the labour hire industry

While Ai Group is not convinced of the need for a licensing system to operate in the industry, we are keen to participate in the Queensland Government's consultative processes if it does choose to go down this path.

We caution the Queensland Government of the following possible pitfalls of any licensing scheme:

- The fact that Queensland laws creating such scheme may be excluded from operation under sections 26 and 27 of the FW Act. The creation of any scheme at best would be open to legal challenge, resulting in uncertainty for both employers, employees and the industry.
- The complexities and regulatory burden of a Queensland-based licensing system for labour hire providers operating in more than one State;

¹⁰ <https://www.fairwork.gov.au/ArticleDocuments/723/On-hire-employees-services-workplace-obligations.pdf.aspx>

- The difficulties of licensing the provision of managed services; such as maintenance services, IT management services, construction project management services or facilities management, where the provision of such services including labour, is specialised and regularly performed by businesses both inside and outside the labour hire industry (as traditionally understood).
- The difficulties of a scheme imposed on established and legitimate labour hire services vertically integrated into other company business services that do not involve the supply of labour to third parties.
- Whether the licensing scheme would in fact be effective at targeting a small minority of unscrupulous labour hire providers; or whether the scheme would be further regulation ignored by such providers.
- It would be difficult to achieve any consensus on the criteria for a licensing scheme.
- Unions are likely to press for inappropriate licensing conditions aimed at bolstering union membership and influence.

Question 1. What do you think are important features of a system to effectively regulate the labour hire industry in Queensland?

Any licensing arrangement should be voluntary – not mandatory. A voluntary system would enable companies that use labour hire providers to determine their choice of provider on the basis that they meet specified criteria.

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 provide?

A licence should be available to those companies that can show, at the time of application, that they do not engage in unlawful conduct, and that condition should be an ongoing one.

Question 3. What level of fee do you consider appropriate to licence a labour hire operator and how would it be collected?

If it is determined by the Queensland Government that a licensing fee is necessary to help fund the administration associated with a licensing scheme, any fee should not be so onerous as to be a barrier to participants entering the industry or result in companies exiting the industry.

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

Ai Group is of the strong view that no capital threshold requirement should be imposed on labour hire companies. Such a requirement would impose a significant barrier to entry to the industry, particularly by smaller businesses.

Question 5. How should a bond for a labour hire operator to operate in Queensland be calculated and what should be an appropriate amount for the bond?

Ai Group is of the strong view that a bond should not be imposed on labour hire operators in Queensland. A bond would impose a significant barrier to entry to the industry, particularly by smaller businesses.

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?

Any regular reporting requirements should not impose an unreasonable red tape burden on labour hire providers. Additional red-tape would simply make it harder for labour hire providers to continue to do business in Queensland.

10. Any licensing system of the labour hire industry should not seek to regulate or alter the employment relationship between a labour hire employer and its employees

Question 8. What information do you consider appropriate to be included in labour hire contracts to ensure that workplace regulations are met?

Labour hire providers are responsible for ensuring that their employees are paid correctly, and hefty penalties apply for breaches. It is not necessary for contracts between labour hire providers and host employers to address this issue. However, of course, host employers should ensure that they only engage reputable labour hire providers that pay their employees correctly.

Question 9. Do you think that 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 a unlicensed provided?

Labour hire workers should be required to pursue any employment claim with their employer (i.e. the labour hire company), not the host employer. This is the way that the system currently works, and it is important that this continues.

Ai Group strongly opposes the doctrine of ‘joint employment’ being adopted within Australian employment law. The concept of joint employment has not gained acceptance in Australian employment law despite many attempts by unions and applicants in unfair dismissal cases to establish the concept. An adoption of the concept of joint employment in Australia would create uncertainty about whether the employer (i.e. the labour hire firm) or the client company is responsible for the employment relationship and subsequent employee entitlements and obligations.

The concept of joint employment has been considered in numerous decisions in the Fair Work Commission (**FWC**) and Courts.

In *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd*, [2011] FCA 1176 Justice Buchanan of the Federal Court set out the general principles in relation to labour hire arrangements, stating:

[60]... arrangements whereby labour is provided by one company to another, without the recipient becoming thereby an employer, are longstanding and unremarkable. There appears no place for an assumption of illegality or illegitimate purpose from the mere fact that a “labour hire” arrangement has been put in place. The Australian cases recognise that, provided the arrangement meets certain objective criteria.

[61] Utilisation in Australia of labour hire arrangements has increased significantly in past decades. There is no doubt that sometimes such arrangements reflect a desire by the proprietors of a business to avoid liability for employment related obligations. That is not illegal as an objective.

Similar observations were made by Justice Merkel of the Federal Court in *Damevski v Guidice* (2003) 202 ALR 494 stating:

*[173] In general, the courts have held that the interposition of a labour hiring agency between its clients and the workers it hires out to them does not result in an employee-employer relationship between the client and the worker: see *Mason & Cox Pty Ltd v McCann* (1999) 74 SASR 438; *Skilled Engineering Pty Ltd v Gill* (unreported, Full Court of the South Australian Supreme Court, King CJ, Cox and Bollen JJ, 11 July 1991).*

In *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605 (affirmed in *Grant Stewart v Amcor Excavations Pty Ltd* [2014] FWC 1031), a Full Bench of the FWC considered whether host employer, Tooheys Pty Ltd should be a named respondent in an unfair dismissal application that was made against it by an FP Group labour hire employee. The Full Bench concluded that:

“The application of a concept of joint employment to labour hire arrangements would involve a very considerable development of the common law. The cases in which Australian courts have analysed labour hire arrangements have invariably involved the identification of which one of two putative employers is in fact the employer. In no case has an Australian court approached the analysis on the basis that the exercise of control over the worker by the hirer of labour in a labour hire arrangement may render the hirer, together with the labour hire company, a joint employer of the worker.”

The *FP Group* decision has been relied upon in numerous recent decisions including *Daniel Bunt v ITW Proline* [2014] FWC 750 where Commissioner Simpson stated:

“The ‘Doctrine of Joint Employment’ has yet to receive firm recognition as forming a part of the law of Australia. The Applicant referred to a single authority of a first instance decision of the Federal Court of Australia. That case however did not make a definitive finding on the existence of the doctrine within Australia but recognised “scope” for it in Australian law. It is noted that a recent Full Bench decision of FWC stated that the Commission had no role in developing matters of common law.”

On appeal, the Full Bench of the FWC in *Daniel Bunt v ITW Proline* [2014] FWCFB 2328, confirmed Commissioner Spencer's view that the doctrine of joint employment did not exist in Australian employment law.

It is important that the case law developments regarding joint employment are not disturbed as they accurately reflect how the employment relationship is ordinarily construed by the common law. That is, there is an intention on the part of the employer and employee to enter into an employment relationship, not an intention to be bound by a tripartite relationship between client, labour hire company and employee.

The concept of joint employment was considered by the Australian Building and Construction Commissioner (**ABCC**) during the 2011 Sham Contracting Inquiry.¹¹ In the Final Report, the ABCC recommended that the concept of joint employment not be pursued.



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¹¹ *ABCC Sham Contracting Inquiry Report, 2011, pp. 24-25*