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RCSA's response to the draft regulations to South Australia's *Labour Hire Licensing Act 2017*

As the peak body for the recruitment and staffing industry in Australia and New Zealand, RCSA welcomes the opportunity to participate in consultation on the draft regulations to the *Labour Hire Licensing Act 2017 (the Act).*

Ordinarily we would express grave concerns about the tight timeframes for response to the draft regulations, especially over a Christmas/ New Year period. In this case however, we recognise that the need to have the regulations in place by 1 March 2018 has left the government with a timeframe that provides limited alternate options for consultation and feedback to the regulations.

In that context, we also appreciate that some of the matters raised in this submission may require additional time for consideration and may ultimately need to be the subject of later, supplementary regulations.

Nonetheless, they are all issues we believe need to be raised as part of this consultation process and RCSA is happy to make itself available to meet with and discuss these matters further with the Government.

Scope and breadth

Of the many matters that could be dealt with in regulations, we note that that only a small number have been included in the proposed draft.

In particular, RCSA notes that the draft proposes no regulations in respect of:

s. 7(2)	Circumstances in which a person does not provide labour hire services;
s. 7(4)(c)	Exclusion from being a *provider of labour hire services* (merely) because a person is a person, or member of a class, prescribed by regulations;
s. 8(2)	Exclusion from being a *worker* as a person, or member of class, prescribed by regulations;
s. 45(1)(a)	Prescribed licences and accreditations for dispensation of some information requirements;
s.45(1)(b)	Prescribed licences and accreditations for fast-track determination of the fit and proper person test;

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s. 50(2)(c)(iii)	Prescribed Acts and laws for the purpose of which disclosure of information is exempt from the confidentiality requirement of s. 50(1); and
Sched 2	Transitional matters.

RCSA would appreciate clarification on whether the government intends to supplement this draft with further regulations in future, or whether it feels there is no need to incorporate these matters into the Act's regulations.

If there is intent to supplement the regulations, we would welcome an indication of the timeframe for release and/or consultation on any supplementary regulations.

Is there a provision for a "licence fee" as distinct from an "application fee" upon initial grant?

RCSA seeks clarification of the fees payable on application and initial grant of a licence.

The draft regulations indicate that the $500 fee that is payable under s. 15 of the Act is an application fee, whilst the $1,200 fee ($220 for an individual) that is payable under s.20(2)(a) is a "renewal fee" only – i.e. it is payable "within 28 days after a reporting period for a licence ends".

That cannot mean that it is payable at the start of the licence period.

Accordingly, there does not appear to be any provision in the Act for the payment of a substantive license fee upon the initial grant of a license.

A solution might be to include an administrative component and a licence (substantive) component in the s.15 "application fee", some part of which would be refundable if the application is not successful or is withdrawn.

RCSA also seeks clarification of whether the $500 application fee provided by reg.4 and the Schedule is refundable in the event of an unsuccessful or withdrawn application.

Dispensations & Fast Track Determinations

RCSA strongly supports provisions in the Act to streamline and simplify the licensing process for providers who can be recognised for meeting some of the criteria through their participation in other relevant licensing or certification schemes.

Section 45 of the Act allows for exemption of suitably certified providers where a person holds an existing licence, accreditation or approval under a law prescribed by regulations.

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Section 46 allows the Commissioner to grant exemptions by notice in writing or published in the *Gazette*. Queensland's Labour Hire Licensing Act contains a similar provision (s. 102) in relation to the waiver of certain requirements under that State's Labour Hire Licensing Act.

In RCSA's view, the scope of those provisions is sufficiently similar to warrant waivers, which can be granted under the Qld law, being recognized for the purpose of s.45. Likewise, we believe that South Australian dispensations and exemptions should also be recognised for the purpose of Queensland s. 102 waivers.

It is RCSA's strong view that implementation of the Act would be enormously assisted by regulations which provide for that degree of "mutual recognition". Further than that, we believe that the absence of mechanism to support this type of mutual recognition would be a failing of the regulations.

As you are aware, RCSA operates StaffSure, an industry certification program designed to make it easier for businesses, government bodies and workers to find and partner with reputable Workforce Services Providers with proven business integrity.

The StaffSure Standard and certification program was developed by RCSA in consultation with industries that use Workforce Services Providers, governments that regulate them, unions that employ workers within them and certification experts. Stakeholders included the National Farmers Federation, Growcom, Fair Work Ombudsman, Australian Taxation Office, Australian Workers' Union and the National Union of Workers, amongst others.

RCSA's StaffSure Program has been well designed and well tested to mitigate risk and provide assurance that workers and members of the public who deal with certified providers can be satisfied that they are reputable and seek to meet their compliance obligations.

Certified providers are required to have passed a fit and proper person test that is comparable to the tests in both South Australia and Queensland.

StaffSure establishes standards and requires certified providers to have suitable controls covering six key areas:

- fit and proper person;
- work status & remuneration;
- financial assurance
- safe work;
- migration;
- suitable accommodation.

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Importantly, StaffSure requires a certified firm to have systems and processes to manage its "service networks" and service network participants.

Service network participants are those businesses that provide services to a certified Workforce Service Provider, usually under some form of subcontract or outsourcing arrangement in respect of the following functions:

- sourcing/selection;
- engagement;
- mobilisation;
- performance of work (by workers);
- management & supervision;
- accommodation;
- payment; and
- demobilisation.

Certified providers can be held accountable through their certification such that in the event of default, certification can be withdrawn or suspended.

Whilst StaffSure was developed and can operate as a stand-alone scheme, it has much potential to operate in parallel with the South Australian licensing scheme through mutual recognition arrangements that may be established under s.45 or s.46 of the Act,

A number of the license requirements outlined under the Act are addressed as part of the audit process for StaffSure. RCSA is keen to work with the South Australian Government to identify where StaffSure certification requirements meet or exceed requirements for licensing under the Act and to find ways to streamline license application processes for StaffSure certified providers accordingly.

RCSA would be happy to make a more detailed presentation on the StaffSure program and answer questions about how it could be operationalised in a manner that could support South Australia Labour hire licensing scheme.

Circularity

In relation to the s. 45 matters, RCSA observes that the draft regulations appear to be somewhat circular.

We note that regulation 7 does not specify any corresponding laws that are prescribed. We are concerned that regulation 7, as currently drafted, has the potential to cause confusion and may weaken the effectiveness of both s.45 as well as that of other provisions in the Act that support the making of regulations – for example, sections 7(2) and 7(4).

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For that reason, we believe regulation 7 should be replaced by a regulation more specific to the purpose and objectives of the Act.

In the next section we make submission about corresponding laws that might be specifically identified and prescribed in the regulations.

Corresponding laws that might be declared

There are some laws that could be declared to be *corresponding laws* in order to align the South Australian s. 7(4) exclusions with laws that regulate employment agents and building work contractors in other States.

We believe the regulations would benefit from the declaration of corresponding laws in a number of areas.

Private Employment Agents

For example, private employment agents are comprehensively regulated in Queensland under the *Private Employment Agents Act 2005* (Qld) and *Private Employment Agents (Code of Conduct) Regulation 2015*, notwithstanding that, in Queensland, there is no requirement for a private employment agents licence.

They are exempted from the requirement to hold a Queensland labour hire license by s. 7(3)(a) of the corresponding Queensland *Labour Hire Licensing Act 2017*.

RCSA believes the Government should explore the opportunity to extend the Act's s.7(4)(a) exemption to private employment agents, who are regulated under statute in Queensland, the Australian Capital Territory and Western Australia.

Extension of the exemption could be managed by regulations made under s.7(2); s.7(4)(c) and/or by declaring the private employment agency laws of the other States and Territories to be *corresponding laws* under paragraph (b) of the s.6 definition.

Private employment agents are not similarly regulated in Victoria, Tasmania or the Northern Territory. Some minimal regulation exists in New South Wales under provisions of that State's *Fair Trading Act*.

Nevertheless, given the practical day-to-day business of a private employment agent in those jurisdictions is substantially the same, regardless of the extent of their regulation, if the intent is that private employment agents are not to be treated as *labour hire services providers*, they should be specifically exempted as a class of persons, who carry on the type of business that is described in the *Employment Agents Registration Act 1993* (S.A.).

In RCSA's view, this exemption is necessary due to the ease with which employment agency services can be supplied in interstate commerce and by the extent of the extraterritorial application of South Australia's *Labour Hire Licensing Act 2017* – see s.4.

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Building Work Contractors

RCSA generally does not support the exemption of building work contractors, who may be engaged in various forms of gang-mastery, from wide sector licensing schemes.

In that context, RCSA notes the extent to which exploitative gang-mastery has been reported within the building and construction industry and notes recent consideration given by the GLAA in the UK to extension of its powers to the building and construction sector.

That said, RCSA does note the s.7(4)(b) exemption in the South Australian LHL Act and the corresponding exemption under the Queensland LHL Act and therefore submits that it would be feasible to extend an exemption to interstate building work contractors by regulations made under s.7(2); s.7(4)(c) and/or by declaring the corresponding building work laws of the other States and Territories to be *corresponding laws* under paragraph (b) of the s.6 definition.

Exempt Under Interstate Regulations

RCSA observes that, although the South Australian Act will commence ahead of the Queensland Labour Hire Licensing Act, the Queensland transition period is shorter (60 days).

The effect of that is that license cover, and a corresponding scheme of regulatory exemptions, may be in place more quickly and be more extensive than would be the case in South Australia.

RCSA submits that, for the sake of uniformity, businesses that are exempt from the requirement to hold an interstate license, whether under the express provisions of the corresponding Act or as prescribed by supporting interstate regulations, should be similarly exempt under the South Australian LHL Act and regulations.

The *quid pro quo* would logically seem to be that businesses that are exempt in South Australia should similarly be exempt in Queensland – except in the case of express divergence in the legislative schemes as has happened in the case of registered group training organisations.[1]

As both the South Australian and Queensland Acts contemplate the widest permissible extraterritorial application, it also becomes necessary, in South Australia, to consider the position of a provider in a non-regulation State, such as New South Wales, who is granted exemption under the Queensland LHL Act.

RCSA believes that such firms should be granted exemption by regulations made under s.7(2); s.7(4)(c) and/or by declaring the corresponding employment agency and labour hire licensing laws of the other States and Territories to be *corresponding laws* under paragraph (b) of the s.6 definition.

Alternatively, it might be made clear that such firms could apply for exemption under the provisions of s.46 of the South Australian LHL Act.

[1] See S.A. LHL s. 5 and Qld LHL s. 7(1) (2nd example). Though this may be harmonized, when Qld makes its Regulations.

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Exclusions

RCSA appreciates that the South Australian government may wish to take advantage of the transition period to develop and fine tune a suite of regulatory exemptions. Nonetheless, it is RCSA's view that there is an urgent and pressing need to resolve a question about the application of the Act to independent contractors – both incorporated and unincorporated.

There is also an urgent and pressing need to resolve a question about the application of the Act in circumstances, where the obligation to pay a worker "in whole or in part for the work" arises from a payroll or escrow arrangement.

On-hired independent contractors (unincorporated)

Although the restriction of s.7(1) of the Act to circumstances where a worker is supplied to do work *"in and as part of a business or commercial undertaking of the other person"* has the effect of excluding - for example; the supply by plumbing contractors of employed plumbers who are used in the plumbers' business to carry out plumbing services at vineyards - it is by no means clear that the on-hire to a client by a labour hire agency of one of its unincorporated independent contractors is similarly excluded.

That is because the qualification to s. 7(1) seems to have had the consequence of setting up an inconsistency with s. 7(3)(a), which provides that a person is a labour hire services provider regardless of whether the worker is the person's employee.

On the face of it, s. 7(3)(a) seems intended to ensure that the distinction between employees and independent contractors will not be relevant in determining whether a person is a *worker* of a labour hire services provider. On the face of it, an agency that on-hires only independent contractors will still be required to have a licence.

However, a difficulty now arises because independent contractors do not work *in and as part of* the businesses of their clients, or those of the agency that on-hires their services. They work in and as part of their own businesses. So much was clearly stated by the Federal Court in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)*.[2]

If the purpose of limiting s.7(1) to circumstances, where the worker works in and as part of the client's business, was to exclude all (genuine) on-hired independent contractors, we believe that purpose should be supported by regulations made under s. 8(2), which would confirm that (genuine) independent contractors – even though they may be supplied through an agency – are not workers of the agency such as to bring the agency within the coverage of s. 7.

If the purpose was merely to give some meaning to what was meant by *supply*; or to capture the on-hire of independent contractors working as part of the client's workforce (however composed) in much the same way as if they were employees, then that, too, should be clarified by regulations.

[2] [2011] FCA 366 per Bromberg J at [207]-[208].

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It is RCSA's view that clarifying regulations made under s. 7(2) or s.8(2) would provide better resolution than having to rely upon notes, examples and analogous applications of the integration test, which seem destined to generate questions of statutory interpretation that will require determination by the superior courts.

Incorporated independent contractors

Independent contractors frequently trade through small, closely-held proprietary limited companies.

They will be found to operate across a wide range of mostly professional services industries including engineering, information technology and communication, medicine, allied health and fitness, design and creative industry, architecture, project management, strategic and business services and logistics etc.

They will also be found to operate across a wide variety of skilled occupations and in some unskilled occupations.

Incorporation for trade as an independent contractor is frequently a legitimate structure for professional and trade services. Its legitimacy in lower skilled occupations is often questionable. We are concerned here only with legitimate applications.

It should be observed that incorporated independent contractors – Pty Ltd companies that provide their principals' or owners' services - are technically labour hire services providers within the *supply-a-worker* model of both the Queensland and South Australian legislation – see s.7 of both the S.A. and Qld LHL Acts.

That is because, typically, a labour hire agency will enter into an agreement with the incorporated entity under which the incorporated entity *supplies,* or "nominates", its principal or "owner" to the labour hire provider's clients to perform work for them.

The incorporated entity does not contract with the client to provide engineering services, IT services etc.; it contracts with the agency to make its principal (worker) available to perform work for the agency's clients.

There may even be strictures regarding the individual worker's ability to incorporate, or other circumstances in play such that the incorporated entity only ever acts as a service entity for the individual – in effect handling the individual's engagements to perform work, making the individual available, taking receipts and paying the individual for the work.

Sometimes the agency makes its agreement with both the incorporated entity and the principal (worker). In other cases, it does not; and simply leaves it to the worker's incorporated entity to secure the supply (to the client) of the incorporated entity's worker (delegate or nominee) and performance of the work out of deference to independence of the contracting relationship.

The arrangements as between:

- labour hire agency, incorporated entity and principal (worker);

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- incorporated entity, principal and labour hire client -

thus demonstrate the familiar triangular relationship that is identified in the legislation and explanatory materials as a "labour-hire" relationship.

This is so regardless of the existence of any contractual relationship between the incorporated entity, the worker and the labour hire client, and regardless of the intermediation of the labour hire agency – see ss.7(3)(b) and (c) of the Act.

This class of contractor is identified within RCSA's services taxonomy as follows:

> ***On-Hire Contractors (Incorporated)***
>
> *An individual independent contractor engaged as an employee of a company which is typically controlled by the same individual as a sole or joint Director. There are examples where the individual will be an employee of a larger, multiple employee, company where the company nominates a key person for the completion of the work on assignment.*

Within APSCo Australia's services taxonomy they have been described[3] as:

> ***Pty Ltd Contractors***
>
> *An independent contractor that is an incorporated company, which employs an individual to perform services and nominates them to an end user client. Alternatively, a third party company may act as the incorporated entity structure (i.e. payroll service provider). The Pty Ltd Contractor is responsible for the individual's superannuation, tax and any insurances (as applicable and agreed between the parties).*

It also seems that there is little doubt that the principals are *workers* for their incorporated entities to the extent that the entity has an arrangement with them (frequently an employment arrangement, or a "working director" arrangement) under which the incorporated entity may provide them to another person to do work and has an obligation to pay them in whole or in part for their work. See s.8 of the Act.

That appears to be so regardless of the intervention of payroll providers or other intermediaries through which payment from the client flows.

The relationships, in their simplest form, can be depicted as set out in Fig. 1. below.

[3] APSCo Au, Victoria's Labour Hire Licensing Scheme Consultation Paper Development of Regulations Submission to Industrial Relations Victoria Department of Economic Development, Jobs, Transport and Resources Submitted: Wednesday December 6 2017. https://www.apscoau.org/documents/item/2759.

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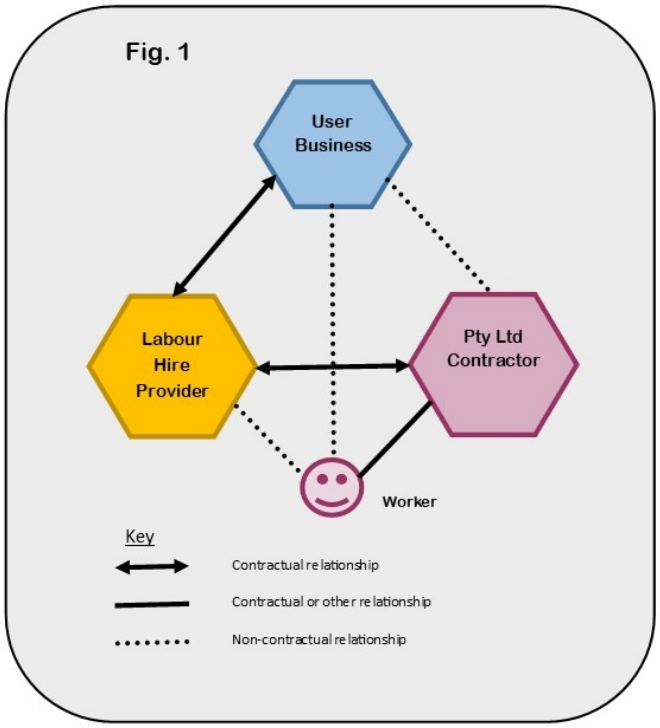

Whilst the restriction of s.7(1) of South Australia's LHL Act to circumstances where a worker is supplied to do work *"in and as part of a business or commercial undertaking of the other person"* has the effect of excluding - (e.g.) the supply by plumbing contractors of employed plumbers who are used in the plumbers' business to carry out plumbing services at vineyards - it is by no means clear that the provision, by an incorporated independent contractor, of one of its workers to perform services for the client of a labour hire agency is excluded; or that the entry by such a company into an agreement to place its worker at the disposal of a labour hire agency is similarly excluded.

The reality is there are thousands of these contractors; and if they are brought within the labour hire licensing scheme, the costs of administering the scheme will be enormous – as will be the disruption to the supply of services occasioned by the need for them to obtain licences, meet licence requirements (including the fit and proper person and reporting requirements) and the cost of obtaining a licence.[4]

[4] For further discussion of this issue, see Wood A (2017) *Labour Hire Licensing Acts (Qld & SA): Application to incorporated independent contractors.* https://recruiterscasebook.com/2017/10/30/labour-hire-licensing-act-2017-qld-application-to-incorporated-independent-contractors/

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Moreover, the risk of a user/client's dealing with an unlicensed contractor and committing the s. 12 offence is high.

RCSA believes such firms should be granted exemption by regulations made under s.7(2); s.7(4)(c) and/or by class order published in the *Gazette* under s. 46(1)(b).

Alternatively, the principals (and a limited number of delegates) of such firms might be excluded from the definition of *worker* by regulations made under s.8(2) of the Act.

Obligation to Pay the Worker "in Whole or in Part for the Work": Payroll Providers and Escrow Payment Services.

In the course of conducting industry briefings on the new labour hire licensing laws, RCSA has encountered a topic of concern to industry participants that may be resolved by regulations made under section 8 of the Act.

The topic concerns a question of whether payroll providers (e.g. an employment agency that does not *merely* act as a licensed employment agency under the *Employment Agents Registration Act 1993,* but also provides a payroll service in respect of the candidates it supplies) is under an *obligation*, within the meaning of s. 8 of the LHL Act, to pay the worker in whole or in part for the work.

The obligation, in this instance, arises from a contract made by the payroll agency with the worker's employer. It is not owed directly to the worker. Nevertheless, the worker has the benefit of performance of the obligation. The employment agent has thus *supplied* a worker and has an *obligation* to pay the worker. Does that circumstance bring the employment agent within the coverage of the Act?

A similar issue arises in respect of online services, such as Freelancer, that facilitate the matching of workers to job providers and handle payment under escrow or similar arrangements.

Assuming that the worker is *supplied* to a business or commercial undertaking, does the circumstance that the online service handles payment for the work bring the online service within the coverage the Act?

RCSA believes these questions could be resolved relatively easily by regulations made under s.7(2); s.7(4)(c) or s.8(2) of the Act and their early incorporation would greatly facilitate the implementation of South Australia's Labour hire licensing scheme.