Ai GROUP SUBMISSION

Minister for Industrial Relations
South Australian Government

Labour Hire Licensing Bill 2017

South Australia

8 September 2017

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.

SUMMARY OF Ai GROUP'S POSITION

Ai Group welcomes the opportunity to provide its response to the South Australian Government's proposed *Labour Hire Licensing Bill 2017 (SA)* (**the Bill)**.

We oppose the Bill.

The Bill is unbalanced and would operate unfairly upon labour hire providers and on businesses that use labour hire in numerous industries.

In addition to the adverse impacts on labour hire businesses and their clients, the Bill would have adverse impacts upon a very large number of other businesses. Numerous genuine contracting arrangements would be covered by the legislation; far beyond any reasonable notion of 'labour hire'. Within industry, businesses provide a huge array of different services to other businesses, and often labour is involved to a greater or lesser extent. The Bill would lead to the disruption of countless business-to-business services, and expose businesses, their owners and managers, to significant risks and added costs.

The Bill would impose unreasonable costs and regulatory burdens on not-for-profit group training providers (e.g. Ai Group Training Services) which coordinate the training of tens of thousands of apprentices and trainees. The Bill would impose significant barriers to the employment of apprentices and trainees and consequently:

- Exacerbate the current youth unemployment problems in Australia;
- Reduce the career opportunities for many thousands of young Australians; and
- Lead to skill shortages in numerous industries.

Not-for-profit group training arrangements are not 'labour hire'. These arrangements need to be excluded from the Bill.

Ai Group is the main industry group which represents the labour hire industry in respect of industrial relations matters. Ai Group has a large number of labour hire companies as Members – small and large. We have represented the industry in numerous Federal and State Industrial Commission cases, inquiries and other forums over many years. Ai Group also has a large membership in industries which use labour hire and it is important that the interests of both labour hire companies and users of labour hire are kept foremost in mind when considering this Bill. The interests of both groups, as well as the interests of the broader community, are best protected by ensuring that a competitive market is maintained for the provision of labour hire services and that an unnecessary regulatory burden is not imposed.

Ai Group opposes unlawful labour hire practices. However, in Ai Group's experience, the vast majority of labour hire companies are reputable in their employment practices and comply with relevant laws and regulations. Many established labour hire companies have developed progressive

and sophisticated employment practices, and often provide superior wages and conditions. Labour hire companies are subject to the same industrial instruments and employment obligations as other employers.

We note the Bill is very similar to the Queensland *Labour Hire Licensing Bill 2017* **(Qld Bill).** Ai Group expressed strong supposition to the Qld Bill. A copy of our written submissions are available here. Ai Group has identified a number of significant concerns with the Qld Bill, many of which would equally apply to the SA Bill. We note that in its Final Report, the Queensland Parliamentary Finance and Administration Committee was unable to reach agreement on supporting the passage of the Qld Bill through Parliament.

Ai Group's position on further regulation of the labour hire industry is also clearly set out in the following earlier submissions provided to the Queensland Parliamentary Inquiry into the Practices of the Labour Hire Industry in Queensland:

- Ai Group's submission to the Queensland Parliament Finance and Administration Committee (June 2017)
- Ai Group's submission to the Queensland Parliament inquiry into the Practices of the Labour Hire Industry in Queensland (7 April 2016); and
- Ai Group's response to the Queensland Government's Issues Paper, 'Regulation of the Labour Hire Industry 2016' (February 2017).

In the above submissions Ai Group has expressed the view that a licensing system for the labour hire industry is unnecessary and we continue to hold this view.

The South Australian Bill, if enacted, would impose significant barriers to businesses entering the labour hire industry thereby diluting competition. The Bill would also impede the legitimate outsourcing of business operations by companies in numerous industries.

The Bill would have a negative impact an employment, training, and business confidence; all which have a direct impact on the South Australian economy.

The Bill would impose very onerous arrangements on reputable and lawful labour hire providers and their clients, by increasing regulation, red tape, and the cost of doing business.

We urge the South Australian Government to abandon the Bill.

If the Bill is to be passed, despite Ai Group's strong opposition, this submission identifies a number of significant concerns about various provisions of the Bill.

OTHER LEGISLATIVE DEVELOPMENTS THAT REDUCE THE NEED FOR A LICENSING SCHEME

Recent legislative developments reduce the need for a licensing scheme or, at least, justify the removal of certain aspects of the licensing legislation.

The *Fair Work (Protecting Vulnerable Workers) Act 2016* has passed through the Commonwealth Parliament and will come into operation shortly.

The Vulnerable Workers Act will amend the *Fair Work Act 2009* (**FW Act**) to:

- Introduce a new "serious contravention" penalty – up to $540,000 per breach for a company (10 times the current maximum penalty).
- Increase penalties for pay-slip and record keeping offences – up to $54,000 per contravention (double the current maximum penalty) and up to $540,000 for a serious contravention (20 times the current maximum penalty);
- Give franchisors and holding companies more responsibility for breaches of workplace relations laws and instruments by franchisees and subsidiaries; and
- Grant the Fair Work Ombudsman compulsory interrogation powers (similar to the powers of the Australian Building and Construction Commission).

The FW Act equally applies to labour hire operators and users of labour hire services.

The measures in the Vulnerable Workers Act provide a strong deterrent to any labour hire operators that do not comply with workplace laws and, should they be suspected of not doing so, the Fair Work Ombudsman will have increased powers to investigate and prosecute.

In addition, the Federal Government is proposing a modern slavery reporting scheme that would require certain large businesses to publicly report on how they address and eliminate any modern slavery practices in their operations and supply chain. Specifically, the Federal Government is proposing that reporting entities be required to publicly report on the following:

1. The entity's structure, its operations and its supply chains;
2. The modern slavery risks present in the entity's operations and supply chains;
3. The entity's policies and process to address modern slavery in its operations and supply chains and their effectiveness (such as codes of conduct, supplier contract terms and training for staff); and
4. The entity's due diligence processes relating to modern slavery in its operations and supply chains and their effectiveness.

These reporting measures are likely to drive large businesses to implement due diligence processes throughout their supply chain, which is likely to include labour hire services. Accordingly, many labour hire services providers will face client driven investigation into their practices and public transparency.

We urge the South Australian Government to consider these developments in assessing the need for such a burdensome, far-reaching licensing scheme with excessive penalties.

CONCERNS ABOUT SPECIFIC PROVISIONS OF THE BILL

While Ai Group strongly opposes the establishment of a licensing scheme in general, we wish to highlight serious concerns about the following aspects of the Bill.

PART 1 – PRELIMINARY

Division 2 – Objects and application of Act

Section 3 sets out the objects of the Bill.

Paragraph 3(1)(a) should be deleted from the Bill. This paragraph implies that providers of labour hire services exploit workers. This is clearly untrue in the vast majority of cases.

Ai Group proposes the following amendment:

(1) The objects of this Act ~~are~~is to~~—~~

~~(a) protect workers from exploitation by providers of labour hire services; and~~

(b) protect licensed labour hire businesses from predatory business practices that may be engaged in by persons unsuitable to be licensed to provide labour hire services; and

(c) promote the integrity of the labour hire industry.

(2) The objects are to be primarily achieved by establishing a licensing scheme to regulate the provision of labour hire services.

PART 2 – INTERPRETATION

Section 6 – meaning of 'labour hire services'

Like the Qld Bill, the Bill bases the proposed licensing scheme on extremely broad definitions of *labour hire service provider* and *worker.* The definitions extend well beyond the labour hire industry and would cover businesses who provide people incidental to the supply of goods and services, including:

- On-site maintenance and repair;
- Professional services;
- Professional secondments; and
- Group training organisations.

These commercial and business arrangements are not labour hire. Within industry, businesses provide a huge array of different services to other businesses, and often labour is involved to a greater or lesser extent. A licensing scheme on such a vast array of business and commercial arrangements is excessive and disruptive. The Bill would impose major impediments to innovation, entrepreneurship, the sharing economy and employment growth.

As set out in our Qld submission, the definition of labour hire developed by a 7 Member Full Bench of the Australian Industrial Relations Commission is a far more appropriate and certain way of identifying labour hire providers and labour hire services than the provisions in the Bill.

During the development of the modern award system under the FW Act between 2008 and 2010, there was considerable focus on an appropriate definition for labour hire. Ultimately, 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. This definition would be a far more appropriate means of identifying labour hire providers and labour hire services, than the definitions in the Bill.

Section 7 – meaning of 'worker'

The proposed meaning of 'worker' is also highly problematic. Section 7 defines a 'worker' as:

> *An individual is a worker for a person if the individual enters into an arrangement with the person under which –*
>
> *(a) The person may supply, to another person, the individual to do work; and*
>
> *(b) The person is obliged to the individual, in whole or in part, for the work.*
>
> *…*

The broad notion of an individual doing "work" for somebody else goes well beyond a labour hire business supplying workers to perform work for another business. "To do work" for another person, where the individual is paid by the supplier, could include a vast array of directly employed occupations that interface with, or "do work for", customers.

The notion of "to do work" for another person is vague, broad and likely to lead to absurd outcomes well beyond the stated objects of the Bill.

Not-for-profit group training companies

Group training schemes operated by not-for-profit bodies like Australian Industry Group Training Services (**AiGTS**) coordinate the training of over 25,000 apprentices and trainees Australia-wide. They fulfil a vital role in the community.

Ai Group's group apprentice and trainee scheme has been providing apprentices and trainees to businesses in the manufacturing and other industries for many decades. Our apprentices and trainees have won many awards.

In addition to the group apprenticeship and traineeship scheme operated by AiGTS, in 2016 Ai Group established a graduate employment service to assist graduates to transition to professional employment. The graduates are employed by Ai Group but placed with businesses for periods of between three months and two years. During this period, mentoring is provided to each graduate and there is close interaction with the host employers to ensure a successful outcome for both parties.

The Bill would increase costs for group training providers like AiGTS and Ai Group's graduate employment service and lead to higher costs for host employers. These costs, and other aspects of the Bill, would increase barriers to the employment of apprentices, trainees and graduates.

Imposing barriers to the employment of apprentices, trainees and graduates would:

- Exacerbate the current youth unemployment problems in Australia;
- Reduce the career opportunities for many thousands of young Australians; and
- Lead to skill shortages in numerous industries.

Not-for-profit group training arrangements are not 'labour hire'. These arrangements need to be excluded from the Bill.

Section 9 – Fit and proper person

Section 9 of the Bill proposes the grounds on which a licence may be issued or refused. Of concern, the Commissioner is given broad levels of discretion in determining who is a "fit and proper person" for the purpose of holding a licence or to be a director of a body corporate that is a holder of a licence.

Such broad discretion can lead to arbitrary outcomes. Ai Group is concerned that a Commissioner, in assessing whether a person or directors of a body corporate have sufficient business knowledge, experience and skills for the purpose of holding a licence, would be able to make a highly subjective assessment and this could lead to unfair outcomes.

Also unfair are some of the grounds on which a person or director is automatically excluded from being a "fit and proper person", such as where a person is a director of a body corporate that has been wound up for the benefit of creditors within 5 years preceding the application for a licence. While this may be relevant information, a blanket exclusion is not appropriate.

PART 3 - PROHIBITED CONDUCT

Excessive penalties

The penalties in the Bill are excessive, unbalanced and unfair.

We note that these financial penalties and imprisonment periods exceed those in the Qld Bill. The Bill's maximum penalties include $140,000 or imprisonment of 5 years for individuals and $400,000 for bodies corporate.

Section 11 of the Bill prohibits a person from entering an arrangement with an unlicensed provider without reasonable excuse. Section 11 does not make clear what a 'reasonable excuse' would be, other than to suggest that it may include a circumstance whereby the person entered the arrangement at a time when the 'labour hire provider' was shown to be licensed on the register.

This infers that prior to engaging the services of a labour hire provider a person must, up until immediately before each worker is provided, check the register, even in circumstances where the labour hire provider holds out that it is licensed.

The threshold of 'reasonable excuse' is vague and would expose clients of labour hire providers to harsh penalties, including imprisonment. An element of 'knowledge' needs to be inserted in s.11 as set out in our Qld submission.

> *11 Person must not enter into arrangements with unlicensed providers*
>
> *(1) A person must not, knowingly and without a reasonable excuse, enter into an arrangement with a provider for the provision of labour hire services to the person, unless the provider is the holder of a licence*

Section 12 should also be varied as follows:

> *12 Person must not enter into avoidance arrangements*
>
> *A person must not enter into an arrangement with another person (an avoidance arrangement) for the supply of a worker if the person knows~~, or ought reasonably to know,~~ the arrangement is designed to circumvent or avoid an obligation imposed by this Act, unless the person has a reasonable excuse.*

Ai Group is also concerned about the harsh civil penalty imposed on persons who fail to report anti-avoidance arrangements under s.13 of the Bill.

Clients are not always in a position to fully understand the workings of another business. Reporting assumptions that may turn out to be incorrect could expose clients to legal action and penalties in other areas. This provision should be removed. If it is to be retained, at the very least s.13(1)(b) should be amended to exclude the words "*or ought reasonably to be aware*" and s.13(2) should be amended to remove the words "*or ought reasonably to have become aware."*

PART 4 – LICENCES

Section 15 – Objection to application

Section 15, and specifically subsection 15(5,) enable a designated entity to object to an application for a licence. Subsection 15(5)(a) defines designated entity as including an industrial association within the meaning of the *Return to Work Act 2014 (SA).*

This power could be used inappropriately by trade unions against a licensee for reasons unrelated to the Act, such as the licensee's decision to not agree to negotiate an enterprise agreement with the union.

Subsection 15(5)(a) should be deleted.

Section 16 – Grant of licence

Like other broad powers given to the Commissioner in determining who is a fit and proper person, the grounds on which the Commissioner may grant a licence (s.16) or impose conditions on a licence granted (s.17) may also lead to arbitrary or inconsistent decisions. Such powers under these provisions are inappropriately broad and unfettered.

Ai Group is concerned about the level of discretionary power given to the Commissioner in granting licences and the resulting uncertainty that would face industry applicants, and the impact on investment decisions.

The licensing scheme, rather than promoting the integrity of the labour hire industry, would unfairly discourage new entrants.

Further, s.16 of the Bill requires that the labour hire business to which the application relates have sufficient financial resources. Ai Group is concerned that applicants, in the satisfaction of this requirement, will be forced to divulge to the Commissioner financial and other information that is confidential.

Subsections 16(1)(a)(ii) and 16(1)(b)(iii) should be amended so that the requirement that an applicant has sufficient financial resources is satisfied by the making of a statutory declaration by the applicant to that effect.

Section 20(1)(c) should also be deleted.

Section 18 – meaning of 'prescribed information'

Section 18 of the Bill requires licence holders to lodge prescribed information with the Commissioner every 12 months. The definition of prescribed information is extremely lengthy and onerous. The reporting obligations on licence holders are excessive and impose a costly regulatory burden. Much of the information to be reported (as defined in *prescribed information* (s.18(6)) would include sensitive business information (for example, the number of workers supplied, the description of arrangements, the details of the work carried out, the industry that the work was carried out in and the location of the work). The information would be of significant commercial value to competitors of the business.

We question the utility of the Commissioner receiving such detailed information every 12 months. This level of reporting would be a disincentive for businesses to engage in providing labour and services, which is outside the objectives of the Bill.

Our concerns about the content and frequency of reporting obligations are set out at p.11 of our Qld submission.

Section 19 – notification of changes in circumstances

Section 19 requires licence holders to notify the Commissioner of a change in respect of prescribed matters relating to the licence, within 14 days of the change.

Section 19(2)(d) refers to *"activities undertaken under or relating to the licence (such as without limitation, accommodation provided by the holder of the licence for workers supplied to another person.)".* Such a broad reference to activities undertaken or relating to the licence is unfairly vague and onerous on licence holders. Many established labour hire operators have an extensive number of services, activities and clients which regularly change. This provision not only imposes an unfair regulatory burden on licence holders but also potentially requires the disclosure of confidential or commercially sensitive business information, to which we have referred above.

The vague notion of *"activities undertaken under or relating to the licence"*, combined with the large civil penalties, make this provision particularly inappropriate and unfair.

Section 19(2)(d) should be deleted.

Section 21 – Suspension and Cancellation

Section 21 provides the Commissioner with broad powers to cancel a licence if *'satisfied'* that a licensee, employee or representative of the licensee, has contravened a 'relevant law', '*whether or not the licensee, employee or representative has been convicted of an offence for the contravention'.* This provision is unfair and unbalanced. The loss of a licence would, in many cases, result in a labour hire provider going out of business with the loss of all employees' jobs. Any consequences

associated with breaches of laws should not arise unless the person has been convicted of an offence in a relevant court and only after appeal rights have been exhausted.

Section 21 enables the Commissioner to cancel a licence for a breach of a 'relevant law', regardless of whether the breach is historical, inadvertent or immediately rectified by the licensee.

If a person's licence is cancelled, the person cannot apply for a new licence for two years from the time of cancellation (s.14(4)(b)). This is excessive.

Section 24 – Requirement for responsible persons

Section 24 requires a licensed business to "*at all times during business hours, be personally supervised and managed by a natural person (a responsible person) who is responsible for the day to day management and operation of the business*." Section 24(2) further requires that a responsible person must be a fit and proper person.

Section 24 is onerous and ill-conceived. It does not account for when 'responsible persons' may be on leave, be travelling for work (as part of the person's job) or that such persons may unfairly include managers who are not the decision makers involved in the planning, directing and controlling the activities of the organisation.

Section 24(1) should be deleted.

PART 5 – MONITORING AND ENFORCEMENT

Sections 31 and 32 charge the Commissioner for Consumer Affairs with sweeping and extensive powers to obtain information from individuals and businesses. This includes entering worksites without the occupier's consent or a warrant and compelling individuals to answer questions and attend interviews. Significant penalties apply if persons or businesses do not comply.

Ai Group is opposed to these powers. They are inappropriate and unnecessary.

Section 44 automatically imposes vicarious liability on principals or employers for an offence by an employee or agent and deems guilty each director of a body corporate if a body corporate is guilty of an offence. The provisions are not balanced or appropriate, despite the limited defences that are specified.

CONCLUSION

The Bill is unbalanced and inappropriate, and should not be proceeded with.

The Bill would have the effect of substantially discouraging investment in South Australian businesses, with consequent adverse effects on employment.

AUSTRALIAN INDUSTRY GROUP METROPOLITAN OFFICES
SYDNEY 51 Walker Street, North Sydney NSW 2060, PO Box 289, North Sydney NSW 2059
CANBERRA Ground Floor, 42 Macquarie St, Barton ACT 2600, PO Box 4986, Kingston ACT 2604
MELBOURNE Level 2, 441 St Kilda Road, Melbourne VIC 3004, PO Box 7622, Melbourne VIC 8004
BRISBANE 202 Boundary Street, Spring Hill QLD 4004, PO Box 128, Spring Hill QLD 4004
ADELAIDE Level 1, 45 Greenhill Road, Wayville SA 5034
PERTH Suite 1, Level 4, South Shore Centre, 85 South Perth Esplanade, South Perth WA 6151

REGIONAL OFFICES
ALBURY/WODONGA 560 David Street Albury NSW 2640
BALLARAT Suite 8, 106-110 Lydiard St South, Ballarat VIC 3350, PO Box 640, Ballarat VIC 3350
BENDIGO 87 Wills Street, Bendigo VIC 3550
NEWCASTLE Suite 1 "Nautilos", 265 Wharf Road, Newcastle 2300, PO Box 811, Newcastle NSW 2300
WOLLONGONG Level 1, 166 Keira Street, Wollongong NSW 2500, PO Box 891, Wollongong East NSW 2520

www.aigroup.com.au