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Business SA Submission

Labour Hire Licensing Bill 2017

8 September 2017

Executive Summary

As South Australia's Chamber of Commerce and Industry, Business SA is the peak business membership organisation in the State.

Business SA appreciates the opportunity to make submissions in relation to the *Labour Hire Licensing Bill 2017 (SA) (the Bill)*. Business SA supports the objectives of the Bill to protect workers from exploitation and South Australian businesses from a small number of unscrupulous and predatory business but notes that this behaviour is not typical of the industry as a whole.

However, the labour hire industry does not pose a unique set of circumstances beyond the capacity of existing legislation and labour hire specific legislation will result in increased regulations and costs.

Current legislative protections are available in:

- Fair Work Act 2009 (Cth)
- Work, Health and Safety Act 2012 (SA)
- Return to Work Act 2014 (SA)
- Criminal Law Consolidation Act 1935 (SA)
- Competition and Consumer Act 2010 (Cth)
- Independent Contractors Act 2010 (Cth)
- Fair Work Act 2004 (SA)
- Migration Act 1958 (Cth)
- Superannuation Guarantee (Administration) Act 1992 (Cth) and the Superannuation Guarantee (Charge) Act 1992 (Cth)
- Tax Administration Act 1953 (Cth)

South Australian businesses are already overwhelmed with regulatory compliance and additional requirements will counter-productive towards achieving job creation and economic growth. In addition, the Bill moves away from national harmonisation. Queensland has already introduced a Bill and Victoria is undertaking a review. If a scheme is introduced, it should be done at a federal level to ensure consistency.

Whilst we do not believe additional compliance is necessary, Business SA recognises the motivation behind the Bill. To this end, we have provided should this Bill or similar progress, we have identified a number of significant concerns with the Bill. Unless these significant concerns are addressed, Business SA cannot support the Bill.

We note that a significant number of the scheme's particulars have been left to regulations which have not been published with the Bill. Due to the consequent importance of these regulations, Business SA requests we also be consulted during the regulation drafting process.

In the event of this Bill being passed in Parliament, the education of businesses, especially in regional South Australia, will be critical to ensure compliance. Education must ensure all potential "host companies" are educated about obligations and potential penalties for non-compliance. Business SA, as the peak business chamber in South Australia, is well positioned to work with the State Government to ensure understanding and compliance across the State.



Anthony Penney
Executive Director Industry and Government Engagement

Labour Hire Licensing Bill 2017

Section 6 – Meaning of labour hire services

Business SA is significantly concerned that section 6 of the Bill disproportionately expands the scope of 'labour hire services' and will inadvertently capture a vast array of South Australian businesses. This section uses the following wording: *"in the course of carrying on a business, the person supplies, to another person, a worker to do work"*. Professional organisations such as accountants, lawyers, business consultants, nurses and I.T professionals may, from time to time, place workers in other workplaces or be seconded to clients. A few examples of such arrangements are:

- *A corporate health service that "supplies" a nurse to deliver flu vaccinations*
- *An I.T professional setting up computer systems*
- *An auditing accountant*
- *A translator supplied to assist migrant workers*
- *A first aid attendant at a sporting event*

Business SA is also concerned group training organisations co-ordinating large number of apprentices and trainees will be covered by this legislation. We note the Bill will also impose requirements on the employers who receive the apprentices. Business SA does not support any changes that impose barriers to the employment of apprentices and young South Australians.

The current wording of this clause will cover many businesses that are not 'traditional' labour hire organisations. These are not the unscrupulous or exploitative organisations which should be targeted by the Bill. Business SA strongly submits it is not necessary for these businesses to hold a licence and imposing this new requirement on them is unnecessary red tape and a barrier to running their legitimate business.

Recommendations

- Vary the definition of 'labour hire services' in s 6(1) to exclude:
 - organisations where labour hire services are not provided as a dominant or primary function of their businesses;
 - legitimate secondment arrangements;
 - the provision of a workers where the arrangement is not for profit;
 - the provision of a worker to do work between associated entities; and
 - group training organisations.
- Involve professional organisations in the drafting of regulations referred to in section 6(4) to ensure appropriate businesses are exempt.

Section 7 – Meaning of Worker

The broad meaning of worker within section 7 is also a significant concern. Whilst we recognise that a number of workers may be excluded through regulation, without these details our concern remains unaddressed. This legislation should specifically target problematic industries and exclude workers who are required to be licensed under other professional schemes.

For example, the security industry is already heavily regulated and monitored via the *Security and Investigations Industry Act 1995 (SA)*, and host businesses must not hire security unless they are registered and provide details of the registration. Security industry providers should not be required to obtain an additional licence, which is similar in nature. This is unnecessary red-tape for the industry and potentially provides a double up of penalties and regulations.

In addition, as detailed above, apprentices or trainees engaged through a group training organisation should be excluded.

Recommendations

Vary the definition of 'worker' in section 7 to exclude:

- workers in specific industries that are not at risk such as professional services, consulting and professions;
- workers that are required, by law, to be registered under Australian Health Practitioner Regulation Agency (AHPRA), Certified Practising Accountants (CPA) or similar regulatory bodies; and
- workers that are required to be licensed under the *Security and Investigations Industry Act 1995* (SA).

Section 9 – Fit and proper person

Business SA holds concerns regarding the wording in section 9(1)(a) which states, when determining if a person is a fit and proper person to hold a licence, the Commissioner may have regard to:

- (a) The reputation, honesty and integrity of the person.

The word "reputation" is subjective and a person's reputation does not always reflect the true nature of the person. In the age of the internet and social media a reputation may be unfairly tarnished without the ability to respond to allegations. A person's reputation may also go beyond their professional life, which is not relevant to this Bill. We note and approve of use of the word 'professionalism' in the *Labour Hire Licensing Bill 2017* (Qld) s 27(1)(a) instead of 'reputation'. 'Professionalism' in this context provides a much more reasonable factor on which to determine whether a person is fit and proper.

Business SA strongly opposes section 9(1)(e), which allows the Commissioner to consider whether the applicant has 'sufficient business knowledge, experience and skills for the purpose of properly carrying on business'. This factor should be removed as it will prevent new businesses entering the industry and hinder job creation. Given the economic challenges facing South Australia, we should not prevent young entrepreneurs from establishing new, legitimate, businesses because of this scheme.

Business SA is further concerned that the requirements under section 9(2) & (3) automatically exclude otherwise 'fit and proper' persons from holding a license with no ability for the Commissioner to exercise discretion. For example, a person will be excluded from holding a licence due to an estranged family member e.g. step-brother being involved in criminal activities covered by the *Serious and Organised Crime (Control) Act 2008* per s 9(2)(b)(ii). Section 9(2)(a) also does not allow for discretion if a person was found guilty of an offence but a significant amount of time has lapsed since the offence. Business SA acknowledges the importance of sections 9(2) & (3), however the Commissioner should have discretion to determine that a person is a fit and proper person, despite conditions in section 9 (2) & (3) otherwise applying.

Recommendations

- Change section 9(1)(a) to read "The professionalism, honesty and integrity of the person";
- Remove clause (e); and
- Amend sections 9(2) & (3) to read "A person **may not be** a fit and proper person to be the holder of a licence if—" (change emphasised).

Sections 10, 11 & 12

Business SA acknowledges the importance of ensuring the integrity of the labour hire industry, however, the penalties in the Bill are highly excessive. The Bill has a maximum penalty of:

- (a) *In the case of a natural person - \$140, 000 or imprisonment for 5 years;*
- (b) *In the case of a body corporate - \$400, 000.*

Similar legislation dealing with licencing, such as the *Dangerous Substances Act 1975 (SA)* or the *Security and Investigations Industry Act 1995 (SA)*, have significantly lower penalties for breaches.

The penalties for a natural person under equivalent legislation are:

- *Security and Investigations Industry Act 1995 (SA)*
 - \$50,000 for an offence committed by a natural person and a maximum of 12 months imprisonment;
- *Dangerous Substances Act 1975 (SA)*
 - \$50 000 or imprisonment for 2 years, or both
 - Where the offence results in death or serious injury, \$100 000 or imprisonment for 4 years or both
- *Work Health and Safety Act 2012 (SA)*,
 - A Category 2 offence (which may have resulted in the serious injury or death of a worker) \$300,000 - no imprisonment.

Business SA is opposed to the threat of imprisonment for offences by host employers and argues that both the monetary penalties and the imposition of a maximum of 5-year prison term is excessive.

Recommendation

- Reduce penalties in the Labour Licensing Bill to be in line with similar state licensing legislation.

Section 13 – Person must report avoidance arrangements

Section 13 imposes a positive obligation on businesses, even if they are not engaging unregistered labour hire companies. Under section 13, a person must give the Commissioner the non-complying person's name and avoidance arrangement in writing. Failure to comply with this requirement could result in a penalty of up to \$30,000. Business SA strongly submits it is unreasonable to impose a penalty, particularly of this magnitude, on businesses that have not engaged in illegal activities.

The Bill requires a person (the client) to have a legal understanding of the definition of an avoidance arrangement. If an organisation does the right thing and turns away an unscrupulous labour hire organisation (the non-complying person), they can still be found guilty of an offence. Section 13 places a wholly unreasonable obligation on businesses who do the right thing and turn away unscrupulous labour hire providers. These businesses are running their business legitimately and should not be forced to 'police' the labour hire industry at the same time for fear of significant financial penalty.

Business SA supports a scheme that encourages businesses to report suspected avoidance arrangements by providing an anonymous avenue to provide the information, not one that imposes penalties for non-reporting.

Recommendation

- Remove section 13(2) entirely and replace with a power for the Commissioner to allow organisations to anonymously inform the Commissioner of avoidance arrangements.

Section 14 – Application for licence

Business SA submits that any application fee should be minimal and not prevent new businesses from entering the market in South Australia, nor unreasonably impact small businesses. Further, the revenue from any fees collected should be used to proactively educate high risk industries and create positive improvements in the industry rather than create a revenue scheme for the State government.

Section 15 – Objection to application

Business SA has significant concerns that there are no provisions in section 15 to avoid objections to applications that are frivolous, vexatious or used to frustrate the applicant. Such a provision would assist in avoiding circumstances where the objection to an application is made to frustrate a tendering process or used by industrial associations as a bargaining tool. Section 15 must include a penalty for any organisation that lodges an application that is found to be frivolous or vexatious.

Further, if an objection made against an application is rejected and that applicant is found to be a fit and proper person, no further applications for objections should be accepted on that ground unless new evidence is available.

Recommendations

- Insert a clause to prohibit frivolous or vexatious objections to applications; and
- Prevent multiple applications once a person has been found to be a fit and proper person, unless further, probative evidence is available.

Section 16 – Grant of licence

It is Business SA's view that any organisation meeting the requirements for registration should have their licence granted. Section 16(1) states the Commissioner **may**.....grant a licence if *inter alia* the applicant or body corporate is a fit and proper person to hold the licence and has sufficient financial resources to carry on their business under the licence.

If a person or body corporate has met the fit and proper person test and has sufficient financial resources for the purposes of properly carrying on a business there should be no circumstances under which the Commissioner has discretion to refuse their application.

Recommendation

- Vary section 16(1) to “*Subject to this Act, the Commissioner **must**, on application under section 14, grant a licence to an applicant if satisfied that-....*”

Section 18 – Duration of licences and reporting

Business SA submits the reporting regime set out under sections 18(2)(b) and 18(6) must not overly burden licence holders with administrative requirements and red tape. The reporting regime should be as streamlined as possible to minimise repetition, particularly from reporting period to reporting period. We suggest the Commissioner establish an electronic system for lodging licence renewals. This system should import information from the current or previous licence and simply require the licence holder to update details as necessary, rather than provide static information again.

Section 18(6), which defines ‘prescribed information’ to include a wide-range of factors and topics requires the licence holder to provide information on accommodation “provided by another person to the relevant workers”. Whilst the intent of this clause is to require labour hire providers to report information on accommodation provided to the worker as part of the employment relationship, this is not reflected in the

current wording of the clause. The current clause requires a licence holder to report on all landlord/tenant arrangements. All reporting for the required licence should relate to the labour hire and employment relationships.

Recommendation

- Vary section 18(6)(h) to read:
*"if the holder of the licence is aware that accommodation was provided by another person to the relevant workers, **as part of the labour hire arrangement**, the best to the knowledge of the holder of the licence -"*

Section 19 – Notification of certain changes in circumstances

Business SA recommends increasing the time period for notification from 14 days to 28 days in line with the other reporting timeframes within the Bill. It is reasonable to allow a month as there are circumstances, such as moving offices or death of the fit and proper person, where a longer period may be required; particularly as licence holders may otherwise face up to a \$4,000 penalty.

Section 20 – Provision of information

This Bill will impose additional administrative duties and costs on businesses. Business SA submits that, where possible, these duties and costs should be kept to a minimum. As there are already strict reporting provisions in section 18, section 20 – Provision of information should be varied to enable the Commissioner to ask for information from holders of a licence only if there is a suspected breach or changes in circumstances that would put into doubt the eligibility to hold a licence.

Section 21 – Suspension and cancellation

Business SA is concerned the power to suspend or cancel a licence under section 21(1)(e) may be exercised beyond the scope of the Commissioner's expertise. Under this section the Commissioner may cancel a licence by notice if they are satisfied that a licence holder has contravened or is contravening, a relevant law. The list of relevant laws in the Bill is significant and covers a wide range of subjects, including tax, work health safety, workplace rights, and education and training. Business SA is concerned that this provision allows the Commissioner, who may not have significant understanding of one or more of the relevant laws, such as the *Fair Work Act 2009* (Cth) to suspend or cancel a licence. Business SA submits the Commission should only have the authority to cancel a licence if a licence holder has been formally found to have contravened a relevant law or is guilty of an offence under a relevant law.

Business SA also submits section 21(1)(h) should be removed entirely. Section 21(1)(h) allows the Commissioner to suspend or cancel a licence if a licence holder "no longer has sufficient resources for the purpose of properly carrying on business under the licence". This subjective test is not consistent with the test for a fit and proper person and appears to serve no further purpose. Trading conditions can be cyclical or seasonal, with relative periods of prosperity and others of difficulty. A legitimate business in a period of difficulty should not lose its licence, and ability to continue trading, at the Commissioner's whim. Such a decision would doom the affected business and prevent any opportunity for recovery and continued employment. Section 9(2)(b)(iii) specifies that a person is not a fit and proper person if insolvent within the meaning of the *Corporations Act 2001* (Cth). The Commissioner, under 21(1)(f), already has the ability to suspend or suspend a licence if the licence holder is no longer a fit and proper person (ie, they are insolvent as identified above). Business SA strongly submits section 21(1)(h) should be removed, or in the alternative, it should be varied to have consistent terminology with s9(2)(b)(iii)'s definition of insolvency.

Recommendations

- Vary section 21(1)(e) to read: ‘the holder of the licence, or an employee representative of the holder of the licence, has **been found to** have contravened a relevant law **by that relevant law’s review body**’ (changes emphasised); and
- Remove section 21(1)(h), or in the alternative, vary section 21(1)(h) to use terminology consistent with section 992)(b)(iii).

Section 24 – Requirements for responsible person

Business SA is concerned section 20 may limit the legitimate movement of licenced small business owners. Business SA understands the intent of this section is to prevent companies being run from overseas or interstate. However, the provision requiring the business be “*personally supervised and managed by a natural person, who is responsible for the day-to-day management and operation of the business to which the licence relates*” has the potential to restrict the legitimate movement of compliant business owners, particularly in situations where a small business owner suffers an illness, has to quickly manage caring responsibilities or goes on leave and is therefore unable to personally supervise the business.

Recommendation

- Delete the words “personally supervised” from Section 24(1)

Section 27 – Substitute of responsible person for limited period

Business SA submits a business should be able to substitute a person for a period longer than 30 days. There is real potential for the licence holder to be on away from the business for a period greater than 30 days, such as in circumstances of long-term illness, caring obligations, accessing long service leave and annual leave. Business SA submits a substitute person should be allowable for a period up to 90 days, or longer at the Commissioner’s discretion. This would overcome the issues identified above that are very real possibilities in all businesses but will have particular impact on small businesses.

Part 5 – Division 2 – Authorised officers

Business SA has significant concerns with the wording of Part 5 - Division 2 of the Bill. These sections of the Bill provide powers to authorised officers that exceed acceptable levels of entry onto private property.

Our first significant concern is with the ambiguity of section 30 – Authorised officers. This section provides no clarification whether “authorised officers” will be public servants, members of industrial associations, or some other class of persons. Business SA strongly opposes the appointment of any member of an industrial association as an authorised officer. An authorised officer must be appointed from the public service.

Part 5, Division 2 requires significant changes. The proposed wording of this division provides broad, sweeping, powers that are concerning to businesses. Significantly concerning is:

1. The section does not specify if the authorised officers are public servants;
2. Authorised officers are able to enter any premise, including residential properties, without consent and without a warrant;
3. Authorised officers are able to seize and equipment or documents without consent and without a warrant;
4. If goods are seized, there are no provisions to ensure a business can continue operations if vital equipment or documents are seized;
5. Authorised officers can stop, enter and search any vehicles or vessels;

6. There are no restrictions on how long items can be held and there is no requirement to return documents or equipment, which may be an essential part of the business;
7. Authorised officers have greater powers to search, enter and seize than an officer of the South Australian Police (SAPOL);
8. Under s 30(8), there is no restriction on who may 'assist' and enter premises with an authorised officer; and
9. There is no requirement for an authorised officer to be of "good character"¹ or a fit and proper person.

Broad and largely unrestricted powers to enter and inspect are one of Business SA's most significant concerns with the Bill. As highlighted above, the powers exercised by an authorised officer under s 32(1) are wide-ranging and unfettered. The *Labour Hire Licensing Bill 2017* (Qld) has significantly better balanced the right of entry procedure for inspectors (equivalent to authorised officer). The Queensland Bill's right of entry provisions ensure the objects of their Bill can be upheld without unreasonably impeding the carrying on of a legitimate business or the rights of the occupier. Under the Queensland Bill an inspector can only enter a premises: with the occupier's consent; where it is a public place; where authorised under a warrant or where a condition of the labour hire licence requires the workplace be open for inspection.²

Recommendations

- Delete Sections 30, 31 and 32 and replace with appropriately modified wording based on the Queensland Bill; and
- Include a new sub-section as follows:
"The Commissioner may, by instrument, appoint a public sector employee under the Public Sector Act 2009 (SA) as an authorised officer."

¹ *Fair Work Act 2009* (Cth) s700(2).

² *Labour Hire Licensing Bill 2017* (Qld) s55(1).

Conclusion

As noted at the outset, Business SA supports the objects of the Bill. Some workers face exploitation from a small number of unscrupulous and predatory labour hire businesses and a response is necessary. Our submissions above do not detract from this response, instead they seek to ensure a balance between the protection of workers, legitimate businesses and the ability for companies to carry on their business without unnecessary red tape and regulation. Business SA is concerned this Bill will become another regulatory and financial burden on businesses which does not penalise the true culprits in the industry. The current suite of legislation, if enforced, has the capacity to address the issues in the labour hire industry.

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