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Labour Hire Licencing Submissions

JUNE 2017

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Background

On 25 May 2017, the Minister for Employment and Industrial Relations presented the Labour Hire Licensing Bill 2017 (the ***Bill***) to the Queensland Parliament. In presenting the Bill, the Minister described various cases of worker exploitation by labour hire operators and nominated the licensing of the labour hire industry as the only way to end that exploitation.

Our submission does not address whether it is necessary or appropriate for the Queensland Government to introduce a labour hire licensing scheme. That is a question other submissions might address.

Instead, our submission primarily makes recommendations that, if implemented, would ensure that the obligations in the Bill do not apply beyond its intended scope (ie the labour hire industry). Our concern is that the Bill would have far-reaching unintended consequences unless it is amended before becoming law.

We thank the Finance and Administration Committee for their consideration of this submission and we are available to discuss it further at the Committee's convenience.

Simon Dewberry
Partner

Andrew Stirling
Managing Associate

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Recommendations

1 The definition of labour hire services

1.1 Refining the definition of labour hire services

The definition of labour hire services should be refined to ensure that it does not cover an unintended range of activities. We suggest:

> ***Labour hire services*** *means the hire of a worker by one person conducting a business or undertaking (the* **host***) from another person conducting a business or undertaking (the* **provider***).*

If this recommendation is adopted, consequential amendments would need to be made to change references to the 'supply' of workers to references to the 'hire' of workers.

1.2 Exceptions to the definition to avoid additional unintended consequences

We recommend that there be exceptions to the definition of labour hire services to ensure that it does not apply to work outside the labour hire industry. We suggest:

> *(1) Despite section [refer to subsection that defines labour hire services], the hire of a worker by one person conducting a business or undertaking (the* **hiree***) from another person conducting a business or undertaking (the* **hirer***) is not labour hire services if:*
>
> *(a) the hiree and the hirer are associated entities (within the meaning of s50AAA of the Corporations Act);*
>
> *(b) the hirer or an associated entity of the hirer is a participant in a joint venture and the worker is hired by the host to perform work in or for the joint venture;*
>
> *(c) the hirer or an associated entity of the hirer is a partner in a partnership and the worker is hired by the host to perform work in or for the partnership; or*
>
> *(d) the work that the worker does for the hiree continues to be work done in or for the business of the hirer or an associated entity of the hirer, unless that business is the hire of workers.*
>
> *(2) If any of subsection (1)(a) to (d) applies, then for that hire of a worker, the hirer is not a provider and the hiree is not a host.*

2 The definition of worker

We recommend that the definition of worker be narrowed to ensure that it does not apply to categories of worker who are not engaged in what is commonly understood to be labour hire. We suggest amending the definition as follows:

> *8 Meaning of worker*
>
> *(1) An individual is a* **worker** *for a provider if the individual enters into an arrangement with the provider ~~under which~~ -*
>
> *(a) the sole or dominant purpose of which is for the provider to hire ~~may supply~~, to another person, the individual to do work; and*
>
> *(b) under which the provider is obliged to pay the worker, in whole or in part, for the work.*
>
> *We also recommend that individuals not be workers to the extent that the work they perform is in their capacity as an officer of a body corporate.*

3 Avoidance arrangements (ss12 and 90 of the Bill)

We recommend that ss12 and 90 are removed from the Bill.

4 Compliance with Commonwealth laws as a condition of licence

We recommend that the Government reconsider making compliance with Commonwealth laws a condition of labour hire licences.

1 The definition of labour hire services

1.1 Refining the definition of labour hire services

RECOMMENDATION

The definition of labour hire services should be refined to ensure that it does not cover an unintended range of activities. We suggest:

> ***Labour hire services** means the hire of a worker by one person conducting a business or undertaking (the* **host***) from another person conducting a business or undertaking (the* **provider***).*

If this recommendation is adopted, consequential amendments would need to be made to change references to the 'supply' of workers to references to the 'hire' of workers.

It is imperative that the definition of labour hire services be precisely targeted to the Government's purpose of regulating the labour hire industry. Any deficiencies in the definition can result in legitimate confusion about whether a licence is required, which in turn exposes individuals to the threat of imprisonment if they get it wrong.

In our opinion, there are two deficiencies in the current definition that need to be addressed.

The first is that the current definition of labour hire services could apply to a broader range of services than just to the supply of people by a labour hire provider. As a consequence, a far broader range of activities would require labour hire licences than appears to be intended.

The current definition applies to the supply of a worker:

- in the course of carrying on a business. This leaves open the possibility that the supply of the worker is just one component of a service being supplied by the provider;
- 'to do work'. The Bill does not define or describe the work that the worker is to do for the definition to be satisfied. This leaves open the possibility that the work the worker is to do is in the course of the provider's business, not in the course of the host's business.

In our opinion, the current definition could apply to any services that include a component of human effort or time. This is especially the case for services provided by a body corporate, which are necessarily provided by individuals on behalf of the body corporate. In a very real sense, every service provided by a body corporate involves the 'supply' of individual workers as part of providing the service. For example, the definition might apply to:

- the supply of farmhands to a farm, where the provider has agreed to pick all of the fruit on a certain parcel of land;
- the supply of cleaners to a shopping centre, where the provider has agreed to clean the shopping centre every day;
- the supply of mining workers to a mine, where the provider has agreed to operate and maintain the mine; and
- the supply of electricians to a building site, where their employer has agreed to carry out the electrical works at the site.

The second deficiency is that the words '*in the course of carrying on a business*' appear to apply only to the provider's business, not to the host's business. This leaves open the possibility that individuals who are not themselves carrying on a business would need to ensure that any supply of a worker to them was covered by an appropriate licence. For example, if a home owner asked an agency to provide a cleaner or home handyman, that 'supply' would need to be covered by a labour hire licence.

The definition of labour hire services should be narrowed to ensure that it does not cover an unintended range of activities. The definition should be targeted to the labour hire industry.

Subject to the further recommendations that follow, our suggested wording is:

> ***Labour hire services** means the hire of a worker by one person conducting a business or undertaking (the* **host***) from another person conducting a business or undertaking (the* **provider***).*

In our opinion, this simple definition more clearly encapsulates what is commonly understood to be provided by the labour hire industry. It is clear that it is the worker being hired. This would remove any uncertainty that labour hire services are being provided where a worker is performing work as part of a broader range of services being supplied by the provider.

This definition also retains the concept that the hire must be in the course of business, but replaces it with the more familiar expression '*person conducting a business or undertaking*'. 'Person conducting a business or undertaking' may itself be a defined term, perhaps along the lines of section 5 of the *Work Health and Safety Act 2011* (Qld).

We recognise that some providers and hosts are likely to try to avoid the licensing requirement by structuring their arrangements to give the appearance that there is no hire of a worker. This would be similar to sham contracting arrangements that occur in the employment context more broadly. However, this behaviour would be an offence under s12 of the Bill. As has been the experience with sham contracting, we expect that a body of case law would develop over time to ensure that these types of arrangements are clearly prohibited.

1.2 Exceptions to the definition to avoid additional unintended consequences

RECOMMENDATION

We recommend that there be exceptions to the definition of labour hire services to ensure that it does not apply to work outside the labour hire industry. We suggest:

(1) Despite section [refer to subsection that defines labour hire services], the hire of a worker by one person conducting a business or undertaking (the **hiree***) from another person conducting a business or undertaking (the* **hirer***) is not labour hire services if:*

(a) the hiree and the hirer are associated entities (within the meaning of s50AAA of the Corporations Act);

(b) the hirer or an associated entity of the hirer is a participant in a joint venture and the worker is hired by the host to perform work in or for the joint venture;

(c) the hirer or an associated entity of the hirer is a partner in a partnership and the worker is hired by the host to perform work in or for the partnership; or

(d) the work that the worker does for the hiree continues to be work done in or for the business of the hirer or an associated entity of the hirer, unless that business is the hire of workers.

(2) If any of subsection (1)(a) to (d) applies, then for that hire of a worker, the hirer is not a provider and the hiree is not a host.

There are various arrangements that are not, on any view, labour hire arrangements, but that would fall within the definition of labour hire services in the Bill and also within the definition that we have recommended. Consequently, we recommend that there be exceptions to the definition of labour hire services to ensure that it does not apply to work outside the labour hire industry.

Some examples of hires of workers that would meet the definition of labour hire services (as currently included in the Bill or as we have proposed), but that are not part of the labour hire industry are:

(a) Employing entity within corporate groups – It is common for corporate groups to employ all of their employees in only one group member or a small number of group members. This is done legitimately to reduce the administrative burden and costs associated with having multiple employing entities within a group. Further, the employees may then perform work across the corporate group, including for members of the corporate group who are not their employer. Some common examples are:

(i) management employees;

(ii) accounting/ finance employees; and

(iii) other shared services employees (eg legal, human resources and information technology).

In some circumstances, those employees' time is 'charged back' to the group member that they provide services for. In other circumstances, the work that the employee does is not charged back, with their salary simply an overhead of the group as a whole.

(b) Multiple directorships across corporate groups – Similarly, it is also common for individuals to hold officer positions with multiple members of a corporate group, but for those individuals to be engaged by only one member of that group. That engagement might be in an executive or non-executive capacity.

(c) Secondments within corporate groups – An arrangement that is similar to, but more formal than, arrangement (a) is a secondment within a corporate group. Under this example, an employee is seconded into a temporary role within the corporate group, but with a group member other than their employer. Such secondments tend to arise:

(i) where an employee is acting in a higher-level role, pending the recruitment of a replacement; or

(ii) where the employee's employment needs to be with the employer for some reason (eg the employer is already a registered visa sponsor), but

the actual role is with another member of the corporate group.

(d) Services agreements within corporate groups – There are also more formal arrangements under which one member of a corporate group agrees to provide multiple employees to another group member. For example:

(i) where the second group member is the manager of a joint venture and needs to have a clear mechanism by which it passes through its employment costs to the other joint venture parties; and

(ii) where the second group member needs to be able to demonstrate clearly that it has engaged an employee with a particular licence or qualification, but the employee who has that licence or qualification is employed by another group member.

(e) Secondments to joint venture managers – In a joint venture arrangement, one joint venturer will typically be appointed to manage the joint venture. It is common for the joint venturers to second key personnel into the joint venture manager, rather than for those personnel to be employed directly by the manager. For example:

(i) the joint venture may require a role to be filled temporarily while a permanent employee is employed by the manager;

(ii) the joint venture requires specialist professional support that a joint venturer supplies on a rotating basis; or

(iii) the joint venturer simply wants one of its employees engaged in the operator, to ensure that it has first-hand involvement in the operations.

We recommend that the definition of labour hire services expressly exclude those types of arrangements. We suggest:

(1) Despite section [refer to subsection that defines labour hire services], the hire of a worker by one person conducting a business or undertaking (the **hiree***) from another person conducting a business or undertaking (the* **hirer***) is not labour hire services if:*

(a) the hiree and the hirer are associated entities (within the meaning of s50AAA of the Corporations Act);

(b) the hirer or an associated entity of the hirer is a participant in a joint venture and the worker is hired by the host to perform work in or for the joint venture;

(c) the hirer or an associated entity of the hirer is a partner in a partnership and the worker is hired by the host to perform work in or for the partnership; or

(d) the work that the worker does for the hiree continues to be work done in or for the business of the hirer or an associated entity of the hirer, unless that business is the hire of workers.

(2) If any of subsection (1)(a) to (d) applies, then for that hire of a worker, the hirer is not a provider and the hiree is not a host.

2 The definition of worker

RECOMMENDATION

We recommend that the definition of worker be narrowed to ensure that it does not apply to categories of worker who are not engaged in what is commonly understood to be labour hire. We suggest amending the definition as follows:

8 Meaning of worker

(1) An individual is a **worker** *for a provider if the individual enters into an arrangement with the provider ~~under which~~-*

(a) the sole or dominant purpose of which is for the provider to hire ~~may supply~~, to another person, the individual to do work; and

(b) under which the provider is obliged to pay the worker, in whole or in part, for the work.

We also recommend that individuals not be workers to the extent that the work they perform is in their capacity as an officer of a body corporate.

Even with our recommended amendments to the definition of labour hire services as above, we are concerned that the Bill would still continue to apply to arrangements that are outside the labour hire industry.

This is principally a result of the language used in s8(1)(a) – in particular, the word 'may'. In our experience, it would be very rare for an employee's terms and conditions of employment to prohibit the 'hire' or 'supply' of the employee to another person. This is the case even for employees who do not work in the labour hire industry. For many employees, it will be a reasonable and lawful direction for the employee to work in a business that is not their employer's.

An obvious example is the secondment of professional services employees into their clients' businesses. Secondments are regularly used in the professional services industry to accommodate a client's temporary need for additional professional support (typically at a reduced hourly fee). However, such a secondment is not 'labour hire', even if it has some similar characteristics.

The key difference between a secondment and labour hire is the purpose for which the employee is employed. A secondee is primarily engaged to work in their employer's business. The secondment is one way in which the employer's services can be provided, but it is not the most common. Labour hire has as its core business model the hire or supply of the employee.

We recommend that this distinction be reflected in the definition of worker. We suggest amending the definition as follows:

8 Meaning of worker

(1) An individual is a **worker** *for a provider if the individual enters into an arrangement with the provider under which-*

(a) the dominant purpose of which is for the provider to hire ~~may supply~~, to another person, the individual to do work; and

(b) under which the provider is obliged to pay the worker, in whole or in part, for the work.

We also recommend that individuals not be workers to the extent that the work they perform is in their capacity as an officer of a body corporate. We doubt that the intention was for the Bill to regulate the arrangements by which officers are engaged by a body corporate (eg to provide services as a director), but that ought to be clarified. This exception from the definition would not need to apply to work done in an executive capacity by the officer.

3 Avoidance arrangements (ss12 and 90 of the Bill)

RECOMMENDATION

We recommend that ss12 and 90 are removed from the Bill.

Section 12 of the Bill requires all parties to an 'arrangement' to avoid knowingly designing the arrangement in a way that circumvents or avoids an obligation in the Bill. The maximum penalty includes imprisonment.

In our opinion, this provision runs contrary to the spirit of the Bill. The Government has determined that there is sufficient worker exploitation within the labour hire industry and that the remedy for this is to impose a licensing scheme on that industry. In those circumstances, it is not clear to us why the Government would penalise parties for arranging their relationships in a way that takes them outside the labour hire industry and so outside the scope of the Bill.

Our assumption is that the motivation for s12 of the Bill is that parties will find loopholes in the definition of labour hire services so that they can supply workers without a licence. If that is the case, in our opinion there is no need for s12 of the Bill. If the Bill accurately defines the arrangements that need a licence:

(a) if the parties successfully arrange their affairs so that they are not providing labour hire services, they take themselves out of the labour hire industry, which the Government should take as a policy achievement; and

(b) if the parties try to arrange their affairs so that they are not providing labour hire services, but a court determines that they were actually providing labour hire services, the parties will already breach ss10 and 11 of the Bill.

In those circumstances, we can see no rationale for ss12 and 90 of the Bill and recommend that they be removed.

4 Compliance with Commonwealth laws as a condition of licence

RECOMMENDATION

We recommend that the Government reconsider making compliance with Commonwealth laws a condition of labour hire licences.

The Bill would require all licensees to comply with various Commonwealth laws. Indeed, the Government's introduction of the Bill is predicated on its perception that the Commonwealth is not doing enough to enforce those laws in the labour hire industry.

However, a consequence of non-compliance with those laws would be a breach of licence that could result in cancellation of the licence. This would seem to create the following issues:

(a) non-compliance with Commonwealth laws would expose the licensee to punishment under those laws and the additional punishment of licence cancellation under the Bill (effectively, double punishment that would prohibit the licence holder from carrying on its business);

(b) decisions about whether the licence holder complied with Commonwealth laws would be reviewed by QCAT instead of a competent Commonwealth court or tribunal; and

(c) the licence holder could be party to concurrent judicial processes under Queensland and Commonwealth law regarding whether it had complied with Commonwealth laws.

These issues seem likely to result in a licensee challenging the validity of the Bill in its entirety. We recommend that the Government reconsider making compliance with Commonwealth laws a condition of labour hire licences.