Consultation Paper 2: Possible treatments to refine the scope of the labour hire scheme

Please note: All responses will be treated as confidential and will not be published.

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1: Secondments

Please provide feedback on:

- If it is appropriate that genuine secondments are considered arrangements that are not intended to be captured by the scheme?
- If the proposed policy treatment is effective in clarifying the scope of the scheme in respect of genuine secondments?
- If the alternative regulation treatment is necessary and, if so, effective in clarifying the scope of the scheme in respect of genuine secondments?
- If there are possible unintended consequences of this treatment?
- Could any unintended consequences be overcome through a different treatment?

Appropriateness of Exclusion from Scheme Capture

Exclusion of genuine secondments from scheme capture is appropriate in RCSA's submission.

Effectiveness of Proposed Policy Treatment

Under s.8(2), prescription is only possible by regulation. Mere policy cannot establish legal definitions. Nor can policy declare legislative intent. Policy treatment alone will therefore be ineffective.

The risks of sub-delegation must also be avoided.

Nevertheless, policy treatment may be useful to announce enforcement priorities, or to establish an administrative framework for granting waivers under s.102 from information requirements. It may be useful in building upon a framework for exemption established in the Act and regulations.

Necessity for Alternative Regulation Treatment

RCSA agrees that more certainty is required.

More certainty could be achieved by prescribing an exemption on the basis of a **class of worker defined by robust criteria** – for example most professional (non-award) secondments could be exempted by this means. Workers who have the benefit of a **high-income guarantee** under the *Fair Work Act 2009* (Cwth) could also be exempted as a class. State Government employees above a certain classification could similarly be exempted as a class. What is important in each instance is that the criteria should be robust and easy to apply.

Effectiveness in clarifying scope

RCSA agrees that a treatment is possible using the regulation making power at section 8(2) and that the effect of the regulation could be to prescribe that a worker on a genuine secondment to an associated entity and a worker on a genuine secondment for professional services as classes of individuals who are not *workers* for the purposes of the scheme.

However, the effectiveness of an exemption according to that formula is compromised by the lack of definitional precision.

Unintended Consequences

In the absence of any provision for determining “genuineness”, or the “boundaries of association”, or the scope of “professional services” on a case by case basis, there remains a significant risk that vaguely defined exemptions will spill over to exempt (or facilitate the disguise) of labour hire arrangements.

Different treatment

It would also seem possible, by regulation made under s.8(2) to exempt a worker (or class of worker) defined by special circumstances. The special circumstances should be prescribed in the regulations.

One such circumstance could be that the worker (or class) is first approved for prescription by the Chief Executive under a form of **administrative clearance arrangement**. This would provide a degree of flexibility whilst avoiding many of the risks of sub-delegation.

Some regulatory support may also be obtained, for ease of transition, by regulations made under s.110.

2: Consultants

Please provide feedback on:

- If it is appropriate that consultants/consultancy arrangements are considered arrangements that are not intended to be captured by the scheme?
- If the proposed treatment is effective in clarifying the scope of the scheme in respect of consultants?
- If there are any unintended consequences of this proposed treatment?
- Could any unintended consequences be overcome through a different treatment?

Appropriateness of Exclusion from Scheme Capture

The expression “consultants”, in the context of a scheme established to cover all sectors and all workers is vague.

The issue under s.7 will the whether there has been a ***supply*** in the sense contemplated by the Act; not whether a worker is a consultant.

Whether a worker, being a consultant, can be excluded is a matter for s.8 of the Act. There will be some consultants, whom it may be appropriate to exclude under s.8. The issue, as is the case with the secondees, will be whether definitional criteria can be established that are robust and easy to apply.

Effectiveness of Proposed Treatment

Treatment is not possible using the regulation making power in s.7(3)(c).

That is because s.7(4) limits the scope of s.7(3)(c) to situations, where the supply of consultants is **not a dominant purpose** of the business ordinarily carried on by the provider.

The supply of professional consultants “to go into another business to review internal processes and provide specialist advice” may indeed be *a* dominant purpose (if not *the* dominant purpose) of the provider’s business.

If an attempt is to be made to exclude “consultants” as a class of worker, it needs to be done under s. 8 not under s.7.

Unintended Consequences

The unintended consequences are that the exclusion under s.7 is ineffective for precisely the circumstances identified in the Consultation Paper.

Different treatment

Some assistance could be gained by developing a guideline on the meaning of "supply" as used in s.7.

It may be useful to follow the Payroll Tax cases, which discuss the employment agency contract provisions of Payroll Tax legislation. See, for example, *JP Property Services Pty Ltd v Chief Commissioner of State Revenue* [2017] NSWSC 1391.

However, in RCSA's respectful submission, the proper focus of the question, in a labour hire context, should be on whether the worker becomes part of the other person's *workforce* (the boundaries of which are perhaps somewhat more permeable), rather than on whether the worker becomes part of its *business or undertaking* (the boundaries of which are more proprietary; and raise difficult issues in the case of genuine on-hired independent contractors who work in their own business or undertakings).

The *business or undertaking* formula produces some unintended consequences in the case of on-hired independent contractors (which we discuss below) and some "fact sensitive" peculiarities in application – such as arose in the distinction made by the court in *JP Property Services* between after-hours cleaners and cleaners supplied during shopping hours.

> **See**: Wood, A: *Lessons for Labour Hire Providers: JP Property Services Pty Ltd v Chief Commissioner of State Revenue (2017)* https://recruiterscasebook.com/2017/10/21/lessons-for-labour-hire-providers-jp-property-services-pty-ltd-v-chief-commissioner-of-state-revenue-2017/

3: Worker is 'director' or owner of business

Please provide feedback on:

- If it is appropriate that a director or owner of a business who hires themselves out are considered as a class of person who do not provide labour hire services?
- If the proposed treatment is effective in clarifying the scope of the scheme in respect of these arrangements?
- If there are any unintended consequences of this proposed approach?
- If there are any alternate means to achieving this effect?

Appropriateness of Exclusion as Class from Scheme Capture

Incorporation for trade as an independent contractor is 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 – and more particularly in circumstances where they are involved with labour hire providers.

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.*

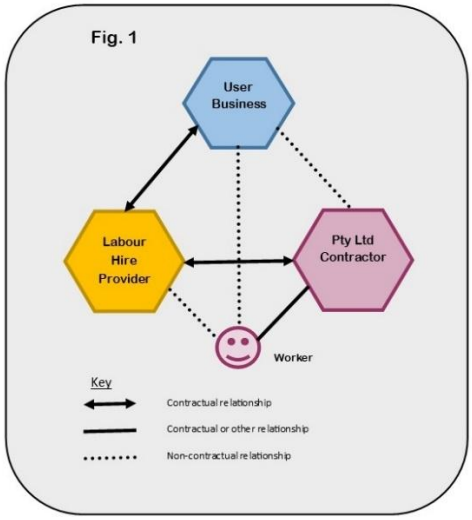
Within APSCo Australia's services taxonomy they have been described[1] as:

> ***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).*

[1] 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.

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. However, the remuneration arrangement may not always satisfy the requirements of s.8 (as will be discussed below).

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



The arrangements as between:

- labour hire agency, incorporated entity and principal (worker);
- incorporated entity, worker (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(2)(b) and (c) of the Act.

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

RCSA submits that such worker owned companies should be granted exemption by regulations. However, supply of the worker/director will often be the dominant purpose of the company that is controlled by the worker/director and its only means of operating. That would make exemption under s.7 impractical.

Nevertheless, the principals (and a limited number of their delegates – in deference to the power of delegation and the involvement of family arrangements) of such firms might be excluded from the definition of *worker* by regulations made under s.8(2) of the Act.

Commonality

RCSA notes that the Queensland Government has remarked that "the most common example of this type of practice is where a medical practitioner sets up a business entity and is both the director of that business and the sole employee." Whilst the example is an accurate example, in RCSA's view, IT contractors, cleaning contractors and logistics contractors would be equally, if not more, common examples.

The business model under consideration should be understood as applying to a wide range of skilled and semi-skilled occupations. Neither is the model uncommon in less skilled callings, where its deployment has been more controversial – See *Hollis v Vabu P/L* (2001) 207 CLR 21.

The reality is that 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.[2]

Exclusion Treatment Issues

Treatment of the exclusion therefore requires consideration of the interaction between exclusionary criteria and established legal rules for determining the existence of independent contracting arrangements according to tests laid down in cases such as *Hollis* and *On-Call Interpreters and Translators Agency P/L v Commissioner of Taxation (No 3)* (2011) 279 ALR 341.

Distinguishing features, such as the fact that the workers perform the work in and as part of their own businesses and the fact that the workers will usually have (original) power to delegate – even if limited by requirements for contractual approval – also need to be considered.

Additionally, worker/directors may be remunerated by wages, shareholder dividends, distributions through various trusts, or directors' fees. They may not be remunerated at all; but may work under a family arrangement as between spouses, parents and siblings.

Are they workers under s.8?

This last aspect raises a question of whether they are *workers* at all – given that, under s.8, a worker is only a worker for a provider if the provider (the corporation or business in this case) is obliged to pay them **in whole or in part for the work**.

It is doubtful that remuneration by any of the means discussed above (other than by payment of wages under a work/wages bargain) can properly be said to arise from an obligation to pay for the work.

Is there a licensed labour hire provider somewhere in the "chain"?

The position is especially problematic in the case of such workers, who are "supplied" through labour hire type arrangements to users of their services.

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. Genuine independent contracting arrangements will usually recognise the entity's power of delegation, though there may be a requirement for contractual approvals.

The incorporated entity cannot be a worker, because it is not an individual – see s.8(1) of the Act.

The individual does not enter into the s.8(1)(a) arrangement; the incorporated entity does.

> **Note**: There are no provisions equivalent to the s.7(2) extensions, because those extensions apply to the arrangement between the provider and the provider's customer; not to the arrangement between the provider and the individual.

Sometimes the agency makes its agreement with both the incorporated entity and the principal (worker). In these cases, there is often a question about who contracts to do what; and the issue turns on the precise terms of the contract.

In other cases, the agency 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.

[2] 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/

In many cases, 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. In those cases, neither the entity nor the individual is a worker for the licenced provider within the meaning of s.8 of the Act.

Effectiveness of Proposed Treatment

Exclusion by regulation under s.8(2) seems to be the correct approach. Although, it will only work in those cases where all the elements for inclusion are present. As we have noted above, that will be far from clear in every case. It will require a fact sensitive investigation into the arrangements that exist between:

- agency and worker entity;
- agency and worker; and
- worker entity and worker.

Confining the exclusion to limited instances, where the director/owner is the only person being supplied and only when the person has control over that business would not be effective. The director/owner would lose the power to delegate, which is one of the distinguishing features of a genuine independent contracting relationship.

What would happen if there was more than one director and control was shared between them?

Unintended Consequences

The restriction on the power to delegate and loss of flexibility in business operation would have the effect of extending the exemption only to disguised contracting arrangements, whilst excluding many genuine ones.

Alternative Means

A less restrictive exclusion of workers in small owner-operated businesses would seem to be answer, here. The workers must have the power to share control of the business with others. They must have the power to delegate.

There are helpful examples of small owner operated business exemptions from other licensing regimes. They include the owner or only that person and one other particular person who works in the business. The drafting of s.23 of the *Sex Work Act 1994* (Vic) provides an example of how this could be done – though under s.8(2) of the *Labour Hire Licensing Act 2017* (Qld), the drafting would need to make the class of worker (or worker in a class of (small) business) the focus for exemption, rather than the type of business *per se*.

Also, clarifying what it means to *supply* a worker would help here, as would some guidance about the application of s.8 to the differing compensation methods that may be utilized by worker/director's entity.

4: Corporate group/employing entity exclusions

Please provide feedback on:

- If the proposed treatment is effective for dealing with common corporate group/associated entity arrangements such as shared payroll which are not labour hire?
- If there are any unintended consequences of this treatment?
- If there are any alternate means to achieving this?

Effectiveness of Proposed Treatment

The proposed treatment is not effective and is unnecessarily cumbersome.

Several remarks in the Consultation Paper warrant some comment in the context of the current consideration.

Clearly labour hire?

> *However, stakeholders have also provided examples where corporate groups sets up a similar internal employing entity structure which operates as an internal labour hire provider and may even be contracted out to an external labour hire company to run. These arrangements are clearly labour hire and intended to be captured by the scheme.* (Our underlining).

The extent to which the qualifier, *"even be contracted out to an external labour hire company"* is the *discrimen* in operation, is not clear here. Would it make a difference to the conclusion that these arrangements *"are clearly labour hire…"* if there is no external contracting out?

Shared payroll, in the absence of contracting out to an external labour hire provider or other engagement, does not involve a supply of any worker and cannot be labour hire under the s.7 definition. That is because a pure payroll function is only a payment function – not an employing, engaging or supply function.

Particularly problematic?

> *Because of this complex matrix of corporate group and employing entity arrangements, some of which are used to provide labour hire services, a specific regulatory carve out for corporate groups and employing entity is considered particularly problematic.*

Once again, the Consultation Paper seems to be making the issue more complicated than it needs to be, by overlaying on the payroll arrangement a distinct labour hire arrangement. There would be no difficulty in providing a regulatory carve out if the arrangement is only one of shared payroll.

Some difficulty may arise, if the paying entity is also the employer and "deploys" workers within a closed group of related entities. Even so, the difficulty is easily managed whilst ever the group remains closed. The workers may be excluded as a class of workers, who are identified by the fact that they are only deployed within the group. Regulations made under s.8(2) would resolve the difficulty.

Unintended Consequences

A question of ownership and control of the employing/deploying entity arises to prevent co-located or joint-ventured labour hire arrangements bringing themselves within the scope of any exemption. The proposal that some form of administrative clearance arrangement might be used has merit as a supplementary measure.

The effective *discrimena* would then be degree of ownership, deployment within suitably closed system and administrative approval.

Alternative Means

It may be possible to make transitional regulations under s.110 to clarify that deployment of workers within a closed corporate group is not a *supply* for the purposes of s.7.

RCSA's StaffSure addresses this issue by providing that a ***Tied Workforce Services Provider*** may be exempted from a certification requirement established in support of the StaffSure Standard.

The supporting definition provides:

Tied workforce services provider

means a workforce services provider that is a body corporate that provides workforce services under a contract arrangement or understanding the only other parties to which are bodies corporate that are, within the meaning of section 4A of the *Competition and Consumer Act 2010* (C'th), either:

a) a holding body corporate of the workforce services provider; or

b) a subsidiary of a holding body corporate of the workforce services provider.

The definition operates to effectively close the group and eliminates the risk that the exemption would apply to supply of a worker outside the group. For the purposes of the LHL regulations the exemption and definition could be adapted to extend to partnerships (and their service companies) and other related entity undertakings.

5: Where workers are supplied to a person in a domestic setting (not to a business or undertaking)

Please provide feedback on:

- If it is appropriate that the supply of workers to persons who are not a business or undertaking (domestic setting) be considered as arrangements that are not labour hire and not intended to be captured by the scheme? And if so, what the specific instances should be and under what conditions?
- If the proposed regulation treatment is necessary and effective in clarifying the scope of the scheme in respect of these arrangements?
- If there are any unintended consequences of considering this treatment?
- If there are any alternate means to achieving this?

Appropriateness of Exclusion as Class from Scheme Capture

In RCSA's submission it is not appropriate to exclude the domestic/consumer sector (or workers within it) as a class from scheme capture.

Several remarks in the Consultation Paper warrant some comment in the context of the current consideration.

> *Victoria and South Australia in their recent Labour Hire Licensing Bill and Act respectively limit their definition of a provider of labour hire services to where the worker is supplied to do work in and as part of a business or commercial undertaking of the other person.*

The genesis of those limitations warrants closer examination, because the better understanding of the qualification is that it was originally intended to distinguish tripartite *supply* arrangements from bipartite *contracting* or *use* arrangements. It seems to be an **unintended consequence** that the domestic/consumer sector has been exempted.

There is nothing in the examples given in the South Australian LHL Act that would suggest that the domestic/consumer sector has been deliberately exempted. All of the examples are commercial examples. Corey, the customer in the first example given under South Australia's s.7(1) *"runs a grape growing business";* and Guy, the putative labour hire provider, *"runs a plumbing business"*. Richard, the customer in the second example, *"runs a manufacturing business"*.

There is no domestic/consumer example – which one would have expected if the intent had been to demonstrate the exclusion of the domestic/consumer sector. Where is the example that says, *"Jan manages a household"*? It's not there.

The purpose of the limitation seems to have been to align the notion of supply as used in the definition of *provide labour hire services* with a form of the integration test.

The Victorian proposal is still only in Bill stage and has yet to pass into legislation. However, the secondary consequence of the application of the integration test seems, for the moment, to be more deliberate.

The Explanatory Memorandum sets out in relation to Victorian clause 7(1):

> *Determining whether a person supplies an individual or individuals to perform work in and as part of the host's business or undertaking requires an assessment of the activities to be performed by the individual or individuals, and the level of integration of those activities in the host's business or undertaking.*
>
> *Factors which would suggest that an individual is working in and as part of the host's business may include, but are not limited to, that the work—is performed at the host's premises; is subject to the host's direction; is supervised by the host or another labour hire worker supervised by the host; is of a low-skilled or low-paid nature and thus does not constitute provision of a specialised service; is a key function of the host's business or undertaking or is of a similar nature to work performed or previously performed by the host's own employees.*
>
> *For example, a person who, in the course of conducting a business, supplies individuals to a host, to work alongside a host's own employees on a production line, performing the same work as the host's employees, and supervised by the host,* ***provides labour hire services*** *within the meaning of clause 7(1), as the individuals are working in and as part of the host's business or undertaking. However, an accounting firm which supplies an employee accountant to prepare tax documentation in respect of a client's business or undertaking, does not provide labour hire services, as the accountant is performing the work in and as part of the accounting firm's business, not the client's business*

Exemption of the domestic/consumer sector is very much a secondary, albeit intended, consequence. The Explanatory Memorandum, after consideration of cl 12, continues:

> *A further effect of clause 7(1) is that a person does not* ***provide labour hire services*** *if the person supplies a worker to an individual who is not conducting a business or undertaking. For example, a plumbing company supplying a plumber to an individual at a domestic residence to fix a dishwasher does not* ***provide labour hire services*** *as the individual at the domestic residence is not conducting a business or undertaking.*

However, the example is not well formulated, because the putative labour hire provider, once again, runs a plumbing company. It would have been better if an example had been formulated with reference to someone who runs a labour hire company.

It seems possible that, in South Australia and Victoria, considerations of the meaning of *supply* have become confounded by:

- the need to draw a distinction between labour hire supply and general (plumbing) contracting supply; and
- reliance upon a business or undertaking integration test - which, although useful to identify an employment agency contract for the purposes of payroll tax legislation and to distinguish an independent contractor from an employer, is not especially useful in determining whether there has been a *supply of labour hire services* as distinct from any other kind of services.

Necessity and Effectiveness of Proposed Regulatory Treatment

Treatment by regulations made under s.7(3) will be ineffective because of the limiting effect of s. 7(4).

Treatment under s.8.2. is possible; but this merely creates the difficulty that a nurse (for example), who provides live in overnight care services in a domestic setting and day time nursing care services in a hospital - all through the same agency - toggles between being a labour hire worker and not a labour hire worker.

The **real question** here is whether there any reason why workers of labour hire providers should be deprived of the protections afforded by the Act, when they are supplied into a domestic setting; and

whether domestic users of their labour should be exempt from the requirement to deal with a licensed provider.

Unintended Consequences

An unintended consequence is that exclusion would leave the domestic/consumer sector open to entry by unscrupulous workforce services provides, who would find easy targets for exploitation without fear of regulatory intervention. It would have the effect of shifting exploitation precisely into the sector where it is most difficult to police and into a sector that has little to no human resources competence to deal with it.

Another unintended outcome is that exclusion according to the South Australian ***business or commercial undertaking*** formula has the consequence that workers, who are supplied to not-for-profit or charitable undertakings (and even to some government programs) would lack protection.

A further unintended consequence is that limitation of the supply of a worker to supplies of the worker to do work ***in and as part of*** a business or undertaking of the customer arguably excludes the on-hire supply of independent contractors (whether incorporated or not) who work under *Odco* arrangements, because the distinguising feature of an independent contractor is that the contractor works "in and as part of" the contractor's own business.

Alternative Means

Reinforcing the meaning of "supply"

If the integration qualification is to be used to reinforce the meaning of ***"supply"*** and distinguish it from general contracting, it will need to be done with respect to a class of workers prescribed by regulation under s.8(2) and supported with clear and comprehensive guidance material.

The class of workers could be identified by the fact that they are not integrated into (i.e. do not work in and as part of) the customer's ***workforce or staff***.

This formula provides a better linkage than the alternatives, ***business or commercial undertaking*** (S.A) or ***business or undertaking*** (Vic) because those formulas involve penetration of hard proprietary boundaries.

A ***workforce or staff***, on the other hand is more permeable and can comprise persons on-hired to work independently as well as directly engaged staff – regardless of whether they are staff in a household, charitable undertaking, government department, or business.

A limited domestic setting exclusion

If the intent is to exclude low risk supply into the domestic/consumer sector (i.e. to adopt the secondary effect identified in the Victorian Explanatory Memorandum), it might be feasible to restrict the exception using s.8(2) and identifying the class of worker by the fact that they do not work in the business or undertaking to the person to whom they are supplied. Again, clear guidance material would be required.

In that context, it is recognised, following the interpretative guidelines of Safe Work Australia dealing with PCBUs that an *undertaking* "may have elements of organisation, systems, and possibly continuity, but are usually not profit-making or commercial in nature".

That would carry the exclusion into the domestic/consumer sector. There would then be a need to create exceptions to the exclusion using an "*except in the following segments*" approach, which would identify those "non-business" sectors that may be at the highest risk of exploitation.

Those sectors might include:

- Domestic & Residential Care
- Domestic Cleaning & Household Services
- Domestic Gardening Services
- Domestic Chauffer Services

- Nanny Services
- Domestic Catering Services
- Domestic Secretarial Services

The precise formulation of exceptions or inclusions could be achieved using award coverage and classification provisions.

Other scope considerations

Your feedback is welcome on any other arrangements that would not be commonly understood as providing labour hire services. Please provide any details of arrangements you propose as being appropriate for possible regulation or policy treatment which would help clarify the scope of the scheme. In your comments, please consider any unintended consequences or different ways to treat the proposed group, again, where the arrangements are not what is commonly understood to be labour hire. Once again, please not the clear policy intention for a broad scheme to apply to all industry sectors and occupations.

Exempt under Interstate Regulations

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 Queensland LHL Act and regulations.

However, there is no ability, by regulations made under s.7, to exempt them as a class of business because regulatory exemption under s.7 is limited to cases where the supply of workers is not a dominant purpose of the business.

Means would have to be found to exempt the workers of such a business as a class by regulations made under s.8(2) identified by the fact that they are workers of an interstate licence holder.

The *quid pro quo* would logically seem to be that businesses that are exempt in Queensland should similarly be exempt in South Australia – except in the case of express divergence in the legislative schemes as has happened in the case of registered group training organisations.[3]

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

Interstate Private Employment Agents

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 Queensland *Labour Hire Licensing Act 2017*.

RCSA believes the Government should explore the opportunity to extend the Act's s.7(3)(a) exemption to private employment agents, who are regulated under statute in South Australia, the Australian Capital Territory and Western Australia.

Extension of the exemption could be managed by regulations made under s.8(2); and/or by transitional regulations made under s.110.

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

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, insofar as 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 persons who merely act as 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 *Private Employment Agents Act 2005* (Qld).

In RCSA's respectful submission, such an exemption is made necessary by the ease with which employment agency services can be supplied in interstate commerce and by the extent of the extraterritorial application of Queensland's *Labour Hire Licensing Act 2017* – see s.5.

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(2) 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 *Private Employment Agents Act 2005* (Qld), 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. RCSA notes that the supplier of the worker does not need to be the worker's employer (s.7(2). Considerations such as those that arose recently in *Kaseris v Rasier Pacific* [2017] FWC 6610 (The "*Uber Case*") therefore do not arise.

Assuming that the worker is *supplied* to another person to perform work, 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.8(2) of the Act and their early resolution would greatly facilitate the implementation of Queensland's Labour hire licensing scheme.