Submission to the Queensland Government Finance and Administration Committee on the proposed Labour Hire Licensing Bill 2017

Jane O'Sullivan, June 2017

The Queensland Government is to be commended for acting promptly to address labour abuses identified in the 2016 parliamentary inquiry into the practices of the labour hire industry.

The Bill would significantly increase the government's ability to monitor the extent and location of labour hire arrangements in Queensland. However, it is unclear to what extent it would diminish the abuse of such arrangements, to the detriment of the workers supplied and/or the workers they displace. Some disincentive to blatantly illegal exploitation would result, but the various grey areas of 'legal exploitation', and the labyrinth of intransparency, are not adequately addressed.

The following discussion identifies sections of the draft Bill *in italics*.

In introducing the Bill, Minister for Industrial Relations, the Hon. Grace Grace said that the Bill was intended to "end [the] appalling exploitation" of "vulnerable workers being exploited at the hands of unscrupulous labour hire operators." Yet the Bill only refers to licensing and reporting. It is assumed that exploitative practices are adequately dealt with under other industrial relations laws, and that "oxygen is the greatest disinfectant": only a little more transparency is required to eliminate them. Whether this is true remains to be demonstrated.

Paragraphs *10 and 11* provide the substantive requirements under this Bill. They require providers to be licensed, and clients to ensure that their providers are licensed. In addition, paragraphs *31 and 32* deal with reporting, the only obligation on licensees under the Bill.

These paragraphs clearly present "persons" as either "individuals" (human beings) or "corporations" (not human beings). Yet the ensuing conditions for licensing focuses on individuals, whether they have criminal convictions etc., without clearly identifying whether the individuals listed as "nominated officers" of "corporations" are subject to the same tests of "fit and proper person".

The Bill also clearly exempts "nominated officers" (distinct from individual licensees) from any risk of imprisonment for infringements. It is not clear how a former breach of the Bill, or of any industrial relations law, by any corporation, would be recorded against a "nominating officer" reapplying under a different corporation name.

Under *Part 5 Obtaining information*, there is no wording to identify "nominating officers" as "applicants" or "licensees". Therefore, there is no clear provision that information, such as criminal records, is to be collected on nominating officers.

In paragraphs *44-46* the criteria for "a fit and proper person to provide labour hire services" is ill-defined, and does not address the potential for labour exploitation. The absence of past criminal convictions appears to be the main criterion.

All these checks focus on the character of an individual applicant, while not making clear how a corporate applicant is to be handled. The problem of phoenixing does not seem to be clearly addressed: if it has been possible in the past for labour hire companies to be dissolved, with no responsibility traceable to individual persons, nor legal responsibility of the client who hired the labour, then this Bill does not appear to remedy the situation.

Likewise, at *92 Persons considered parties to offences*, the language does not identify "nominated officers", but only the "corporation" as defined as "person" under paragraphs *10 and 11*.

It is vital that the Bill makes exploitation of workers through labour hire arrangements a criminal offense, and ensures that individuals (human beings) are held accountable.

To ensure enforceability, *33 Requirements for nominated officers* should require nominated officers, as well as individual licensees, to be permanent residents of Australia.

In her speech introducing the Bill, Minister Grace Grace said:
"The bill does not interfere with any existing obligations under workplace relations, taxation, antidiscrimination, health and safety, or independent contractor laws. However, the bill will provide stiff penalties for any business that aids, abets or induces improper or unlawful practices designed to breach or avoid those obligations, whether by threats, promises or otherwise." (emphasis added)

I did not find any reference to such penalties in the Bill. The reporting requirements in *Division 2* are reasonably thorough, with provision for regulations to stipulate further detail. This is the strongest part of the legislation, with the potential to identify breaches of any industrial relations law. However, it relies on sufficient resources to be allocated for inspectors to monitor compliance in workplaces. It is not clear what measures might be taken to detect unlicensed labour hire arrangements. It is less clear how abuses quietly arranged between the provider and workers "by threats, promises or otherwise" would be uncovered.

In this Bill, the only obligation on clients is to ensure that providers are licensed. There is no new or clarified responsibility of clients to ensure that workers are fully paid at award rates for the type of work provided. No capacity is provided for workers to seek unpaid wages from clients if labour hire companies disappear. (Such provisions have existed in other legislation regarding indirect employment, such as outworkers.) The division of responsibility between providers and clients is not made clear, with respect to such conditions as provision of breaks, overtime compensation, safety inductions and sick leave. It may be that these responsibilities are adequately covered in other legislation with which I am unfamiliar. However, given that exploitation under labour hire arrangements has often exploited exactly this ambiguity, allowing employers to distance themselves from underpayment of workers, it would seem necessary for a bill intended to end exploitation through labour hire to remove such ambiguity.

I further suggest that the Bill specify contracted outwork (work paid by piece, such as assembling garments) as labour hire, and reference it in paragraph *31(2)(e)* under *Examples of arrangements*. I'm not sure what the current status of outworker protection legislation is in Queensland – the regulation provided under the Bligh government was repealed by the Newman government. In any case, this Bill is general enough in its definition of labour hire that it can well accommodate outwork, and could thus provide some consistency in the handling of indirectly-employed workers.

The Bill does not state that inspectors appointed and empowered under the Bill will do anything other than demonstrate that providers maintain valid licences and reporting. It does not refer to these inspectors as investigating any potential breach of industrial relations laws. It probably does not need to do so, since other industrial relations laws provide for such inspections of workplaces. But it is difficult to see why such a large tract of the Bill must be dedicated to defining and delimiting the powers of these inspectors (the entirety of *Part 6, paragraphs 47-89* out of the total 110 paragraphs), if all that is needed is for the Bill to provide a means of recording the addresses of providers and workplaces for existing industrial relations inspectors to monitor. Why empower inspectors under this Bill at all? Why not just assign responsibility for monitoring licensing and reporting under this Bill to existing industrial relations inspectors, whose powers are detailed in other legislation? Perhaps what is needed, in the place of the vast tracts of the Bill relating to inspectors, is a clear definition of labour hire providers as the employers of workers, in order for them to fall under the obligations of other industrial relations laws.

Under *55 General power to enter places*, nowhere is it mentioned that places to be inspected include places where hired-out labour are put to work. The responsibilities of clients of labour hire companies (employers of hired-out labour) are not defined, other than that they must ensure the labour hirer is licensed. It should be stated that all addresses provided in reports from licensees (including the place of business of the licensee, the workplace of hired-out labour, the administrative offices of the client, and the workers' accommodation) are places which may be inspected, to verify the claims made by licensees, as well as to evaluate compliance with industrial relations laws generally.

Under *62 Issue of warrant*, the warrant may only be issued if there is reasonable suspicion of "a particular thing or activity that may provide evidence of an offence against this Act." This Act does not mention entitlements of employees or obligations of employers or employment agents toward employees. It would seem that the substantive abuses which have characterised labour hire arrangements are not "offences against this Act", and this Act does not authorise inspectors to access workplaces to investigate them.

Part 7 General offence provisions is the only point at which some link might be drawn to abuse of industrial relations provisions.

This is limited to: *90 Persons must report avoidance arrangements*
However, an "avoidance arrangement" is not defined. A range of situations, which one might reasonably consider to be avoidance of employer responsibilities, are legal. A purpose of this Bill, responding to the deplorable, yet often legal, labour hire situation, should be to constrain the legality of such arrangements. I do not see that the bill does so.

For example,

- All instances of "casual" employment where the casual work is ongoing for more than several weeks, might be considered avoidance of the range of benefits that a worker would receive if they were to do the same work under a temporary employment contract.
- All instances of "internship", where the worker is unpaid or paid only for direct costs of attending the workplace, but where the worker nevertheless does work which would otherwise be done by a paid employee, might be considered avoidance of employer responsibilities.

Yet these arrangements are legal, and the failure of legislation to restrict them has led to their gradual displacement of employment arrangements which comply with hard-won protections under industrial relations laws. Hence they are "avoidance arrangements".

One could similarly argue that the entire category of "labour hire" constitutes avoidance arrangements, as all such work could be done through short-term employment arrangements with the labour supplier being either an employment agent or a contractor.

Specifically relating to common issues raised in labour hire arrangements:

- All instances of "labour hire", where the amount paid by the client is not transparently relatable to the amount received by the worker, net of charges which the labour hire company may take from either client or worker, may be viewed as avoidance of employer responsibilities.
- Any charge made by either the client or labour hirer to the worker, for accommodation, food, transport, migration services or other charges, where the worker does not have the opportunity to seek other suppliers due to the conditions of employment imposed on them, should be considered avoidance of full remuneration. (If they are not permitted to use other suppliers, this might be classed as extortion or even deprivation of liberty; if there are no alternatives due to the remoteness of the place of employment, these are costs which should be borne by the employer, as is typically stipulated in awards for remote work such as shearing and mining; all costs relating to visas should also be borne by the employer sponsoring the migrant worker, if it is not to be seen as a direct rort allowing migrant labour to undercut domestic labour.)
- All instances of "labour hire", where the work done is not accurately related to the appropriate skill, qualification or responsibility level identified in an award, because the employee is only a "temp" or contractor, may be considered avoidance of appropriate remuneration.

It is not clear to me that any of the above instances are reportable "avoidance arrangements" under the terms of this Bill. Indeed, there is no guidance as to what "avoidance arrangements" refer to. Hence I wonder if this paragraph has legal efficacy at all.

To conclude, I welcome the Bill as an important step toward regulating labour hire arrangements and ensuring they comply with normal industrial relations laws. However, I believe the Bill could be strengthened, particularly

- By ensuring that criminal proceedings can be taken against culpable individuals in the case of illegal practices,
- By clarifying the responsibilities of clients toward workers,
- By linking the enforcement provisions in this Bill with the enforcement of industrial relations laws generally,
- By clarifying what constitutes "avoidance arrangements", which the Bill implies are illegitimate uses of labour hire arrangements.

Thank you for considering this submission,

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