Labour Hire Licensing Bill 2017

Submission of the Maritime Union of Australia

19 June 2017

Submitted to:
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The Maritime Union of Australia's Submission

1. Overview

1.1. The Maritime Union of Australia ("MUA") was formed in 1993 with merger of the Seamen's Union of Australia and the Waterside Workers Federation of Australia, which trace their formation to 1872. The MUA represents approximately 16,000 Australian seafarers, stevedores and other maritime workers, and covers more than 90% of Australian maritime workers. The MUA is also a proud affiliate of the 4.5 million member International Transport Federation. The Queensland division of the MUA covers approximately 2000 members.

1.2. The use of labour hire arrangements across Australia has impacted upon the maritime industry and therefore, members of the MUA. The Labour Hire Licensing Bill 2017 ("the Bill") is a commendable initiative by the Queensland Labor Government to regulate labour hire arrangements. However, there are areas of deregulation enjoyed by labour hire companies, which the Bill does not address. Unless they are incorporated into the proposed legislation we submit that this will result in the continued exploitation of workers under labour hire arrangements. These areas have been identified and outlined below, along with our proposed recommendations.

2. A lack of protections afforded to labour hire employees from unfair dismissal

2.1. A recent decision of the Full Bench of the Fair Work Commission undermined the effectiveness of protections to labour hire employees from unfair dismissal. The decision allows labour hire companies to rely on a decision by the company to which it is providing the labour, as a defence to an unfair dismissal claim without meeting any other requirements of a fair dismissal.

2.2. In the *Pettifer* case,[1] the Applicant made an application under s 394 of the *Fair Work Act 2009* (Cth) for an unfair dismissal remedy in relation to the termination of his employment by MODEC Management Services Pty Ltd (MODEC). MODEC was contracted to BHP Billiton Petroleum Inc (BHBP) to provide labour on a BHBP project. The Applicant had an unblemished employment record, but BHPB invoked a term of the contractual arrangement with MODEC, which purportedly gave BHPB the right to direct MODEC to remove any employee – in this case, the Applicant – from the site. The Respondent said that it did not terminate the Applicant's employment due to any findings of misconduct, but that it acted at the direction of BHPB; a direction with which MODEC did not agree but, under the terms of its contract with BHPB, it said it had no choice but to comply. The Full Bench of the Commission affirmed a first instance decision dismissing the Applicant's unfair dismissal claim on the basis that because BHBP invoked its rights under the contract with MODEC to remove a person from the site, the Applicant did not have the capacity to perform his job with MODEC and therefore there was a valid reason for dismissal and the dismissal was not unfair.

2.3. In a similar application under s 394 of the Act, the Commission found in favour of the Applicant.[2] Tasmanian Ports Corporation Pty Ltd (trading as TasPorts) provides labour at a site operated by Grange Resources Limited (Grange). Following a number of alleged incidents on site involving the Applicant, Grange – without allowing the Applicant an opportunity to respond to the allegations – removed the Applicant's access to the site. Relying on Grange's decision to deny the Applicant's access to the site, TasPorts dismissed the Applicant. The Commission in this case found that there was no valid reason for the Applicant's dismissal, nor was there any procedural fairness. This decision has been appealed to the Full Bench of the Commission, in part in reliance on the principle of capacity in the Pettifer case.

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[1] *Pettifer v MODEC Management Services Pty Ltd* [2016] FWC 3194.
[2] *Warwick Gee v Tasmanian Ports Corporation Pty Ltd T/A Tasports* [2017] FWC 31.

2.4. In the *TasPorts* case, the Commission found that TasPorts, on becoming aware that Grange was investigating allegations against the Applicant, failed to act to protect the Applicant's interests by making representations to Grange about the Applicant and a procedurally fair investigation.[3] TasPorts did not notify the Applicant of the investigation, and failed to speak directly to the person carrying out the investigation on behalf of Grange or make its own findings about the allegations.[4] The Commission found that TasPorts was required to do more to satisfy itself that there was a reasonable basis for Grange's decision to revoke site access.[5] The Commission further found that TasPorts should have undertaken a more thorough review of redeployment opportunities within its business for the Applicant.[6]

2.5. Tasport appealed to a Full Bench of the Commission.[7] The appeal raised an important legal principle arising from a previous Full Bench Decision in *Donald Pettifer* v *MODEC Management Services Pty Ltd* which also concerned an employee (Mr Pettifer) who was engaged under a labour contract with a third party host employer (BHBP). BHBP made a unilateral decision to exclude Mr Pettifer from the site which resulted in Modec terminating his employment. In similar circumstances to *Tasports* v *Gee*, the employer in *Pettifer*, Modec, relied on the decision of a third party, namely BHBP, to dismiss Mr Pettifer, claiming that there were no other jobs available for Mr Pettifer to performTasports' appeal relied on 10 separate grounds (see para [15]). The Full Bench granted permission to appeal in relation to Grounds 1 to 4 only, and held at paragraph [25]:

"*We consider that it would be in the public interest to grant permission to appeal in relation to grounds 1-4 of the appeal insofar as those grounds raise an significant issue concerning the import and application of the Full Bench decision in Pettifer v MODEC Management Services Pty Ltd. Those grounds raise an issue which is of general importance and in relation to which some further appellate guidance would seem to be desirable*"

2.6. The Full Bench went on to consider the application of the Full Bench decision in *Pettifer* and referred to a previous decision of the Commission in *Kool v Adecco.* The Full Bench held at [33] that *Pettifer* endorsed the decision in *Adecco* which stood for the general statement of principle that "*the contractual relationship between a labour hire company and a host employer cannot be used to defeat the rights of a dismissed employee seeking a remedy for unfair dismissal. Labour hire companies cannot use such relationships to abrogate their responsibilities to treat employees fairly*".

2.7. At paragraph [34] the Full Bench rejected Tasports submission that *Pettifer* stood for the principle that a decision by a host employer, in the context of a labour hire arrangement, to have a worker supplied by a labour hire employer removed from its worksite meant that there was a valid reason for the worker's dismissal based on the worker's capacity for the purpose of s.387(a) of the *Fair Work Act 2009*. The Full Bench held that Tasports submission was inconsistent with the statement of principle in *Adecco*, and further held in the context of labour hire arrangements "*whether there is a valid reason for dismissal will depend upon all the circumstances of the case."*

2.8. The Full Bench determined that in circumstances where a host employer has a contractual right to remove an employee from a site based on misconduct, and a labour hire company dismisses a worker based on an allegation of misconduct by the host employer, it may be the case that the

[3] Ibid, [42].
[4] Ibid, [56].
[5] Ibid.
[6] Ibid, [51], [54].
[7] *Tasmanian Ports Corporation Pty Ltd t/as Tasports v Warwick Gee* [2017] FWCFB 1714.

dismissal is better characterised as conduct-based rather than capacity-based (see [35] and [36]). The Full Bench also observed that the availability of alternative work is an issue that might properly arise for consideration as to whether or not a dismissal was unfair (see [37] to [39]).

2.9. In applying the factual circumstances in *Tasports* the Full Bench held:

1. There was no evidence that Grange had a legal right to require Mr Gee's removal from their work site or that Tasports had no recourse to preserve Mr Gee's employment at the site once that step had been taken (see para [41:1]).

2. Tasports did not form its own independent conclusion as to whether Mr Gee had committed misconduct "*but instead essentially adopted the outcome of Grange Resources' procedurally unfair investigation*". This meant that "*Mr Gee's dismissal was capable of being characterised as substantially related to his conduct, with its validity to be assessed on that basis. This was not, as Tasports submitted, a case of assessing whether Grange Resources had a valid reason, but whether Tasports' reasons for dismissal as stated in its own dismissal letter were valid*" (see para [41:2]).

3. Tasports failed to adequately investigate options for Mr Gee's redeployment which they were required to do facilitate the performance of the employment contract (see para [41:3]).

4. The matter was be referred back to Deputy President Wells for further submissions in relation to remedy including reinstatement and compensation.

2.10. Although the *Tasports* decision dealt with a number of issues concerning labour hire employment, the question in point one above arising from the *Pettifer* decision is yet to be resolved. The Full Bench, and in fact the Fair Work Commission are yet to make any findings in relation to contractual arrangements giving the host employer a unilateral right to determine a labour hire employee's ongoing engagement in a workplace or on a project. Such a contractual arrangement is undesirable in circumstances where a labour hire employee may ultimately have no protection for unfair dismissal because of the contract between the labour hire employer and host/third party employer

2.11. The Bill in its present form does not address the above situation, whereby a worker can be dismissed from employment absent any wrongdoing on their part, and be left without recourse. Accordingly, we make the following recommendation.

Recommendation

2.12. We recommend that the proposed legislation prohibit a labour hire company from entering into any contractual arrangements with a third party employer that would cause the labour hire company to offend any relevant legislation including but not limited to unfair dismissal provisions in *Fair Work Act 2009*.

3. Threshold capital requirement/phoenixing

3.1. We support and adopt the submissions of Maurice Blackburn Lawyers[8] and the Queensland Council of Unions[9] made in response to the Labour Hire Industry 2016 Issues Paper.[10] We are

[8] Maurice Blackburn, Response to Queensland Office of Industrial Relations' Regulation of the Labour Hire Industry 2016 Issue Paper, 17 February 2017.
[9] Queensland Council of Unions, Submission in Response to Regulation of the Labour Hire Industry 2016 Issues Paper, February 2017.

also of the view that an effective licensing scheme should incorporate a threshold capital requirement in order to operate a labour hire company. This threshold capital requirement would ensure that an enterprise is able to guarantee the payment of any entitlements owed by the labour hire company to its workers. It would also act as a deterrent for undercapitalised companies to create labour hire companies without sufficient capital to cover their legal obligations, including employee entitlements.[11]

3.2. In addition to an annual licensing fee we support the payment of a bond to the Queensland Government, so as to ensure that there is a safety net of wages for employee conditions in the event of liquidation. We support the recommendation of the Maurice Blackburn that the method for calculating the bond should be an amount that is commensurate with the level of exposure the labour hire operator has in the event it is unable to make payment to its employees.[12] A bond would also act as a deterrent in relation to the practice of phoenixing, by way of shelf-companies.[13]

4. Compliance unit

4.1. We support and adopt the position outlined in the aforementioned submission of Maurice Blackburn Lawyers, in terms of the establishment of a dedicated compliance unit as part of the licensing body. This would assist in compliance with industrial laws, including those relating to work health and safety. We appreciate need for monitoring and compliance as outlined under Part 6 of the Bill, however, we submit that such provisions need to be expanded so as to enable a Union to take action against a host employer (on behalf of an employee), to recover any wages or lost entitlements.[14] We also impress upon the Committee the importance of any the outcome of any investigations being shared with the Fair Work Ombudsman and the Fair Work Commission.

4.2. Further, we submit that the compliance unit should establish a public register of all licensed labour hire companies. This would ensure transparency in the licenses issued and would assist the Compliance Unit (should it be established) in carrying out its compliance function.

5. Fit and proper person test

5.1. We note that under section 27 of the Bill, that a fit and proper person test must be met before a license is granted by having a history of compliance with relevant laws or by being able to demonstrate compliance with relevant laws. We submit that the 'relevant laws' referred to under section 27(1)(b) should specifically list those outlined in the Queensland Government's Regulation of the Labour Hire Industry, Issues Paper 2016 and echoed by the Queensland Council of Unions.[15] In this regard, the Issues Paper put forward that one way to approach the fit and proper person test would be demonstrable compliance with the following:

5.1.1. Fair Work legislation and associated employment conditions, including time and wage records and the provision of pay advice;
5.1.2. WorkCover insurance obligations;

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[10] Labour Hire Issues Paper 2016
[11] Above n 9, 5.
[12] Above n 8, 6.
[13] Ibid, 5.
[14] CFMEU, Regulation of the Labour Hire Industry 2016 (undated).
[15] Queensland Government Issues Paper 2016

5.1.3. Workplace health and safety legislation;
5.1.4. Anti-discrimination and immigration legislation;
5.1.5. Accommodation standards;
5.1.6. Taxation and superannuation guarantee legislation; and
5.1.7. *Criminal Code Act 1889*.[16]

5.2. We submit that by specifically outlining the laws which applicants need to demonstrate compliance with, this would hold applicants to a higher standard of accountability than that which is presently outlined in the fit and proper person test under section 27.

6. **Reviews and appeals**

6.1. We refer to Part 8 of the Bill with respect to reviews and appeals. Specifically, under section 93(2), we note that an interested person may apply for a review of a decision to:

a. grant a licence under section 16;
b. suspend a licence under section 22; or
c. impose, vary or revoke a condition of a licensee's licence under section 29.

6.2 We submit that it would be more effective to enable interested parties to make objections to an application at the time the application is being made, as opposed to making an objection once a decision has already been made to approve an application. We propose that once an application has been made, the application should be made publically available and it is at this stage, that objections may be heard before QCAT allowing any interested parties to raise objections to the application.

6.3 Further, we submit that interested parties should also be given an opportunity to appeal a decision to approve an application to issue a licence.

[16] Ibid, 32.