

Ai GROUP SUBMISSION

Industrial Relations
Victoria

**Consultation on Labour Hire
Licensing Regulation
Victoria**

6 December 2017

Ai
GROUP

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Ai Group contact for this submission

Stephen Smith, Head of National Workplace Relations Policy

Telephone: 0418 461183 or 02 9466 5521

Email: stephen.smith@aigroup.com.au

Introduction

Ai Group welcomes the opportunity to provide its response to Industrial Relations Victoria regarding the development of regulation supporting the Victorian Government's proposed labour hire licensing scheme (**the scheme**). We note the Victorian Government's announcement on 10 September 2017 to introduce legislation establishing a labour hire licensing scheme and understand that key features of the licensing scheme will include:

- J A requirement that all providers of labour hire services must be licensed. Substantial civil financial penalties may apply if they are not.
- J Licence holders to demonstrate that the business and its key personnel are fit and proper persons and are compliant with workplace laws, labour hire industry laws and minimum accommodation standards.
- J A requirement that users of labour hire services must use a licensed provider and may be subject to substantial civil penalties if they do not.
- J The administering of the licensing scheme by a Commissioner for Labour Hire Licensing as head of an independent Labour Hire Licensing Authority.
- J An inspectorate within the Licensing Authority with broad powers to investigate non-compliance with licensing scheme.
- J An ability for interested parties to object to licence applications and request reviews into some licensing decisions.

Ai Group participated in the Victorian Government's Inquiry into the *Labour Hire Industry and Insecure Work* in October 2015 and we provide a link to our [Submission](#) and [Reply Submission](#).

Ai Group has also provided its response to the development of the *Labour Hire Licensing Act 2017 (Qld)* (**the QLD Act**) which can be accessed [here](#) and the more recent *Labour Hire Licensing Bill 2017 (SA)* (**the SA Bill**) which is [here](#). Key elements intended to form part of the Victorian licensing scheme are very similar to provisions in the Queensland and South Australia labour hire licensing schemes.

Ai Group is not convinced of the need to create a licensing scheme regulating the labour hire industry and has opposed the labour hire licensing legislation in both Queensland and South Australia.

We urge the Victorian Government not to follow the approach taken by the Queensland and South Australian Governments in creating a labour hire licensing scheme.

Should, despite Ai Group's position, the Victorian Government proceed with legislation to create a labour hire licensing scheme, it is critical that the licensing scheme be limited to business and employment arrangements that are genuinely labour hire rather than disrupting a vast array of

business to business arrangements. Many of our non-labour hire members have raised concern that they may be deemed labour hire service providers under the broad statutory definitions adopted in the Qld Act and SA Bill and are alarmed at the severe civil and criminal penalties in place and extensive reporting obligations.

An appropriate definition of labour hire services

During the development of the modern award system under the *Fair Work Act 2009* (FW Act) between 2008 and 2010, there was considerable focus on an appropriate definition for labour hire. Ultimately, a seven Member Full Bench of the Australian Industrial Relations Commission decided upon the following definition, including the use of the term ‘on-hire’ rather than ‘labour hire’:

“on-hire means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client”.

The above definition is included in nearly all modern awards and has been well understood by industry, unions and employees for the past 8 years. We note that the Victorian Government in its Consultation Paper has stated it *“wants to ensure that the scheme does not capture arrangements for supply of workers to a third party which would not be commonly understood as labour hire arrangements”*. Ai Group considers that the adoption of the modern award definition would be the most effective way to ensure that the licensing scheme is genuinely limited to labour hire arrangements.

This definition would be a far more appropriate means of identifying labour hire providers and labour hire services, than the broad definitions adopted in the Qld Act and SA Bill.

Problems with SA definition of labour hire services

The Government’s Consultation Paper refers to potential categories of limitations or exclusions, including:

-)] limiting the scheme’s application to providers who supply workers to another business or undertaking, rather than to an individual not conducting a business or undertaking; and
-)] limiting the scheme’s application to where a worker is working in and as part of the business or undertaking of the host, rather than in and as part of the business of the provider.

Ai Group considers these limitations alone to be inadequate. Indeed the second limitation is very similar to the definition of labour hire services that was ultimately adopted by the South Government in the passage of the SA Bill.

Ai Group expressed its concerns to the South Australian Government in the development of the SA Bill and specifically the definition of *labour hire services*.¹

The SA Bill definition is narrower than the excessively broad definition used in the Qld Act and reads:

“a person (a provider) provides labour hire services if, in the course of conducting a business, the person supplies, to another person, a worker to do work in and as part of a business or commercial undertaking of the other person.”

While the SA definition is preferable to the broad definition of *provider* and *labour hire services* adopted in the Qld Act², the SA definition is still problematic in its potential coverage of, for example:

- J Businesses which provide legal services already regulated under relevant legal profession legislation, and users of such services;
- J Businesses which provide other professional services where labour is supplied to a client as an associated, secondary or ad hoc service in conjunction with the service for which it is engaged;
- J Contracting businesses (e.g. electrical contracting, mechanical contracting, IT, engineering), and plant and equipment hire where labour is supplied to perform the work because of a particular expertise or as part of equipment owned by the provider;
- J Business structures where employees from one entity may be seconded to perform work for another related entity for the benefit of the corporate group (commonly referred to as a shared services model);
- J The occasional or adhoc supply of labour to a client which may not be regular or an ongoing occurrence.

The addition of the legislative note and examples in the SA Bill are somewhat instructive but do not comprehensively cover the variety of non-labour hire business to business arrangements that could remain subject to the Act’s obligations. This lack of clarity is concerning, including because of the extremely high civil and criminal penalties (including imprisonment) that apply to persons who provide or use unlicensed labour hire services.

Importantly, the SA Bill does not cover businesses which are registered group training organisations and it is essential that this exclusion also applies in any Victorian scheme.

¹ See s.6 *Labour Hire Licensing Bill 2017 (SA)*

² See s.7 *Labour Hire Licensing Act 2017 (Qld)*

A narrow statutory definition is necessary, rather than extensive and detailed regulations

Ai Group's view is that an appropriate definition of 'labour hire services' should be contained within the Act; not regulations. Placing necessary exclusions to the scheme in regulations would be a precarious and less effective way of providing clarity regarding the scope of the licensing scheme.

Businesses and users of labour hire should not have to interrogate the detail of regulations to determine whether or not they are about to enter a labour hire service arrangement for the purpose of licensing requirements. This would cause disruption for many business to business transactions and add to administrative and compliance costs. Such costs would also be passed on to consumers in many cases.

A precise, and well understood statutory definition of 'labour hire services' is needed and the modern award definition of "on-hire" fits this purpose.

In Ai Group's view, the adoption of the modern award definition of 'on-hire' would limit the need to comprehensively identify the list of necessary exclusions in regulation of non-labour hire arrangements.

If the Government proceeds with the development of regulations to further define the coverage of the licensing scheme, we attach the various exclusions Ai Group is seeking in regulations being developed by the Queensland Government for the Qld Act. This list of exclusions is set out at **Annexure A** and is not necessarily exhaustive but represents the types of business arrangements and industries that Ai Group contends are not, nor should be, construed as labour hire arrangements for the purpose of any labour hire licensing scheme.

In addition, Ai Group supports other exclusions identified in the Government's Consultation Paper including:

- Pure outsourcing of a business or part of a business;
- The exclusion of short term ad hoc arrangements between similar businesses.

The array and number of non-labour hire business to business services and internal company arrangements highlighted in the list of proposed exclusions in Annexure A, highlights that it would be nearly impossible to regulate for all appropriate exclusions. This reinforces the need for an appropriate, narrow and sensible definition of 'labour hire services' in any Victorian labour hire licensing Bill and this is best done by using the modern award definition referred above.

Annexure A – Exclusions identified under the *Labour Hire Licensing Act (2017) Qld*

Various exclusions identified by Ai Group in respect of proposed Regulation under the *Labour Hire Licensing Act 2017 (Qld)*.

Exclusion	Relevant section of Labour Hire Licensing Act 2017 (Qld)	Comments
A worker for a provider that provides labour to other entities within the same integrated business.	s.8(2)	It is common for businesses to have different legal entities even though the various entities operate as a single integrated business (e.g. one legal entity owns the plant and equipment, while another entity employs the labour). Sometimes these business structures are necessitated by the lending requirements of banks that provide finance to the business.
A worker for a provider that provides services to related entities within the same corporate group	s.8(2)	Many corporate groups have a “shared services” model where one entity within the group provides services (e.g. finance, IT, HR, industrial relations, maintenance, design etc) to other entities in the group.
A worker that provides legal services under the <i>Legal Profession Act 2007 (QLD)</i>	s.8(2)	The provision of legal services is already subject to extensive regulation and is not appropriately covered by the Labour Hire Licensing Act. If the provision of legal services is included under the Act, major issues relating to the reporting obligations under the Act will arise, given the onerous confidentiality requirements that apply to the provision of legal services.
A worker for a provider, if the dominant purpose of the business ordinarily carried on by the provider is manufacturing goods.	s.8(2)	Manufacturers have warranty obligations to their customers. If products require warranty repairs, the repairs are often carried out by employees of the manufacturer on customers’ premises
A worker for a provider, if the dominant purpose of the business ordinarily carried on by the provider is providing information technology, telecommunications, office equipment and/or communications services to customers of the provider.	s.8(2)	ICT companies employ a large number of professional staff who provide ICT services to customers. It is not reasonable for these staff to be covered by the Act.
A worker for a provider, if the worker is employed by a registered organisation	s.8(2)	Registered organisations are already subject to extensive regulation under the <i>Fair Work (Registered Organisations) Act</i>

Exclusion	Relevant section of Labour Hire Licensing Act 2017 (Qld)	Comments
under the <i>Fair Work (Registered Organisations) Act 2009</i>		2009. The provision of industrial relations and other services to members of unions and employer organisations should not be covered by the legislation.
A worker for a provider, if the dominant purpose of the business ordinarily carried on by the provider is providing medical, dentistry, health, accounting, financial, management, training, recruitment, human resources, workplace relations, work health and safety, environmental, design, engineering, surveying, architectural, advertising, marketing, real estate, property, or other professional services to customers of the provider.	s.8(2)	The provision of professional services should not be covered by the Act.
A worker for a provider, if the dominant purpose of the business ordinarily carried on by the provider is providing security, cleaning, catering, equipment hire, traffic management or maintenance services to customers of the provider.	s.8(2)	These workers are not “labour hire” workers, and it is not reasonable for them to be covered by the Act.
A worker for a provider, if the dominant purpose of the business ordinarily carried on by the provider is providing transport, freight, aviation or maritime services to customers of the provider.	s.8(2)	These workers are not “labour hire” workers, and it is not reasonable for them to be covered by the Act.
A worker for a provider, if the dominant purpose of the business ordinarily carried on by the provider is providing mechanical, civil, electrical or communications contracting services to customers of the provider.	s.8(2)	These workers are not “labour hire” workers, and it is not reasonable for them to be covered by the Act.
A worker for a provider, if the dominant purpose of the business ordinarily carried on by the provider is providing office administration, printing or related services to customers of the provider.	s.8(2)	These workers are not “labour hire” workers, and it is not reasonable for them to be covered by the Act.
A worker for a provider, if the dominant purpose of the business ordinarily carried on by the provider is providing contract	s.8(2)	These workers are not “labour hire” workers, and it is not reasonable for them to be covered by the Act.

Exclusion	Relevant section of Labour Hire Licensing Act 2017 (Qld)	Comments
mining services to customers of the provider.		
A worker who is a non-executive director of a provider.	s.8(2)	Non-executive directors on boards should be excluded.
A worker for a childcare business, if the dominant purpose of the business ordinarily carried on by the provider is providing childcare services to customers of the provider.	s.8(2)	Non-executive directors on boards should be excluded.
A worker who is a volunteer.	s.8(2)	These persons are not “labour hire” workers, and it is not reasonable for them to be covered by the Act.
A worker that provides services to a person who does not require the services in the course of carrying out a business (e.g. a worker providing services to a natural person for household or domestic purposes, such as a gardener, a handyman or a home carer).	s.8(2)	These persons are not “labour hire” workers, and it is not reasonable for them to be covered by the Act.