

QUEENSLAND COUNCIL OF UNIONS

SUBMISSION IN RESPONSE TO REGULATION OF THE LABOUR HIRE INDUSTRY 2016 ISSUES PAPER



**Queensland
Council of Unions**

The Queensland Council of Unions is Queensland's peak union council. The QCU and several of its affiliates have made submissions to a previous inquiry undertaken by the Queensland Parliamentary Finance and Administration Committee (FAC). This submission is in response to Regulation of the Labour Hire Industry 2016 Issues Paper (the issues paper) released by the Minister for Employment and Industrial Relations on 15 December 2016.

It is not intended to re-prosecute the arguments made in submissions to the FAC. Those various submissions have been noted in the issues paper. In addition, other Australian jurisdictions have dealt with this very issue and came to similar conclusions. A senate inquiry into visa workers¹ established that labour hire was associated with some of the most appalling cases of abuse of guest workers.

The Queensland Government will have some jurisdictional limitations because of the Commonwealth regulating private sector industrial relations. It is noted that the report from the senate inquiry into visa workers made 33 recommendations, including the regulation of the labour hire industry. It is unfortunate the ideological disposition of the Turnbull Government prevents it from considering any such policy and in typical fashion, would seek to punish those being exploited rather than the venal operators within the industry.

This submission, therefore, is made on the basis that the need for regulation of labour hire has been established by the FAC Inquiry and various other inquiries throughout Australia. The purpose of this submission is therefore to provide some potential solutions to the problems that we know exist in an unregulated labour hire industry.

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

The QCU favours a multi-layered approach to regulate the labour hire industry. An effective licensing regime is fundamental to the regulation of the labour industry. Whilst licensing is an

¹ Report A National Disgrace: The Exploitation of Temporary Work Visa Holders Commonwealth of Australia 2016

important aspect of regulation, however on its own, it will be insufficient to eradicate the worst practices within the labour hire industry. To date the labour hire industry has proven to be unable to self-regulate without exploitation.

A licence to operate as a labour hire company is only effective if there is a regulatory regime to make it work and the QCU proposes the strongest possible sanctions to accompany a system of licensing. Legislation would need to clearly articulate the obligations of labour hire companies to comply with other relevant legislation and all legal obligations to their employees. Licenses should only be granted subject to regular reporting. Such reporting (discussed further under question 6) would provide demonstrated compliance with industrial employment legislation including such specific details as relevant industrial instruments and superannuation funds. In cases of guest workers, visa status of employees should also be reported. For transparency sake, these details should be published to allow industrial parties to assess the legality of labour hire arrangements and, if necessary, make submissions to the appropriate authority. Industrial parties will be best placed to provide advice as to a range of matters including appropriateness of industrial instruments.

Legislation should also stipulate the obligations for clients of labour hire companies. For example, we have been made aware of cases where contracts have been let with the full knowledge that the contractor could not be complying with their obligations for the tender price. Breaches of legislation introduced to regulate labour hire need to be deterred by sufficient penalties. A properly resourced licensing unit, located in an appropriate government agency, is essential. Such a licensing unit could be cost neutral if licence fees were set at a rate to fund it.

In addition to a licence, it would be appropriate for labour hire companies to pay both a bond to cover wages owing to employees and fines for any breaches of labour hire or other regulation. The ability to pay a bond, and an associated threshold capital requirement would provide a regulator with a demonstration of the bona fides of the labour hire company. This combination of licence fees, bond and a threshold capital requirement would

overcome the problems raised by unions, workers and legitimate labour hire operators in relation to the exceedingly easy entry into the industry, that currently allows anyone with a mobile phone to be able to pose as a labour hire provider. It is these 'backyard' operators who have so badly damaged the reputation of the labour hire industry and no one with a legitimate interest should be concerned about the departure of unscrupulous operators. If the need for the service provided by the unscrupulous operator was real, it would be fulfilled by a legitimate operator. If, on the other hand, it was a mechanism to provide for an avoidance of obligations by the host employer, then our community is all the better for the removal of the unscrupulous operator.

The NUW submission in response to this paper discusses the functions of a compliance unit as follows:

The licensing body and compliance unit would be responsible for issuing licenses, ensuring compliance with licence requirements and monitoring the activities of licensees through regular audits and investigations.

The unit would also:

- Establish a public register of all licensed labour hire companies to ensure transparency and assist with compliance;
- Develop and manage a online portal that acts as a 'one-stop-shop' for workers, labour hire operators and host businesses;
- Provide the Queensland Government with a strong understanding of the companies operating in the labour hire industry in Queensland;
- Conduct investigations, including by exercising powers of entry and inspection, into allegations of noncompliance with licence requirements and share information with the Fair Work Ombudsman and the Fair Work Commission to ensure minimum standards and workplace laws are complied with;
- Determine whether a licence holder has, in fact, breached a condition of the license;

- Provide education and conduct targeted campaigns; and
- Audit contracts between labour hire companies and host employers.

The QCU adopts this submission and suggests that another alternative is for the compliance unit to approve training to be provided by accredited trainers. The NUW submission contains the following suggested workplace rights and entitlements training to ensure the worker:

- Receives information about the minimum wages and conditions that apply to the worker, including superannuation entitlements;
- Has an understanding of the relevant workplace health and safety laws and discrimination and harassment laws (including sexual harassment) and any company policies in relation to these matters;
- Receives information about the role of the compliance unit and the Fair Work Ombudsman;
- Has an understanding of laws that relate to freedom of association and collective bargaining and including the general protections provisions of the Fair Work Act 2009 (Cth); and
- Is introduced to a representative of a trade union as part of the training.

Upon completion of the training, labour hire companies would be required to provide the compliance unit with a statutory declaration confirming that workers have received the mandatory workplace rights and entitlements training. The QCU adopts those NUW submissions in relation to mandatory training.

Compliance with any form of regulation will also require enforcement from an appropriate tribunal. The existing jurisdiction of the Queensland Industrial Relations Commission would lend itself to complaints and prosecutions made in relation to potential breaches of the appropriate laws.

2. Fit and Proper person test - what criteria do you consider appropriate to include in a fit and proper person test or other wise to obtain a licence to operate as a labour hire provider?

Licensing would bring with it a requirement for a fit and proper person test. These tests already exist for a range of licenses and are usually associated with a person being charged with certain offences. In addition to offences that might ordinarily exclude an employee from being a fit and proper person, given the nature of the concerns raised in submissions, the QCU submits that demonstrated compliance with employment and industrial law form part of the fit and proper person test. Non-compliance with the laws and obligations set out under question 6 would justify the refusal of a license.

The type of traditional matters considered by a fit and proper person test as well as those pertaining to industrial compliance are as set out in the NUW submission as follows:

In considering whether to approve or deny the license, the licensing body should consider:

- Whether the applicant Company meets the 'threshold capital requirement';
- The identities of persons who are, or would have, any financial or operational decision making powers in relation to the activities undertaken in exercise of the license;
- Whether the persons who are, or would have, any financial or operational decision making powers in relation to the activities undertaken in exercise of the licence are a 'fit and proper person'; and
- Demonstrated ongoing compliance with Fair Work Legislation and associated employment conditions (including Workcover, Health and Safety, Anti-discrimination legislation etc), time and pay records and providing pay advice
- Any other relevant matters.

The 'fit and proper person' test for the purpose of obtaining a licence should be based on the requirements of obtaining a right of entry permit under the Fair Work Act.

However, this test should be extended to reflect the nature of running a labour hire business in which the business operators have control over workers' wellbeing. As such, key features of the

ASIC Fit and Proper Person should be incorporated into the test.

The test would consider whether the person has been:

- convicted of an offence against an industrial law,
- convicted of an offence involving entry onto premises, fraud, dishonesty, violence against another person or intentional damage or destruction of property
- ordered to pay a penalty under the Act or other industrial law in relation to action taken by the proposed licence holder
- whether the proposed licence holder has received appropriate training;
- whether a licence issued to the proposed licence holder has been cancelled, suspended or made subject to conditions;
- whether the proposed licence holder has been disqualified from exercising or applying for a licence;
- whether a licence applicant has the attributes of good character, diligence integrity and judgement;
- either has no conflict of interest in performing their role in the labour hire business, or any conflict that exists will not create a material risk that the person will fail to properly perform their role in the labour hire business;
- whether the proposed licence holder has been, or is bankrupt; and
- any other matters that the licensing body considers relevant

In considering any other matters, the licensing body should have regard to the conditions laid out in the issues paper:

- demonstrated ongoing compliance with Fair Work legislation and associated employment conditions, time and pay records and providing pay advice;
- WorkCover Insurance obligations;

- Workplace health and safety legislation;
- Anti-discrimination and Immigration legislation;
- Accommodation standards;
- Taxation and Superannuation Guarantee legislation; and
- Criminal Code Act 1889.

As well as whether the proposed licence holder has:

- Carelessly or recklessly breached an industrial law; and
- Whether there are any inherent liabilities of the industry that the proposed licence holder seeks to operate in.

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

Some research has been undertaken by affiliates in relation to existing licence fees. In our submission, the licence fee for a brothel licence pursuant to the Prostitution Act 1999 is sufficient to achieve the aims established in answering question one above.

Annual payment of licence fee would appear to be appropriate, perhaps coinciding with the anniversary date of any legislation introduced to regulate labour hire. Regulation could also provide for the escalation of fees in accordance with Brisbane CPI or some other similar measure.

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

Sufficient funds should be demonstrated by the labour hire licence holder to cover any potential contingency. This threshold capital requirement would need to be commensurate with the level of exposure the labour hire operator has in the case of being unable to make payment to employees.

Depending on the number of employees, there would be a greater need to demonstrate sufficient capital to avoid the practice of phoenixing using shelf companies. The labour hire provider needs to demonstrate that they are a person or company

of sufficient financial substance to meet their legal obligations.

This would act as an effective barrier to entry and would exclude small, undercapitalised companies from entering the market unless they have sufficient capital to properly fund the necessary costs of operation, including ongoing licence fees, tax liabilities and employee wages and entitlements, including superannuation payments.

Notwithstanding the need for greater capital requirements the larger the operation of the labour hire provider, there is a requirement for a minimum amount to be demonstrated to avoid the scenario of running a labour hire company with nothing more than a mobile phone. This minimum requirement should provide some protection against the less reputable operators that have been the perpetrators of the more heinous mistreatment of employees and particularly guest workers.

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

An amount of 11% of turnover is the initial position of the QCU. This figure is drawn from the formula used in Luxembourg² and would appear to be reasonable in the circumstances.

The NUW submission has provided some discussion on a bond as follows:

The NUW recognises that the ultimate setting of the value of the mandatory bond payment, initial capital threshold and on-going capital requirements should occur only after consultation with key stakeholders, including employers and their organisations, unions and other parties with an interest in the operation of the licensing scheme.

We look to the Singapore model in relation to the formula for which security bonds are calculated, which takes into consideration previous performance/breaches by the agency.

The formula used in Luxembourg is also notable. In the first year of activity, the agency is required to provide a 'financial guarantee' of 87,000 euros. For the following years of activity, the guarantee has

² Luxembourg : Temporary agency work and collective bargaining in the EU

been fixed at 11% of turnover.

In Norway, it is a requirement of the licence to register as either a limited liability/ public liability company or provide a guarantee for funds and equity capital comparable to the minimum share capital given in Norwegian legislation.

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?

In considering the types of matters that should be reportable, the NUW submission includes the following non-exhaustive list:

- Compliance with workplace laws including industrial laws, health and safety laws, anti-discrimination laws etc;
- Where employees are placed (principal employer);
- Superannuation payments;
- Payment of Workcover premiums, including industry breakdown;
- Relevant industrial instruments that govern employee entitlements, i.e. provide copies of any contracts, enterprise agreements, awards or piece rate agreements that they pay under;
- Training records, including workplace rights training;
- ATO documents; and
- Number of incidents and injuries sustained, and workers return to work progress.

In addition, the number of employees being engaged by labour hire firms should be published with particulars in relation to employees from non-English speaking backgrounds and employees on working visas.

It is suggested that reports be made public and are required quarterly and that any changes be reported immediately.

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?

Training should be provided in a culturally and linguistically appropriate fashion to all employees, particularly guest workers and other employees for whom English is a second language. This training should include the various rights and obligations of employers and employees within Australian industrial and employment law. Training should also include provision of information as to who is the employee's actual employer. Such training should include information about:

- Industrial instruments including relevant and current minimum rates of pay;
- National Employment Standards;
- Unfair dismissal laws;
- Workplace Health and Safety rights and obligations;
- Workers Compensation;
- Anti-discrimination and sexual harassment laws;
- Superannuation including choice of funds;
- The right to join a union;
- Taxation as employee (why and how much);
- Limitations of their visa and potential risks associated with a breach of those terms; and
- Complaint mechanisms and remedies for all of the above.

Mandatory training, approved by the compliance unit, should be provided by accredited trainers. Introduction to a union official would prove advantageous to employees in such training.

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

In our submission, failure to comply with relevant workplace regulations should amount to a repudiation of the contract. The NUW submission contains the following comment in relation to other aspects of the nature of such contracts:

All contracts should reflect the minimum

employment standards for the type of work, i.e. Award and safety minimums. Contracts should include clause/s that entitle the engaged employee to pursue the principal employer in the event that the labour hire company fails to meet their obligations, or does not provide entitlements. The compliance team should audit these contracts and issue improvement notices for those that are not compliant. Contracts should confirm that the labour hire company and the host have the same workplace health and safety policies.

The Queensland Government also has a role to play as a procurer of services. It could take a lead role in ensuring industrial compliance through its own procurement policy including the capacity to audit compliance with the various matters listed under question 6 in this submission.

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 that the labour hire provider does not meet their obligations?

There are a number of circumstance where it would be appropriate for the host employer to be held liable for entitlements not paid to employees of a labour hire firm.

As previously mentioned there are circumstances where a host employer has let a contract in full knowledge that the contractor could not possibly be able to provide the relevant services at the tendered price and be compliant with the law. In addition, host employers should have an obligation to ensure that the contractor is compliant. If a licensing regime is in place and a host employer uses an unlicensed provider, that would also be grounds for the host to be liable.

In cases where the labour hire company ceases to exist and/or is unable to pay its obligations to employees, the onus should be on the host employer to demonstrate that all reasonable steps had been taken to ensure compliance. Reasonable steps would best include some evidence of audit rather than merely taking the word of the labour hire provider.

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?

The QCU supports this concept of a one stop shop. A compliance unit would also have an educational role. As mentioned above a properly resourced licensing unit, located in an appropriate government agency, is an essential aspect of regulating the labour hire industry.