



Queensland Horticulture Council Submission on the Regulation of Labour Hire Issues Paper

About the Queensland Horticulture Council

The Queensland Horticulture Council (QHC) was set up in 2015 to bring together the voices of the regional horticulture bodies operating in Queensland. Queensland's production horticulture industry delivers the fresh fruit and vegetables that grow healthy Australians. Our industry directly contributes more than \$2.7 billion to the Queensland economy, supports significant regional employment, and is the only agricultural sector to consistently achieve strong growth over the past five years. Horticulture is Queensland's second largest agricultural sector after beef.¹

Queensland is Australia's leading state for fruit and vegetable production, growing one-third of the nation's produce and supplying most of Australia's bananas, pineapples, mandarins, avocados, mangoes, beetroot, fresh field tomatoes and capsicums. Queensland's 2500 production horticultural farms produce more than 120 types of fruit and vegetables and are located from Stanthorpe in the south to Cooktown in the far north and are well represented by the groups above.

Introduction

The majority of the horticulture workforce is, by necessity, made up of casual, transient harvest workers, with large numbers of Working Holiday Makers (visa subclass 417 and visa subclass 462) making up the numbers required to get the harvest in. This is not a matter of choice – the seasonal nature of the horticulture industry means that growers often require large numbers of workers for short periods of time. Harvest work can be impacted by weather and even with the best of intentions, no grower can guarantee ongoing work or even certain work for any particular period.

While the industry is currently focussed on workforce planning and stabilising their workforces as a matter of good practice (via the implementation of the Production Horticulture Workforce Development Program), the reality is that, as a highly seasonal industry which is subject to the vagaries of nature as well as market conditions, our reliance on this temporary flexible workforce continues to be high.

Growers access their workers from a variety of sources including walk-ins, the harvest trail, the gumtree website and labour hire companies. Labour hire companies (LHC) play an important role in the horticulture industry, particularly in relation to accessing seasonal labour in a short timeframe. If a grower requires 200 workers to get the mango harvest in, there is a 4-6 week window to undertake that work but little hope of finding all those workers locally. This is a daily reality for growers. Turnover of backpacker employees is high and it becomes a daily challenge to find, induct and train workers who may decide to stay for a day or a week. The administration and management of workers is governed by a raft of laws, regulations and guidelines and the expectations and

¹ (DAFF 2013, *Queensland AgTrends 2013-14* and DAFF 2014, *AgTrends Update April 2014*).

requirements on employers grows every year. With labour consisting of up to 50% of input costs, and the industry a “price-taking” industry, it is imperative to contain costs.

Using a reputable LHC can cut down on administration time for growers and make businesses more efficient. That said, it is clear that many LHCs are not treating their workers properly and are placing individual growers and the industry as a whole at reputational risk. If it becomes more difficult to access workers due to a reduced pool of WHMs, then there might be more reliance on LHCs to facilitate access to those workers.

The Queensland Horticulture Council does not support or condone any mistreatment of workers and we have been publicly vocal in our condemnation of any such practices. Through Growcom we work closely with the Fair Work Ombudsman to ensure our growers are fully informed of their obligations to their workers. All Growcom members have direct access to our IR specialist and we regularly communicate with our members via our industry magazine and on-line newsletter as well as through dedicated workplace relations workshops, conferences and other field days. Whilst it would be naive to think that all growers were doing the right thing, we consider that a significant majority of the issues relating to worker mistreatment relate to labour hire companies.

Private sector employers throughout Queensland fall under the national workplace relations system and are covered by the Fair Work Act 2009. The labour hire services industry includes businesses that employ workers and provide a service to other organisations (host organisations) by assigning those workers to perform work for that host organisation. The host organisation pays the labour hire provider a fee for providing on-hire employees to work for them. These employees are employed by the labour hire business - they are **not** employees of the host organisation – in this case the grower. As the legal employing entity, the on-hire business is responsible for ensuring employees receive their minimum employment entitlements at all times (Fair Work Commission).

It is clear that labour hire providers (howsoever named) are the legal employers of these workers, they are governed by and subject to the provisions of the Fair Work Act, relevant state Work Health and Safety and WorkCover legislation, applicable awards and the National Employment Standards. Employees of labour hire providers are entitled to enjoy the same entitlements and provisions of direct hire employees, irrespective of how they are employed.

Overarching recommendations

Labour Hire operators are a vital component of the horticulture industry and while many are honest and ethical operators, the growing number of “fly by night” operators is a serious and growing concern. There is nothing new about hiring travelling harvest crews. These workers have traditionally serviced the horticulture harvest with groups of workers traversing the south and east coast of Australia following the seasons and the work. However it is the increasing numbers of largely unregulated and unscrupulous labour hire providers in our industry that has caused our industry the most grief in recent times.

The ease with which anyone can register for an ABN and then set themselves up as a labour hire contractor is legendary. The simplicity of getting of an ABN means that within an hour operators can call themselves a labour hire company and begin to offer workers to farmers. Real problems arise when a grower takes the labour hire provider at ‘face-value’, believing they will operate legally and ethically, without undertaking proper due diligence on the business and its operations. While growers are time-poor and not necessarily well educated in complex employment and workplace relations laws and practice, as a necessary risk management strategy growers must take

responsibility for their dealings with third party providers to ensure that they are legitimate businesses who will not put them at risk through their operations.

The Queensland Horticulture Council acknowledges the many issues presented in the issues paper and are strongly supportive of better oversight of the labour hire industry. That said, we contend that some of the issues raised are already covered by existing legislation and it is more a lack of co-ordinated enforcement. A simple licensing scheme could facilitate better enforcement of the existing legislation.

Additionally whilst we commend the Queensland government for their proactive approach we are not supportive of individual States developing legislation as many of the rogue operators work across State borders as do many growers. It is an ongoing issue for growers to navigate disjointed State based legislation and it is an ongoing burden on organisations such as Growcom to participate in “harmonisation” processes down the track.

Recommendation 1: We respectfully request that the Queensland government, rather than developing State based legislation, pushes this agenda through COAG to develop a national approach that does not duplicate existing legislation.

Recommendation 2: We request that the Queensland government works with the labour hire industry to complement the industry led certification process rather than imposing a top-down regulatory approach.

In response to the need for a single and national point of focus, the Recruitment and Consulting Services Association (RCSA) who are the peak body for labour hire firms is developing an Employment Services Provider Certification program. This program is a national assurance audit program that will provide assurance to purchasers of employment services and is open to all employment services providers. It will give balanced assurance that a provider is making every effort to operate legally and honestly in its activities and transactions.

The RCSA certification program is already well advanced and has the support of the QHC and other agricultural bodies as well as unions and the Australian Government. It addresses six key areas the Queensland Government has identified in the Issues Paper:

- a. Fit and Proper Persons Test
- b. Work status and remuneration
- c. Financial assurance
- d. Safe Work
- e. Migration
- f. Decent accommodation (as applicable)

The Employment Services Provider Certification scheme will provide a widely available register of Certified Employment Services Providers allowing buyers to make informed choices. Certification is available to all employment service providers and is paid for by the employment service providers that seek certification. Growcom is also in the process of developing an “ethical treatment of workers” certification through funding from the Fair Work Ombudsman and it will be a requirement that growers use LHCs certified under the RCSA scheme and have in place a robust labour hire agreement. The strongest driver of change in the horticulture industry is supply chain pressure and these two certifications will provide the mechanisms for all players in the supply chain to demand evidence of good practice.

In addition, RCSA’s proposed Employment Services Industry Code (ESIC) proposes a single national regulatory scheme that will provide further consistency and transparency. ESIC will be lodged with

the Federal Government in early 2017, and recognises the employment services industry is a “high consequence” industry in terms of the way in which poor practice within its operations might directly contribute to exploitation.

Response to the Questions

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

As discussed above, we think that a State based scheme is doomed to failure and will create unnecessary bureaucracy for those doing the right thing and have no material impact on rogue operators. However we do see the key elements of a national approach as including:

- A fit and proper person test as described in the issues paper
- Some form of ‘test’ to actually gain registration similar to obtaining a drivers licence. We would see obtaining the RCSA certification as a mechanism for demonstrating that an operator met the requirements for registration
- A publically available register of who has obtained a certification
- A mechanism which prevents operators who are removed from the register for non-compliance to re-register under a different business name

2. *What criteria do you consider appropriate for the fit and proper person ‘test’?*

We broadly support the criteria outlined in the issues paper, however “ongoing compliance” implies that there is no initial barrier to entry for new operators which opens the pathway for phoenix behaviour and is meaningless without a supporting enforcement program. The RCSA certification provides a mechanism to proactively monitor compliance against these standards and will potentially represent enough of a barrier to phoenix operators.

Some of the worst offences against employees reported by FWO have been committed against international workers – not only working holiday makers, but those workers who come to Australia under the Seasonal Worker program. The seasonal worker program is highly regulated, but this has not prevented abuses from occurring. It is gratifying to see the Department of Employment has barred “Approved Employer” status for the purposes of accessing the Seasonal Work Program to labour hire operators who cannot demonstrate a clean bill of business health over a five year period. Obviously it is not appropriate to bar new entrants altogether so we suggest that requiring the RCSA certification or equivalent as a minimum combined with a “probation” period for new operators, supported by proactive monitoring of compliance particularly around the visa status of employees, would be effective.

3. *Licensing fees to operate as a labour hire provider*

Whilst a license fee does act as an initial barrier to phoenix behaviour, it should not be set at so high a rate as to cause increased costs for growers. We would consider that this is a discussion best had with the RCSA.

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

5. *How should a bond be calculated and what would be an appropriate amount for a bond?*

Labour hire companies are very important to the horticulture industry and we need to ensure that good labour hire companies can operate effectively and efficiently. It is not expensive to set up a labour hire company and a lack of assets and threshold capital does not necessarily mean that an operator is “dodgy” but by the same token a lack of capital is a hallmark of phoenix operators. A bond may be a better option and again we request that you consult with the RCSA as to how their proposed certification scheme manages this issue.

6. *What types of information do you think would be appropriate to be reported regularly by LHC to demonstrate compliance against their obligations?*

The QHC considers that a 3rd party audited system such as the RCSA certification has much more value than a report generated by the company in question. A poorly thought through reporting requirement places a significant red-tape burden on good operators and poor operators will not be entirely factual with their reporting. We are uncertain how a self-generated report on compliance will have any additional benefit compared with a check through existing compliance bodies.

7. *What additional information and training do you think labour hire firms should deliver to employees on their rights, entitlements and obligations and how should this be delivered?*

A one-off induction on their rights and obligations should be provided to all employees as well as information on where to seek assistance and support. This information should be provided in written format to all employees and be a condition of LHC certification. Many workers in our industry are itinerant so there is no need to provide the induction multiple times however it should be contingent on the LHC to check that their workers have been provided with the correct information and have it in written form.

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

9. *Do you think there any circumstances where a labour hire worker should be able to pursue the host employer for*

Growcom has developed a tailored industry service agreement that is now available to growers as a basis for negotiation with labour hire providers. This document clearly establishes the roles, obligations and responsibilities that each party has to those workers. Vitality, this includes ensuring that all workers provided by the labour hire operator are legally entitled to work in Australia. We have encouraged growers to use this agreement as a mechanism to drive compliance and also to protect them from accessorial liability². That said, we see the whole point of a certification/registration scheme is to ensure that LHCs are compliant and such a scheme would reduce the need for individual contracts as certified organisations should by definition already meet these conditions. We would see any legislative onus on growers to have specific contracts or bear additional responsibility beyond the requirement to use a certified/registered LHC to be doubling up on the regulatory burden. We also see an additional contractual requirement to pay wages and conditions in accordance with employment laws as nonsensical as these are already legislative requirements under Federal workplace legislation.

Whilst we accept that our growers must not “turn a blind eye” to poor practice by LHCs operating on their farms, **we reject the proposal that host employees be pursued for any liabilities incurred by a registered/certified LHC.** Such a proposal completely negates the benefit of the regulatory approach

² A copy of the Growcom Labour Hire Agreement was provided to the FAC Inquiry and we are happy to provide a copy on request.

for growers and the onus should be on the regulatory body or certifying organisation to ensure that the regulation or certification is robust. A householder is not expected to carry responsibility for the treatment of workers employed by a registered tradesperson and nor should the grower be expected to carry responsibility for the payment of workers if they are paying the LHC appropriately. Obviously if a grower uses an uncertified LHC or knowingly pays less than the known cost of employment then they should be liable.

10. Do you think it would assist the workers, host employers and labour hire operators if there was access to information via a one-stop-shop?

Whilst we agree with the concept of a one-stop-shop, it would seem unnecessarily expensive to set one up in Queensland as much of the legislation is Federal. Once again we see this as an opportunity to promote a national approach.

In the first instance we would recommend that the Fair Work Ombudsman have the necessary resources and staffing to pursue and prosecute these operators. With a handful of Fair Work Inspectors operating in Southern Queensland, the reality is that many of these operators escape scrutiny, only to appear again in some other region. While “naming and shaming” of those found guilty already occurs, this does little to stop their re-emergence in different regions under different names. We have noted that the FWO tend to focus on host employers as they are at a fixed location and are a relatively easy target. A national registration/certification scheme supported by effective enforcement would be supported by the QHC.

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