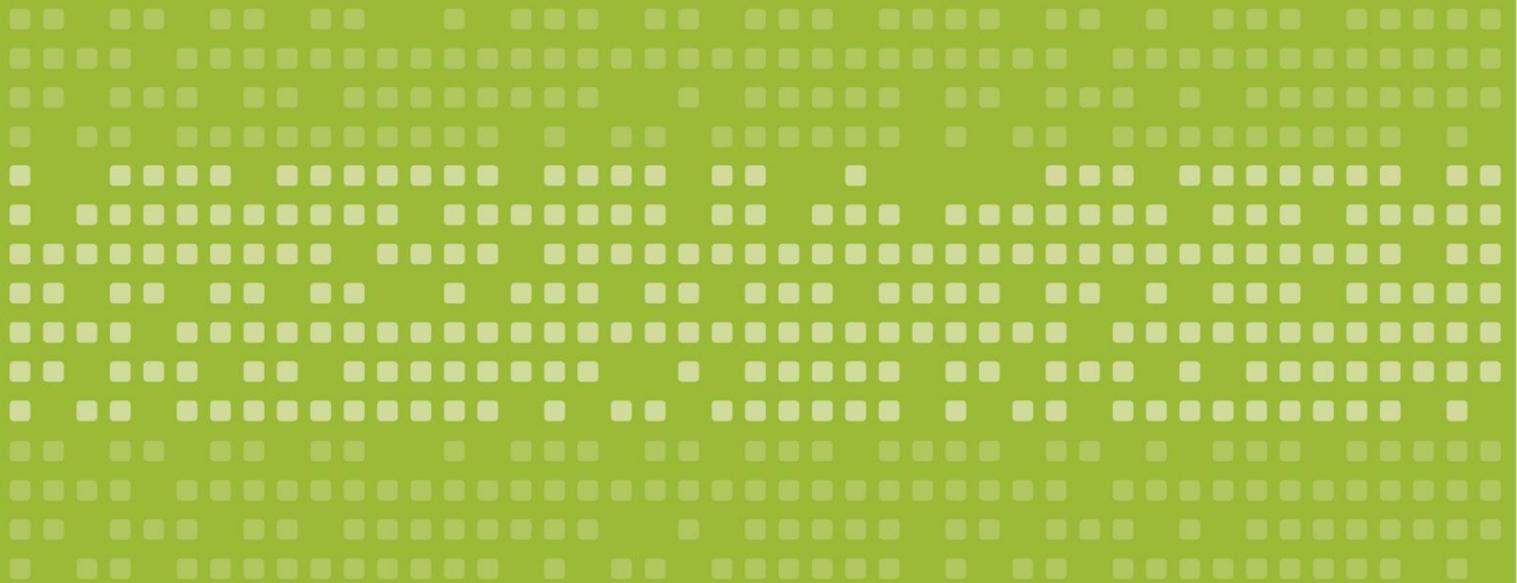


Labour Hire Licensing Scheme Decision Regulatory Impact Statement March 2017



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1: Introduction

On 30 June 2016, the Queensland Parliamentary Finance and Administration Committee (FAC) released and tabled its Inquiry into the practices of the Labour Hire Industry in Queensland Report (the Report). The Report contained disturbing evidence of exploitation and mistreatment of labour hire workers in Queensland. The FAC found that while labour hire arrangements can be beneficial in providing flexibility for businesses and workers, a wide range of adverse consequences and risks were found to be associated with the use of labour hire employment.

Evidence to the FAC included cases of underpayment of wages and unauthorised deductions, sexual harassment, workers housed in overcrowded and sub-standard accommodation, lack of proper safety equipment and appropriate training, systematic tax avoidance, sham contracting and 'phoenixing' of companies leaving workers stranded without their entitlements and uncertainty about the identity of their employer.

Similar evidence of exploitation and mistreatment has also been provided to similar inquiries held in other Australian jurisdictions.

In response to the findings of the FAC Inquiry, and the increasing evidence of exploitation of labour hire workers around the country, the Queensland Government is determined to lead the way nationally and regulate the labour hire arrangements in Queensland. Although the Queensland Government does not have jurisdiction to regulate the employment relationship itself, it can address this problem through the establishment of a licensing scheme.

In December 2016 the Hon. Grace Grace, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs released a Labour Hire Regulation Issues Paper (the Issues Paper) to seek stakeholder feedback on the components of a labour hire business licensing scheme and other measures that may be employed to stop exploitation and mistreatment of labour-hire workers, ensure the bona fides and provides minimum standards for labour hire provider (LHP) businesses, and improve overall confidence in the integrity of labour hire in Queensland.

Submissions to the Issues Paper closed on 6 February 2017, and were considered by the Office of Industrial Relations (OIR) in the formulation of the proposed licensing scheme. Submissions to the Issues Paper largely supported the Government's aim to provide greater transparency in labour hire arrangements and to stamp out those LHPs who exploit their workers.

This Decision Regulatory Impact Statement (RIS) will consider how to best implement a licensing scheme for labour hire in Queensland that supports ethical LHPs and protects labour hire workers from exploitation.

2: The Problem

Labour hire arrangements characteristically involve a 'triangular relationship' in which a labour hire business supplies the labour of a worker to a third party (host employer), for an agreed fee. The essential quality of these arrangements is the splitting of contractual and control relationships, whereby:

- the host employer pays the labour hire agency for the labour provided by the worker and also has a direct contractual relationship with the labour hire agency;
- the worker is under the direction or control of the host employer for the performance of work, but is not engaged in any contractual or employment relationship with the host employer; and
- the worker is paid by the labour hire agency. The labour hire agency retains the contractual or employment relationship with the worker. As the employer of the worker the labour hire agency is responsible for ensuring the worker's entitlements are met as well as the full range of associated employer responsibilities and liabilities, including legal requirements for workplace health and safety, workers' compensation and taxation.

Professor Andrew Stewart explained that labour hire arrangements involve:

the agency entering into an agreement with the worker, and arranging to hire out their services to a host, or to a series of hosts. The worker generally performs these services at the host's premises, and may be supervised (if their work requires supervision at all) either by the host's staff or by other workers supplied by the same, or a different, agency. The worker is paid by the agency, but aside from any requirement to submit timesheets may have relatively little contact with it. The host, on the other hand, pays a fee to the agency which covers the worker's remuneration and any associated on-costs. ... In many instances the nature of the arrangement is such that there is no obligation on either side to give or accept work. If an assignment is accepted, a contract is formed (usually on the agency's standard terms). But in between assignments, there may be no mutuality of obligation and hence no contract.¹

In *Kool v Adecco Industrial Pty Ltd T/A Adecco*,² Deputy President Asbury defined the business model of LHPs:

The business model of labour hire companies is generally that they employ persons (usually on a casual basis), and place those persons in the businesses of other companies with which the labour hire company has a contractual relationship (host employers). In some cases the labour hire employees will work intermittently or for specific periods of time at the premises of the host employer – for example to replace the employee of a host employer temporarily absent from the workplace for a specified period, which is ascertained in advance of the placement or which may be extended or terminated during the period of the placement if circumstances change. The labour hire employee may have been required by the host employer to meet a seasonal or operational fluctuation. In other cases, labour hire employees may be required to work at the host employer's premises for lengthy periods; under the supervision and management of the host employer; integrating with the employees of the host employer; and for all intents and purposes forming part of the host employer's workforce...The diversity of such arrangements is considerable, reflecting the need for flexibility in modern workplaces.

¹ Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton and Stewart's Labour Law* (6th edition, The Federation Press, Annandale, 2016).

² [2016] FWC 925.

Labour hire is a growing part of the employment placement services industry. Labour Hire workers are employed across all industries and occupations in Queensland. The industries with the most labour hire workers include manufacturing, construction, healthcare and social assistance, public administration and safety, and agriculture, forestry and fishing.³

The issue of exploitation of labour hire workers across all forms of employment and work is a significant problem for regulatory and compliance bodies. Problems and illegalities can occur under all models of businesses engaging workers, but certain models of employment arrangements are more susceptible to misuse whether intentional or not. This often results in unfair treatment to the workers who are actually performing the work.

It has been identified through anecdotal evidence and quantitative data that labour hire is one of these models where mistreatment of workers can occur, and this takes a range of forms, including:

- underpayment and non-payment of wages, superannuation, and tax amounts;
- unlawful arrangements, for example, payment of piece rates in a way which does not comply with minimum award requirements;
- using illegal workers, for example, workers on visas who are not permitted to work, or are not permitted to work more than a specified number of hours;
- the use of sham contracting arrangements;
- structuring the employment so that the worker must obtain an Australian Business Number (ABN) and perform work as a contractor and be ostensibly responsible for their own tax and superannuation;
- inadequate workplace health and safety training and measures, including a lack of proper safety equipment;
- other significant concerns for health and safety such as sexual harassment and overcrowded accommodation; and
- other forms of 'corporate avoidance', for example tax and payroll tax avoidance; 'phoenixing' of companies leaving workers unpaid; lack of wage records kept, and anti-competitive to other LHPs who seek to operate in a lawful manner.

This is not an issue that is limited to Queensland or limited by state boundaries, however, in the absence of an effective national response, the Queensland Government has indicated its intention to do all it can at state level to address the issues identified as problems in the labour hire sector. However, the Queensland Government cannot attempt to address these problems by regulating the employment relationship itself, as this would likely be beyond the jurisdictional reach of the State due to the *Fair Work Act 2009 (Cth)* (FW Act) 'covering the field'. Consequently a labour hire licensing scheme is a suitable alternative that can be established in the State jurisdiction to provide support for all parties involved in labour hire.

If businesses which seek to engage LHPs must first check that a LHP is licensed through a government licensing scheme, it would make it more difficult for LHPs to operate outside the law, as well as providing a simple way for businesses or workers who might engage or work for a LHP to find out if they are licensed and therefore more likely to be operating in a lawful

³ ABS Cat. No 6333.0, Characteristics of Employment, Australia, August 2014: Customised Reports, Unpublished.

manner. This would also make it easier for businesses engaging LHPs to meet their due diligence obligations required under this proposed scheme and other employment and workplace health and safety laws.

Regular media reports of unethical and unlawful labour hire businesses, including the Four Corners 'Slaving Away' report, the Fair Work Ombudsman (FWO) investigation of the Baiada Adelaide chicken factory, and other updates from the FWO, highlight that there are large number of LHPs whose business model is to make money by ignoring their legal obligations and to pay the fines if and when they are caught. This is simply not acceptable given the large numbers of known and presumably even larger number of unknown labour hire workers who are seriously exploited by these businesses and people.⁴ Many of these workers include visa holders such as international students and working holiday makers (WHMs), and their mistreatment may have serious negative impacts on their experience in Queensland. These stories are reported in the media and social media both with in Australia and overseas. This may in turn lead to lower numbers of WHMs or other overseas visitors and have consequential impacts on tourism and the availability of itinerant workers for horticulture.

The Report of the FAC Inquiry contained disturbing evidence of exploitation and mistreatment of labour hire workers in Queensland.⁵ Evidence to the FAC included cases of underpayment of wages and unauthorised deductions, sexual harassment, workers housed in overcrowded and sub-standard accommodation, lack of proper safety equipment and appropriate training, systemic tax avoidance, sham contracting and phoenixing of companies leaving workers stranded without their entitlements and uncertainty about the identity of their employer.⁶ These issues need to be addressed.

The Government members of the FAC supported state regulation through registration of labour hire providers.⁷ More than half of all submissions to the FAC Inquiry supported regulation of labour hire through a licensing scheme, with monitoring and referral services where improper behaviour is suspected. The Commonwealth parliamentary inquiries into temporary work visa holders⁸ and the seasonal workers program⁹ both recommended the introduction of a labour hire licensing scheme, as has the South Australian Inquiry into Labour Hire Industry (SA Inquiry Report)¹⁰ and the Victorian Inquiry into the Labour Hire Industry and Insecure Work (Victorian Inquiry Report).¹¹

The Queensland Government tabled its response to the FAC Report on 30 September 2016 accepting the FAC's sole recommendation to, 'request that the Federal Government place the

⁴ See Fair Work Ombudsman, 2017 *Labour-hire operator allegedly flouts laws relating to overseas workers on Queensland farms*, <<http://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/february-2017/20170207-hta-farmings-litigation>>, Fair Work Ombudsman, 2016 *Labour-hire operator allegedly underpaid overseas workers on Queensland farms* <http://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/december-2016/20161214-seasonal-farm-services-litigation> and Fair Work Ombudsman, 2016 *Labour-hire contractors signs workplace pact after underpaying Korean workers thousands of dollars*, <<http://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/september-2016/20160921-boonah-packing-eu-presser>>.

⁵ Finance and Administration Committee, Report No 25, 55th Parliament, *Inquiry into the practices of the labour hire industry in Queensland*, June 2016.

⁶ *Ibid*, 25.

⁷ *Ibid*, 57.

⁸ Parliament of Australia, Joint Standing Committee on Migration, *Inquiry into the Seasonal Worker Programme*, May 2016.

⁹ Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (17 March 2016).

¹⁰ Economic and Finance Committee, South Australia Inquiry into the Labour Hire Industry, October 2016, <https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CId=173>.

¹¹ Economic Development, Jobs, Transport and Resources *Victorian Inquiry into the Labour Hire Industry and Insecure Work* June 2016. <http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0016/139011/IRV-Inquiry-Final-Report-.pdf>.

matter of the issuance of Australian Business Numbers (ABNs) to employees as a way for labour hire companies to avoid their employer obligations on the agenda of the next Council of Australian Government (COAG) meeting'. However, the Queensland Government also noted that the Report's single recommendation alone is unlikely to address the acknowledged issues.

The Queensland Government is consulting with Victoria and South Australia as both states have indicated they intend to develop a scheme to regulate LHPs in the respective states. The Queensland Government intends to work to implement an effective compliance and monitoring program as soon as possible, while consulting with relevant industry stakeholders.

In October 2016, the FWO released a report into the experiences of 417 visa holders in Australia (the 417 Visa Inquiry).¹² The 417 Visa Inquiry sits alongside the FWO's Harvest Trail Inquiry focused on the horticulture sector, which commenced in August 2013. The 417 Visa Inquiry surveyed 4000 overseas workers who had applied for and been granted a second year 417 visa after meeting specific requirements including performing 88 days of documented work in rural or regional Australia. The 417 Visa Inquiry found that only 38 per cent of the visa holders felt positive about their experience. The Report also found that 66 per cent of visa holders felt that employers take advantage of WHMs by underpaying them, and 59 per cent noted that workers are unlikely to complain about their working conditions in case their work is not signed off by the employer, making these workers highly vulnerable to exploitation and mistreatment.

The 417 Visa Inquiry also found concerning patterns of behaviour with respect to the treatment of WHM visa workers, including:

- underpayment and non-payment of wages;
- sexual harassment and workplace health and safety issues;
- exploitative workforce cultures and behaviours in isolated and remote workplaces;
- employers and hostels withholding passports without authority;
- employers engaging in sophisticated labour supply chains involving sham contracting, with visa-holders being engaged as contractors and not employees;
- employers making unlawful deductions from wages and unlawfully requiring visa-holders to spend part or all of their wages in an unreasonable manner;
- employers requiring visa-holders to do unpaid work in exchange for providing evidence that they had completed 88 days requisite paid work;
- visa-holders offering, or being induced to offer, payment to employers and third parties for assistance to gain a second-year 417 visa;
- employers recruiting workers by offering to assist them with second-year visa requirements if they agree to perform unpaid work;
- employers advertising jobs to overseas workers seeking a second-year 417 visa, but then imposing unlawful demands and conditions, such as requesting they pay for the job and for accommodation;
- visa-holders working for free in exchange for non-certified accommodation programs; and
- employers requiring visa-holders to pay money up-front for tools and equipment that the business was legally required to provide.

The findings of these reports and campaigns mirror the outcomes of a number of other parliamentary inquiries:

¹² Fair Work Ombudsman, 2016 *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program* October 2016. < <https://www.fairwork.gov.au/ArticleDocuments/763/417-visa-inquiry-report.pdf.aspx>>.

- the Commonwealth Senate Education and Employment References Committee Report on the inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders, released in March 2016, found unscrupulous exploitation across Australia including of labour hire workers¹³;
- the Commonwealth Joint Standing Committee on Migration report on the inquiry into the seasonal worker program, released in May 2016, found exploitation of workers by LHPs¹⁴;
- the SA Inquiry Report reported in October 2016 found instances of exploitation of labour hire workers and noted the susceptibility of insecure and vulnerable workers to exploitation¹⁵; and
- the Victorian Inquiry Report has also recommended a business licensing scheme, new procurement policies that give preference to secure employment, a voluntary code of practice for LHPs in Victoria, a public register of licensed LHPs and that hosts in each of the sectors be subject to a legal obligation to use only licensed labour hire suppliers.¹⁶

Labour hire arrangements, even when lawful, come with a range of issues. Submissions in response to the Issues Paper included reports from individuals including:

- a mining labour hire worker who says he earns approximately \$30,000 per annum less than a permanent employee doing the same job;
- allegations that higher rates were offered to potential employees at the time of signing the agreement, but upon the commencement of the agreement, the employees were told they were not going to receive that rate and were dropped to a lower rate; and
- difficulty for people who are not in traditional full time employment to seek loans even if they are paid reasonable rates, and that this lack of stability and working without the benefits of permanency needs to be addressed.

Many industries in Queensland are heavily reliant on the mobility of workers and WHMs. Visa holders in particular have become a significant part of the labour force in the horticultural industry throughout Queensland, as well as in the tourism, hospitality, accommodation and café, hotels and restaurant industries. The Queensland Government is committed to the fair treatment of all workers and to ensuring their safety and well-being. For employers, these workers are a valuable and necessary workforce, and it is imperative that they be treated well so that they continue to seek to work in these industries and areas in Queensland.

¹³ Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (17 March 2016).

¹⁴ Parliament of Australia, Joint Standing Committee on Migration, *Seasonal Change - Inquiry into the Seasonal Worker Program* (May 2016).

¹⁵ Economic and Finance Committee, South Australia Inquiry into the Labour Hire Industry, October 2016, <https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CIId=173>.

¹⁶ Economic Development, Jobs, Transport and Resources *Victorian Inquiry into the Labour Hire Industry and Insecure Work* June 2016. <http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report-.pdf>.

2.1 What is the scale of the problem?

The scale of the problem in terms of numbers of LHPs and numbers of workers subject to mistreatment or exploitation is difficult to quantify for many reasons. Many LHPs are believed to operate outside of the regulatory framework. Reporting of labour hire arrangements from workers' compensation industry figures and the Australian Bureau of Statistics (ABS) figures do not provide clear sets of data to identify how many individual labour hire businesses there are in Queensland or engaging workers to perform work in Queensland.

However, some estimates suggest that there are approximately 5,800 businesses involved in labour hire across Australia and around a quarter of those (24.5%) are based in Queensland.¹⁷ Further, according to ABS figures, in September 2014, approximately 103,900 people in Queensland found their job through a labour hire company or agency.¹⁸ This figure includes both placement services and labour hire arrangements. Of these, an estimated 59,100 (57%) were full-time males, 3,900 (4%) were part time males, 25,900 (25%) were full-time females and 15,900 (15%) were part-time females. There were 13,900 (13%) workers who identified as public sector workers and 90,600 (87%) who identified as private sector workers.¹⁹ These workers are employed across all industries and occupations in Queensland. The industries with the most labour hire workers include manufacturing, construction, healthcare and social assistance, public administration and safety, and agriculture, forestry and fishing.²⁰

It is clear that labour hire has become a significant feature of working arrangements in Queensland. **Attachment 1** provides an estimate of the number of LHPs working in these sectors.

For the purposes of analysis and development of the scheme, data provided by WorkCover Queensland has indicated that there are approximately 1,500 to 2,000 LHPs in Queensland. There may be more than this given the common use of labour hire arrangements in particular industries which may not be normally characterised as labour hire because of the use of contractors. In consultation, industry stakeholders have suggested that the figure would be higher when including businesses which might supply labour on an ad hoc basis, or where the main business provided is other than labour hire. Other factors which might increase the estimates are the numbers of transient LHPs (for example, fruit picking) and those based interstate or even overseas which provide labour in Queensland.

More broadly, several studies have noted the increase of labour hire arrangements in Australia from the early 1990s (commonly in administrative, IT and other roles) and more recently the use of labour hire has expanded into nearly all areas of the workforce.²¹ Other non-standard

¹⁷ Allday, *Industry profit falls due to increased competition*, IBISWorld, January 2016, p.3

¹⁸ ABS data as provided by the Office of Industrial Relations, Correspondence, 18 February 2016, Paper 2, page 1, available at: <http://www.parliament.qld.gov.au/documents/committees/FAC/2015/15-LabourHire/15-bp-25Feb2016.pdf>

¹⁹ Australian Bureau of Statistics, Persons who found their job through a labour hire firm or employment agency, By Industry of main job - By Sex-Labour hire firm or employment agency, By industry of main job -By sex, August 2014

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/EF3BF9BDA5BF304ECA25801F00186541?opendocument>>.

²⁰ ABS Cat. No 6333.0, Characteristics of Employment, Australia, August 2014: Customised Reports, Unpublished.

²¹ J Burgess and J Connell, *Temporary agency work and the evolving employment model in Australia*, Employment Studies Centre, University of Newcastle, Australia, 2006, p.1; A Allday, *Needs a helping hand: Industry profit falls due to increased competition*, IBISWorld Industry Report N7212: Temporary Staff Services in Australia, January 2016, pp.5-6; R Johnstone, *Dismantling Worker Categories: The Primary Duty of Care and*

forms of employment such as the sharing economy (such as Uber and AirTasker) are also increasingly common throughout the labour market. These forms of employment bring similar concerns around insecurity of work and lack of certainty and clarity about the employment relationship to those which occur in labour hire arrangements, and need to be monitored with respect to the potential application of this or other regulation if needed.

Certain industries are widely acknowledged to have very significant issues arising through the use of labour hire arrangements, and in particular using migrant workers. The horticulture sector in Australia has been the subject of a number of investigations and increasing scrutiny from the FWO, which has set up a major national investigation, the Harvest Trail Inquiry, as well as the federal Migrant Worker Taskforce, a multi-agency taskforce including FWO and Department of Immigration and Border Protection which is headed by Professor Allan Fels. Professor Fels has commented that major reforms were needed to confront the growing problem and that there is, 'enough evidence to say that it is systemic' and 'significant numbers [of migrant workers] are really exploited'.²² In many cases, the illegality starts overseas, with foreign workers responding to advertisements which guarantee work in regional areas in Australia, often in return for payment from the worker to a LHP.

Meat and poultry processing industries have also been the subject of serious allegations and inquiries, and also share a reliance on visa workers with the horticultural industry. These two areas (horticulture and meat/poultry processing) are considered particularly high risk industries for exploitation of workers.

In the coal mining industry in Queensland, the increasing use of labour hire is causing problems, and local members and mining workers have expressed their concern about casualisation of workers. There has been a significant downturn in mining, with resultant reductions in staff and decreases in wages. The use of labour hire can further weaken workers' entitlements and result in job losses for permanent employees. This was an issue recently in Queensland, at the Anglo American German Creek mine in late 2016 when Anglo American advertised for labour hire workers.

In the construction industry, the use of labour hire workers or contractors is common, and can be linked with decreased pay rates under payment of wages, as well as higher incidence of workplace health and safety issues or accidents.

Labour market exploitation goes beyond simple non-compliance with safety net conditions. It creates labour market distortions and undermines competition in a way that favours firms that do not comply with Australian laws and standards of fair dealing. It includes all forms of unlawful or unconscionable conduct that negatively affects the ability of the labour market to regulate, efficiently and equitably, the supply of jobs, access to jobs, or the conditions or price according to which labour is offered and acquired. Relevantly to the employment services industry, labour market exploitation especially includes all forms of illegal, unprofessional and unethical conduct or "sharp practice" in dealings for the supply or acquisition of employment services that create conditions of unfair competition, unlawful restraints upon trade, and worker exploitation that fails to meet acceptable standards for the protection of workers' dignity and human rights including their labour rights.

Additionally, the types of labour hire agencies are widely varied. They include:

- large, multinational corporations with thousands of staff;
- mid-tier LHPs;

Worker Consultation, Participation and Representation in the Model Work Health and Safety Bill 2009, National Research Centre for Occupational Health and Safety Regulation, ANU Working Paper no. 82, October 2011, p. 3
²² Professor Alan Fels as quoted in article by Nick McKenzie and Richard Baker, *The Age*, 15 November 2016.

- small, regionally-based, industry-based or occupationally-based companies where the agency owners know each of their workers personally;
- not for profit groups utilising labour hire as a means to improve employment opportunities in communities;
- accommodation proprietors who procure work for backpackers; and
- LHPs consisting of an individual (or a few individuals) with no physical location and only a mobile phone.

The types of labour hire arrangements are equally diverse and include:

- labour hire workers filling short term vacancies for a host employer;
- labour hire workers performing seasonal work for a host employer on a short-term basis;
- labour hire workers performing long term work for a host employer, alongside permanent direct employees of the host;
- staffing of a host employer's entire business, or a specific business unit, with labour hire workers; and
- contracting out a host employer's particular business function to a labour hire agency.

2.2: What are the causes?

The nature of labour hire arrangements leaves workers with limited bargaining power in the employment relationship and vulnerable to exploitation. Where workers face language or cultural barriers or lack of knowledge of their workplace rights, that vulnerability is heightened and results in the types of cases that have been reported in the media and through a number of public inquiries. The nature of the labour hire arrangements also present particular challenges to effective monitoring and enforcement as they can be used as a way for a firm to avoid their obligations under workplace laws and lines of responsibility can become blurred. These inherent characteristics of labour hire arrangements are some of the causes for exploitation of labour hire workers.

Another reason for poorer labour market outcomes for labour hire employees lies in the insecurity of employment. This makes workers vulnerable to exploitation but also less likely to speak up about their concerns for fear of losing their job, and, in the case of temporary visa workers from overseas, jeopardising their prospects of staying in the country. In addition, labour hire workers generally have no access to collective bargaining and limited level of union representation. Even labour hire workers who have worked for a long period of time with the same firm are denied the right to participate in enterprise bargaining and so are prevented from negotiating better pay and conditions of employment and have limited recourse to raise issues of concern in relation to workplace and safety. Further they are generally unable to benefit from or secure the pay rates gained by directly employed workers for the same employer.

The extent to which workers are vulnerable to exploitation is increased by how many elements of the relationship and their arrangements their employer has control over. For example, an overseas worker whose employment has been arranged and whose accommodation is provided by his or her employer is likely to be at a higher risk of exploitation than a worker who simply provides their labour on a casual basis to a LHP.

There are of course exceptions to labour hire workers being paid low rates and being vulnerable to exploitative practices, for example high paid professional services labour hire workers such as information technology experts, and specialist consultants, can be very well paid.

Lack of visibility of LHPs is a problem which has many consequences. As discussed earlier in this paper, it is difficult to identify numbers of businesses which operate as LHPs in some capacity. LHPs sometimes operate entirely outside the framework of employment law by using contractual arrangements. In some cases, these are probably lawful business-to-business arrangements, but in some cases these structures are 'sham contracting' where workers are required to obtain an ABN and work as contractors when they should in fact be employees, covered by appropriate workplace laws and award rates. Other consequences of this lack of visibility include the manifold issues around avoidance of obligations or other unlawful practices discussed above, such as non-payment of superannuation, tax, payroll tax and appropriate business insurances. Also, the practice of 'phoenixing' companies or sole trader LHPs simply disappearing without paying entitlements, has been reported.

The complexity presented by labour hire arrangements also causes the end user or host employer of the labour to be distanced from the employment relationship and can result in an abrogation of the responsibility for ensuring worker's rights and entitlements. This complexity is increased by:

- a) the range of agencies across the three tiers of Government that have responsibility for regulating employment, including immigration and border protection, work health and

safety, anti-discrimination and harassment and maintaining standards for accommodation and community cohesion;

- b) a lack of information and transparency around the bona fides of labour hire businesses;
- c) insecurity of employment which makes workers vulnerable to exploitation and means they have little industrial power or representation to raise concerns, to negotiate better wages and conditions of employment, or to bargain collectively; and
- d) the high incidence of businesses using vulnerable workers with limited awareness of their workplace rights and entitlements or who are particularly vulnerable to exploitation, for example workers on visas.

2.3: What are the issues?

Various inquiries in Australia have highlighted the vulnerability of labour hire employees to poor treatment at work, ranging from cases of underpayment and unauthorised deductions of wages, dangerous conditions of work and substandard accommodation, to more extreme cases of exploitation akin to slavery and bonded labour. That evidence is widespread, not uncommon and ongoing with new cases reported regularly in the media. Although the reported incidences have tended to be concentrated in the horticultural and food processing industries and have often involved WHMs or other visa workers, the issue is much broader. **Attachment 2** provides a snapshot of instances of exploitation of workers as reported in the media.

As discussed above, the Report of the FAC Inquiry contained disturbing evidence of exploitation and mistreatment of labour hire workers in Queensland.²³ These issues need to be addressed to ensure the safety and fair treatment of workers.

Overview of issues from written submissions

Written submissions to the Issues Papers largely agreed that the central issue to be addressed in the labour hire sector is the exploitation of workers. For example, the NUW submitted that:

*the growth and entrenchment of precarious and contingent work is a significant threat to workers and their life chances. ...The current scheme of workplace laws in this country does not comprehend the radically changed nature of modern employment relationships.*²⁴

The submissions also identified a range of other issues associated with the use of labour hire employment that impact upon both LHPs, employees and host employers. These include:

- cutting labour costs and substituting an existing workforce with a cheaper workforce with lesser pay and conditions, and which is also more likely to be compliant due to the uncertain nature of their employment arrangements;²⁵
- workers receiving lower hourly rates of pay and being unable to access entitlements available to permanent workers;²⁶
- an increased use of enterprise bargaining agreements which fall outside typical award rates and may offer different standards of conditions. For example, labour hire workers at a particular site may be paid under a specific enterprise bargaining agreement, while their directly employed colleagues at the same site may be paid under a more recent, higher award or higher enterprise bargaining rate;²⁷
- an increased use of labour hire arrangements with poorer conditions on average which is widening the gap between standard and non-standard workers (cast as insiders versus outsiders), at a time when insecure work arrangements are becoming more common. The heavy reliance on casual rather than permanent workers – often over the long term – which largely negates the protection of unfair dismissal afforded to

²³ Finance and Administration Committee, Report No 25, 55th Parliament, *Inquiry into the practices of the labour hire industry in Queensland*, June 2016.

²⁴ National Union of Workers, submission no. 36.

²⁵ Queensland Nurses Union, submission no. 10.

²⁶ Dr Elsa Underhill, submission no. 28, Regulation of the Labour Hire Industry 2016 Issues Paper.

²⁷ Queensland Nurses Union, submission no. 10.

other employees. Further, this may have the effect of displacing other legitimate sources of labour and eroding employment rights and conditions;²⁸

- the growth of unstable, non-regular patterns of work that characterise labour hire. This has implications for the living standards of these workers and their families, including limiting their ability to access loans and credit or plan for their futures;²⁹
- ambiguities in the employment relationship posing a potential threat to occupational health and safety standards, with a lack of clarity over parties' specific responsibilities potentially serving to degrade workplace conditions and reduce protections for employees. Studies have identified that labour hire workers are more likely to be injured at work than direct hire workers, and their workplace injuries underreported, with the obligation and ability to rehabilitate injured workers often limited (labour hire workers are less likely to have a specific work site for rehabilitation and return-to-work duties);³⁰
- opportunities for career advancement is often limited within labour hire arrangements;³¹
- labour hire workers have less of a "workplace voice" in the host's workplace than directly employed workers;³²
- employees of labour hire companies have considerably less bargaining power and may be disinclined to speak out about their conditions largely out of fear for their employment;³³ and
- low barriers to entry into the labour hire sector allow opportunistic LHPs to easily enter and work in an industry³⁴

Overview of issues raised by industry from written submissions

Written submissions to the Issues Paper by industry representatives such as, APSCo, the RCSA and the Queensland Horticulture Council, acknowledged the well documented exploitation of workers as the catalyst for reform in the labour hire sector. The majority of these submissions agreed that no action is not an option. These industry representatives also provided reports of industry specific issues that have emerged in relation to labour hire arrangements. Identification of these issues provides a further degree of analysis as to why maintaining the status quo places both industry and workers at substantial risks. It helps to create a fully formed picture as to the need for regulation. Some issues identified include:

- uncertainty as to the existence and scope of agreements between LHPs to supply workers to host employers;³⁵
- invasive collections of personal information of workers;³⁶
- some LHPs "rebranding" job postings "owned" by competitors in a manner which often under cuts the original offer of ethical LHPs;³⁷

²⁸ Caxton Legal Centre, submission no. 23, Regulation of the Labour Hire Industry 2016 Issues Paper.

²⁹ Chris Birchley, submission no. 8 and confidential submission no.7.

³⁰ Dr Elsa Underhill submission no. 28.

³¹ Ibid

³² QCU submission no, 29 FAC Inquiry

³³ Dr Elsa Underhill, submission no. 28.

³⁴ NWU, submission no. 36.

³⁵ APSCo, submission no. 39, RCSA submission no. 37, Queensland Horticulture Council, submission no. 29.

³⁶ Ibid.

³⁷ Ibid.

- misleading job ads with substantial impacts for workers, host employers and LHPs;³⁸
- LHPs engaging in ‘predatory pricing’ to undercut their competition;³⁹
- offshoring of practices not conforming to Australian or international standards;
- poor record keeping and record destruction practices;⁴⁰
- refusal or failure to undertake voluntary dispute resolution processes (across all aspects of the labour hire tripartite relationship) in good faith or at all;⁴¹
- host employer uncertainty about worker suitability assessment processes and responsibilities; and⁴²
- uncertainty and equivocation about whether a LHP or host employer has responsibility for payment of wages and safety.⁴³

Overview of benefits of labour hire arrangements from written submissions

Another common theme apparent in submissions to the Issues paper was that labour hire underpins many working arrangements and is consequently vital to the success of some industries. Some benefits of the use of LHPs identified in submissions include:

- Australian businesses are operating in a modern and dynamic 21st century economy with greater global market connectivity which require higher levels of labour market flexibility and adaptability. These needs are being met by the type of flexible and temporary employment arrangements that is offered by labour hire;⁴⁴
- people employed in non-standard forms of work are highly heterogeneous, with such jobs suiting people’s circumstances well and often acting as stepping stones for more secure work;⁴⁵
- LHPs play an important role in industries, like horticulture, where accessing seasonal labour in a short time frame is highly sought after; ⁴⁶
- many established LHPs have developed progressive and sophisticated employment practices, and often provide superior wages and conditions;⁴⁷ and
- the use of labour hire is an established and essential mechanism to address economic and business challenges faced by employers.⁴⁸

Anecdotal and quantitative evidence from the submissions to the Issues Paper (discussed above), reports conducted by the Victorian, South Australian and Federal Government, the FAC Inquiry, academic and industry research and reports of union and employee groups have made a clear case for regulation in the labour hire sector. It is apparent that in the absence of regulation, ‘maintaining the status quo’ will not only see continued instances of worker exploitation, but also enable LHPs to engage in illegal practices and undercut ethical LHPs. Host employers might also continue to avoid their due diligence obligations. In Queensland in particular, where labour hire workers and LHPs have become a significant part of the labour force in many industries, maintaining the status quo will only encourage these practices which can have devastating impacts on workers, host employers, ethical LHPs and the broader community. This Decision RIS will discuss how to best address these issues by implementing

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Chamber of Commerce and Industry Queensland, submission no.31.

⁴⁵ Ibid.

⁴⁶ Queensland Horticulture Council, submission no.29.

⁴⁷ Ai Group, submission no.19.

⁴⁸ Ibid.

a regulatory scheme that not only aims to protect workers but also raise standards of integrity and professional conduct in the workforce.

3: Objectives in establishing a labour hire licensing scheme in Queensland

The objectives of implementing a licensing scheme in Queensland for labour hire is to, protect labour hire workers, require LHPs to obtain a licence to operate and create a legal obligation for host-employer's to only use licensed LHPs. By making it mandatory for people or businesses seeking to engage a LHP to only use a licensed LHP, the licensing scheme seeks to encourage all parties in the labour hire supply chain to operate within the regulatory framework, in a transparent and legitimate way. The scheme would also assist host employers in identifying legitimate LHPs and meet their due diligence obligations.

The Queensland Government is committed to establishing a fair and cost-effective system for licensing LHPs, requiring relevant information and compliance reporting to help prevent exploitation of workers, with an online 'one-stop-shop' featuring an up-to-date searchable register of licensed LHPs so that host employers can readily find licensed providers in their area and required industry, and workers can verify the bona fides of prospective employers.

Regulation of labour hire through business licensing, monitoring and information and referral services is anticipated to promote greater transparency and scrutiny of labour hire, provide specified minimum standards and requirements for operating as a LHP, provide information to the users of labour hire services about the legitimacy of the service provider, and raise the standard of integrity and professional conduct.

The scheme will support all parties, including host employers, LHPs and labour hire employees, to ensure ethical conduct and compliance with existing regulations, including by providing easily accessible information and resources about rights and obligations in labour hire and links and referral to other government agencies.

To ensure that the objectives of the licensing scheme are met, the following strategic outcomes are sought, to:

- provide effective, meaningful engagement with stakeholders thereby enhancing the effectiveness of regulation;
- identify and regulate LHPs in Queensland;
- support legitimate LHPs by requiring users to use only licensed LHPs;
- work with LHPs, host employers and labour hire workers to identify and address non-compliance;
- prosecute health and safety negligence and breaches of employment and other laws/regulations, including by referral to relevant agencies where necessary;
- maintain a credible licensing scheme which creates a level playing field and promotes integrity and growth in labour hire arrangements in Queensland; and
- identify exploitation of labour hire workers by licensed and unlicensed labour hire companies.

These objectives are not considered to be subject to a particular timeframe, and it is proposed that they be addressed through the implementation of a comprehensive and ongoing scheme. Therefore, the Queensland Government is seeking to implement an effective and efficient LHP licensing scheme that; seeks to stop exploitation and mistreatment of labour hire workers, ensures the bona fides of and provides specified compliance obligations for labour hire providers and improves overall confidence in the integrity of labour hire in Queensland.

This will be achieved through the creation of a legal obligation for LHPs to be licensed and for host employers to use only licensed LHPs.

4: Options for implementation

4.1 Option 1 - No regulation

Overwhelming evidence in submissions responding to the Issues Paper highlighted that no action is not adequate. In the absence of a national licensing scheme, the Queensland Government is determined to do all it can to ensure the labour hire sector is properly regulated in the interests of workers, reputable providers, and those who engage LHPs alike.

Generally, labour hire workers are at a significant disadvantage in employment, given their insecurity of employment. This not only makes workers vulnerable to exploitation but also less likely to speak up about their concerns for fear of losing their job, and, in the case of temporary visa workers from overseas, jeopardising their prospects of staying in the country.

As evidenced, workers are placed in situations where there is a risk of physical and emotional harm and sexual abuse. It is difficult to quantify these costs. Some understanding of the impact can be gained by considering potential costs such as;

- costs of medical treatment or hospitalisations associated with increased incidents involving workers;
- costs associated with investigation and prosecution of potential acts amounting to criminal conduct;
- costs of psychological care associated with workers who may have suffered emotional harm and abuse; and
- costs to employers due to an absence of an employment workforce.

Currently the *Fair Work Act 2009* (Cth) (FW Act) is the primary piece of legislation providing for the regulation of the employment relationship and workers' rights. Submissions to the Issues Paper have identified that the FW Act has not met monitoring and compliance expectations in the exploitation of labour hire workers. ⁴⁹A status quo option would fall short of protecting these workers from harm.

Further, non-regulatory options are not considered to have adequate effect given the seriousness of the issues which are widely acknowledged to occur. While the Queensland Government is supportive of any attempts to improve integrity of LHPs, the evidence of unlawful behaviour and the commentary and recommendations of numerous inquiries support a strong regulatory approach.

⁴⁹ Maurice Blacnurn Lawyers, submission no. 26.

4.2 Option 2 - Self regulation

Self-regulation is defined as ‘a regulatory process whereby an industry-level organisation (such as a trade association or a professional society), as opposed to a governmental- or firm-level, organisation, sets and enforces rules and standards relating to the conduct of firms in the industry.’⁵⁰ Self-regulation is generally characterised by industry-formulated rules and codes of conduct, with industry solely responsible for enforcement.

In Australia, an example of self-regulation is provided by the Recruitment and Consulting Services Australia (RCSA). The RCSA has a Code for Professional Conduct (the RCSA Code) which is authorised by the Australian Competition and Consumer Commission. RCSA’s objective is to achieve self-regulation of the on-hire worker services sector. The RCSA Code sets the standards for relationships between members, best practice with clients and candidates and general good order with respect to business management, including compliance. Acceptance of, and adherence to, the RCSA Code is a pre-requisite of Membership. The RCSA Code is supported by a comprehensive resource and education program and the process is overseen by the Professional Practice Council appointed by the RCSA Board. The Ethics Registrar manages the complaint process and procedures with the support of a volunteer Ethics panel mentored by the RCSA’s Professional Practice Adviser.

The Code’s objective is to provide a single national framework for regulating labour hire. It would regulate the conduct of employment services and employers who use employment services at all points of the labour supply chain in order to eradicate unfair practices. If approved, the RCSA proposes that it will become a prescribed industry code under Australian competition law and be mandatory for LHPs. It would operate in addition to any law of the Commonwealth, a State or a Territory that applies to an employment services provider and would require compliance with applicable laws where necessary.

Supporters of the Code consider that self-regulation is a benefit in that it does not impose too much red tape on businesses. Further, in, in their submission to the Issues Paper the RCSA advocated for the implementation of a self-regulatory model. They noted that the:

‘RCSA are committed to achieving the right balance between the protection of vulnerable workers and the promotion of a responsive and flexible self-regulatory framework to ensure businesses in Queensland can compete in the national and international market and under changeable economic conditions.’

This support for a self-regulation model is echoed by the Queensland Horticulture Council who requested that, ‘the Queensland government work with the labour hire industry to complement the industry led certification process rather than imposing a top-down regulatory approach’.

Critics of the system consider that it does not address the issues identified. For example, Dr Elsa Underhill in her FAC submission said:

It is really not clear to me how the code, which is convoluted and requires employees to complain in the first instance to their employer that the code is being breached, improves on any arrangements that are currently in place, particularly when the code is enforced by a worker having to complain about a breach to the compliance manager at the agency where they are employed. We know that if labour hire employees – 80 per cent of them are casual workers – complain about employment conditions invariably they lose their job. You really do need an independent agency with very clear

⁵⁰ Gupta, A and Lad, L ‘Industry Self-Regulation: An Economic, Organizational, and Political Analysis,’ *the Academy of Management Review* 8, no. 3 (1983), 417.

*rights to enforce consistent standards across the industry. I really do not think their code meets that at all.*⁵¹

Dr Underhill also noted an ineffective international self-regulation example.⁵² The major industry association for employment agencies in the United Kingdom (UK), the Recruitment & Employment Confederation (REC) promotes self-regulation through the issuing of member standards. These require agencies to provide the REC with documents showing they comply with the Conduct of Employment Agencies and Employment Businesses Regulations. The documents are largely consistent with those required under the EU Directive, although equal pay is not included. The REC has also adopted a Code of Professional Practice and a Code of Ethics and Professional Conduct which members are expected to abide by. These codes cover conduct such as 'Respect for Work Relationships', 'Respect for Honesty and Transparency' and 'Respect for Laws'. Breaches of the code are investigated by the REC and penalties include a compliance order, a warning, and expulsion from the association.

A survey conducted by the UK Department for Business, Innovations and Skills (DBIS), as part of their review of agency regulation, found that only 50% of respondents thought trade association codes of practice helped maintain standards.⁵³ A high number of respondents thought that such codes needed to be underpinned by legislation. Further, 45% of DBIS's survey respondents thought prohibition orders, preventing LHPs from continuing their business, should be included in a new enforcement regime.⁵⁴ The DBIS report notes comments from some respondents 'that employment agencies and business[es] that give the industry a poor reputation need to be eradicated...more use need[s] to be made of prohibition orders and they also need to be better publicised to act as a deterrent'.⁵⁵

In their submission to the Victorian Inquiry, the Construction, Forestry, Mining and Energy Union (CFMEU) said that immoral providers are unlikely to voluntarily commit to an industry code, and if they do, are unlikely to follow the Code when they have no incentive to do so.⁵⁶ CFMEU submitted that the regulatory approach must be enforceable and not voluntary. They went on further to say that:

*In fact, as there are costs associated with following the code [such as paying workers appropriately], those businesses who do choose to follow it will not likely survive the increased competition from those providers, with lower costs, who do not. The International Labour Organisation has stated 'mindful of their negative image, in some quarters, leading private employment agencies have developed mechanisms of self-regulation to promote good business practice and receive recognition as legitimate places alongside public employment services. Self-regulation, however, cannot replace the role of national legislators and law enforcement agencies.'*⁵⁷

In their submission to the Issues Paper, the Gangmasters Licensing Authority (GLA) suggested that the development of industry-led self-regulation could be considered. However, they noted that:

⁵¹ Underhill, E 2016, Oral submission (11 May 2016 public hearing) to the Finance and Administration Committee Inquiry into the practice of the Labour Hire Industry in Queensland, 2016, <<http://www.parliament.qld.gov.au/work-of-committees/committees/FAC/inquiries/past-inquiries/I5-LabourHire>>.

⁵² Underhill, E 2013 'A Review of Licensing Arrangements for Labour Hire Firms' *Deakin University* 26.

⁵³ Department for Business, Innovations & Skills, 2013, 'Reforming the regulatory framework for the recruitment sector', Department for Business, Innovations & Skills, London <www.bis.gov.uk>.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Construction, Forestry, Mining and Energy Union, Submission No 27 to the Economic Development, Jobs, Transport and Resources *Victorian Inquiry into the Labour Hire Industry and Insecure Work* August 2016.

⁵⁷ *Ibid.*

'any such approach needs to focus on how any such scheme would have teeth to prevent irregular conduct other than banning someone from the membership of a voluntary code'.⁵⁸

A 'one size fits all' system may not be appropriate to such varied and diverse industries in order to enforce compliance. Without the provisions of a regulatory framework to support the effectiveness of a self-regulation scheme, there is a likelihood that labour hire workers' would continue to be exploited. Any benefits employers receive from self-regulation will be outweighed by the risk to the safety, well-being and fair treatment of labour hire workers.

⁵⁸ Gangmasters Licensing authority, submission no. 42.

4.3: Option 3 - Independent body administers a licensing scheme

In considering an appropriate option for the regulation of a labour hire licensing scheme in Queensland the current international labour hire regulatory frameworks and their effectiveness have been canvassed. In particular the UK Gangmasters Licensing Authority (GLA) has been looked to as a model of best practice. Identification of the GLA as a best practice model has been supported by numerous Australian inquiries and submissions to the Issues Paper. This section will discuss the GLA as an example of how to best regulate the labour hire sector in Queensland. As the GLA is an independent authority, the implementation of a reciprocal scheme in Queensland would be in the form of a statutory body independent of Government. It would assume similar roles and functions as the GLA. These are outlined below.

The GLA has historically regulated the supply of workers to the agricultural, horticultural and shellfish industries in the UK. However, a recent reconsideration of the effectiveness of the GLA and the way it tackles non-compliance within labour market regulation across the spectrum has resulted in the UK Government making changes to widen the remit of the GLA.

In its submission to the Issues Paper, the GLA indicated that the ability to effectively tackle labour exploitation across any industry where it arises requires an effective combination of civil and criminal investigative powers and sanctions, without any regulatory restrictions to narrow industry sectors. Further GLA licence holder data identifies that most, if not all, licence holders supply labour into other industry activities and do not restrict their economic endeavors to the agricultural sectors. Logically therefore, if an employer operates exploitative practices in agriculture they will operate them in any part of their business, and effective enforcement must be capable of tackling it wherever it is found.

The key objectives of the GLA listed under the *Gangmasters (Licensing) Act 2004* (UK) (GL Act) that could be adopted by a Queensland licensing scheme under this option are:

1. introducing and operating a system to licence labour providers, including a publicly accessible register;
2. effective communication of the legal requirements for labour providers to become licensed and to operate and remain with the formal economy;
3. imposing the least possible burden on labour providers and labour users through efficient and effective processes and procedures;
4. developing and promoting standards for best practice in supply and use of temporary labour, in collaboration with stakeholders;
5. checking licence holders for continued compliance with licence conditions;
6. taking enforcement action against those who operate illegally or who for other reasons are judged unfit to hold a licence;
7. supporting enforcement of the law, by or in conjunction with the enforcement authorities of other government departments, and others as appropriate, through shared information and joint working;
8. maintaining a continuous review of the activities of LHPs and the effects of the legislation and the Authority on them.

In regards to the first objective of introducing and operating a licensing system, the GLA also provides a guide as to what licensing standards labour hire providers should be required to maintain. It is considered that if this option is implemented, these licensing standards would also be adopted to the fullest extent possible. In brief, licenses would be administered and monitored with reference to; a fit and proper person test, pay and tax matters, evidence of forced labour and mistreatment of workers, accommodation, working conditions, health and safety, recruiting workers and contractual arrangements, and sub-contracting and using other labour providers.

The GLA also has the following functions and responsibilities:

- processing fees associated with licences, recruiting workers and contractual arrangements, sub-contracting and using other labour providers;
- prescribing the form and contents of applications for licences and other documents to be filed in connection with applications;
- regulating the procedure to be followed in connection with applications and authorising the rectification of procedural irregularities;
- prescribing time limits for doing anything required to be done in connection with an application and provide for the extension of any period so prescribed;
- prescribing the requirements which must be met before a licence is granted;
- providing for the manner in which the meeting of those requirements is to be verified;
- allowing for the grant of licences on a provisional basis before it is determined whether the requirements for the grant of a licence are met and for the withdrawal of such licences (if appropriate) if it appears that those requirements are not met;
- prescribing the form of licences and the information to be contained in them;
- requiring the payment of such fees as may be prescribed or determined in accordance with the rules;
- maintaining a register of licences and considering any appeals against any decision;
- carrying out inspections considered necessary of persons holding licences;
- reviewing the general activities of persons acting as gangmasters;
- supplying information held by the body to specified persons;
- reviewing the operation of the establishment legislation;
- monitoring and maintaining the identification and enforcement of breaches of employment standards, minimum wage and statutory employment rights;
- assisting labour users/providers in the co-identification of and dealing with potential worker exploitation prior to formal regulatory engagement; and
- developing closer working relationships with enforcement agencies.

As the administering body would be independent of Government it is considered that it would adopt the above functions and responsibilities as much as jurisdictionally possible.

It is considered that an independent statutory body, similar to that of the GLA, would be an effective scheme to regulate labour hire in Queensland. This determination has been based on the analysis of the GLA by various Australian inquiries, academics, the UK Government and submissions to the Issues Paper that identified the GLA model as industry best practice. The GLA is also considered a highly effective licensing regime by labour providers, unions, retailers and representatives of workers, for its significant work in improving working conditions for labour hire workers and creating a more level playing field for employers.⁵⁹ Further, the GLA has also been considered an effective licensing model exemplifying a stronger enforcement policy and a more rigorous compliance regime than applies to employment agencies across the rest of the UK economy. It covers a range of standards designed specifically to prevent worker abuse and exploitation backed up with a stronger range of sanctions.

A 2009 study of the GLA commissioned by Oxfam supported that it was an effective labour hire licensing scheme as:

- stakeholder respondents reported a reduction in the form and scale of exploitation (fewer abuses, increased transparency in employment conditions) in the sectors covered by GLA licensing;

⁵⁹ Mick Wilkinson, 'New Labour, the Gangmasters Licensing Authority and the woefully inadequate protection of migrant workers in the UK' (Unpublished paper drawn from findings of an independent evaluation of the efficacy of the GLA undertaken in 2008-09, Contemporary Slavery Research Centre, Wilberforce Institute, University of Hull), 12.

- licensing provided a clearer signpost to host employers of legitimate/illegitimate LHPs in their supply chain;
- the majority of employment agencies clearly considered the GLA to be beneficial to the sector and to be stamping out bad practice; and
- the GLA has provided invaluable intelligence to other government departments, in order to exert pressure on exploiters.⁶⁰

Various inquiries in Australia have also looked to the GLA as a model of best practice for regulating LHPs and mitigating the effects of exploitation on workers. Several stakeholder submissions to the Issues Paper proposed the introduction of a similar licensing scheme to that of the GLA in Queensland, as it would ensure that many cases of workplace exploitation and associated abuses of human rights would be reduced.⁶¹

In relation to costs of operation, it is noted that the running of the GLA requires the UK Government to provide extensive funding as it is a large scale operation (**Attachment 3**). It is considered that if this option was implemented in Queensland there would be similarly significant associated costs to establish the independent body and maintain its functions.

In 2015-16, it was estimated that the jurisdiction of the GLA was around 464,000 UK workers in the regulated agriculture, horticulture, and shellfish sectors alone. In Queensland, the labour hire sector is much smaller than in the United Kingdom. In September 2014 it was estimated that there were 103,900 persons in Queensland who found their job through a labour hire firm or employment agency.⁶² As discussed earlier in this paper, exact figures of people employed by LHPs as well as the number of LHPs is difficult to establish, and this figure does not differentiate between those employed by a LHP and those placed in a job with another employer where they are then directly engaged. However, it is the case that there would be much lower numbers of both LHPs and labour hire workers in Queensland, and consequently if an independent body like the GLA were established, it would struggle to recover much of its costs of operation through licensing fees and penalties.

In their submission to the Issues Paper, the Anti-Discrimination Commission Queensland (QDCQ) submitted that the GLA licensing model provides the best protection for workers, and that this model ought to be the benchmark in Queensland, and in Australia, if a national scheme is adopted. The Lockyer Valley Regional Council (LVRC) submitted that 'the introduction of a licensing scheme similar to that of the GLA, with adequate resourcing to enforce compliance and substantial penalties for non-compliance, would ensure that many cases of workplace exploitation and associated abuses of human rights would be reduced'. Elsa Underhill noted that checks and balances that are used by the GLA could be used in the Queensland, where old companies do not have outstanding wage debts, non-payments of superannuation and that directors have not been declared bankrupt. The Local Government of Association Queensland (LGAQ) supported the GLA licensing scheme.

The implementation of an independent scheme in Queensland would require extensive funding by the Government to operate and LHPs would also be faced with high licence fees to help cover the administrative cost.

⁶⁰ Mick Wilkinson, Gary Craig and Aline Gaus, *Forced Labour in the UK and the Gangmasters Licensing Authority* (Contemporary Slavery Research Centre, Wilberforce Institute, University of Hull, undated).

⁶¹ Lockyer Valley Regional Council and Anti-Discrimination Commission Queensland submissions.

⁶² Queensland Treasury Briefing Paper to the Finance and Administration Committee Inquiry into the practice of the Labour Hire Industry in Queensland, 2016. (ABS figures from: ABS, Persons who found their job through a labour hire firm or employment agency August 2014) <<https://www.parliament.qld.gov.au/documents/committees/FAC/2015/I5- LabourHire/I5- bp-25Feb2016.pdf>>.

It is considered that the costs of this model would be very significant, and could outweigh the benefits. However, it is considered that appropriate and relevant functions and objectives of the GLA could be implemented and adopted through a government-administered scheme using existing government resources as much as possible to respond to the needs identified, providing better cost benefit.

4.4: Option 4 – Government department administers the licensing scheme

This option proposes a universal labour hire licensing scheme administered through an existing Government department. It is considered that an effective licensing scheme can be developed within existing government resources which achieves its intent through a legislative obligation on host employers to use only licensed LHPs, as well as the obligation on LHPs themselves to be licensed, in combination with a 'one-stop-shop' easily accessible website, including a searchable public register of licensed LHPs.

The essential elements of the proposed scheme are:

- a 'fit and proper person' test;
- financial requirements and appropriate insurance, eg. financial information to show the business is a viable operation, with flexible provision for additional conditions to hold a licence where this cannot be provided or to deal with higher risk cases;
- payment of licence fee;
- regular and progressive compliance reporting;
- the establishment of a compliance unit to administer, monitor and enforce the scheme;
- criminal and civil sanctions for non-compliance; and
- provisions for recognition where similar requirements have been met under other schemes.

A capital threshold requirement, payment of a bond and mandatory workplace rights and entitlements training were also considered as potential elements of the scheme. However, it was considered that while a capital threshold requirement might mitigate the risk of 'fly-by-night' LHPs, it could also exclude small ethical LHPs critical to labour supply as well as act as a disincentive for LHPs to be licensed. A threshold capital requirement would be complex for the scheme to administer and monitor given the typical operating model which means that many LHPs operate with large debt levels because of lags between paying workers and being paid. For these reasons and because there is little evidence of their use in other similar business licensing schemes, the requirement to meet a capital threshold is not supported as the same objectives can be achieved more simply and effectively by alternative means. The scheme will also develop an easily accessible public register of licensed LHPs as part of a 'one-stop-shop' website, which would allow easy and immediate identification and validation of licensed LHPs for employees and host employers, as well as providing relevant information and resources and links and referrals to other government agencies.

This option will also recognise that some LHPs already comply with a rigorous regulatory licensing scheme. Industry bodies have also been working towards improving the integrity of their industries, for example, the RCSA is finalising a national certification program for employment services providers. Consequently, the scheme will also seek to include flexibility to recognise, where possible and appropriate, to reduce regulatory burden, and provision to recognise comparable licensing schemes in other Australian jurisdictions if they are established in the future. However, while recognition may be available in relation to meeting certain requirements, it will still be necessary for businesses which intend to operate as LHPs to be licensed under the scheme to operate in Queensland.

The scheme has been formulated with reference to labour hire inquiries in Queensland, and in other states. These inquiries have all supported the introduction of a regulatory scheme to make LHPs highly visible and responsible through licensing.

The development of the scheme has also considered international jurisdictions for examples of best practice, including the GLA discussed above. In Singapore, the Ministry of Manpower (MOM) regulates the labour hire licensing scheme through the *Employment Agencies Act*

1958. The MOM scheme has been considered a cost effective alternative to an independently administered labour hire licensing scheme (like the GLA) as it requires less funding and resourcing. It is noted that the crucial element that underpins the successful operation and administration of the MOM scheme is the 'one-stop-shop' website. The Queensland Council of Unions (QCU), National Union of Workers and Elsa Underhill looked to the Singapore model in relation to the formula for which security bonds are calculated. The LGAQ highlighted that the Singapore scheme has merit and that it is an effective regulatory system.

The scheme will apply to all LHPs who are wholly or substantially engaged in supplying workers to another entity (the client business) on a fee or contract basis; and are not a separate service entity for the client business. Further consideration around definitions will be undertaken in developing the scheme to ensure the scheme applies appropriately to relevant LHPs whether they are engaging workers on an employment or contract basis.

4.4.1 Fit and Proper person test

Under the proposed scheme all LHPs will be required to pass a 'fit and proper person test' to operate in Queensland. The fit and proper person test was supported by employee groups, the Queensland Law Society, LGAQ, and LVRC. The RCSA and the Queensland Horticulture Council noted that the RCSA's certification program provides a mechanism to proactively monitor compliance against fit and proper standards.

A 'fit and proper person' test will apply as criteria to be allowed to operate as a LHP in Queensland. The proposed key elements of the test include a criminal history check, previous experience in operating a similar business undertaking and whether there is a history of business insolvency and/or breaches of relevant workplace and corporate laws (see **Attachment 4** for further detail). However, any finding that a registered LHP has contravened a State or Commonwealth industrial and criminal law will first need to be made in the jurisdiction responsible for administering the law in order to avoid any unfair operation of the test and the test will not operate in a manner which may constitute discrimination under State or Federal laws.

The business or entity is the approved licence holder, and the 'fit and proper person' test will apply to the appropriate person, including, but not limited to, a director of a company, an authorised representative, or for a sole trader, the sole trader themselves or a person responsible for the business. Given that there are no mandatory training or qualifications to operate a labour hire business, this test will be a critical part of establishing the suitability of LHPs.

The factors the compliance unit will consider include, but are not limited to, whether the director or company officers, partners, members of the association and any person named or otherwise specified in the licence:

- can demonstrate their knowledge and understanding of the obligations as a LHP;
- has been disqualified from holding a licence or registration certificate;
- has been convicted within the past five years of a serious offence;
- has been declared bankrupt;
- has had any substantial convictions under the WHS Act;
- has been an owner, director or partner, or has been concerned in the ownership or management of a business that has gone into insolvency, liquidation or administration whilst the person has been connected with that organisation;
- has been investigated, disciplined, censured or criticised by a regulatory or professional body, court or tribunal, whether publicly or privately in matters relating to any business with which they have been involved;
- has been dismissed from, or asked to resign and resigned from, employment or from a position of trust, fiduciary appointment or similar;

- has been disqualified from acting as a director or disqualified from acting in any managerial capacity;
- has not been candid and truthful in all their dealings with any regulatory body and has not demonstrated a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards;
- has been influenced by a third party who the compliance unit considers not fit and proper;
- has good practice in compliance with industrial, superannuation and taxation legislation, evidence of payment of workers compensation insurance; and
- satisfies the fit and proper person guidelines provided by the Australian Securities and Investments Commission.

The compliance unit will treat each case individually, taking account of the seriousness of, and circumstances surrounding the matter in question. The compliance unit will consider the explanation offered by the person to whom it relates, the relevance of any conviction, rehabilitation and evidence that the matter will not reoccur. Failure against this standard will potentially lead to a licence being suspended or revoked. Some flexibility will be provided for to allow small scale or entrepreneurial endeavors who do not meet all of the requirements to be licensed to make a case to be granted a licence under special conditions including more regular monitoring and reporting.

A 'fit and proper' person test is a feature of regulatory schemes for labour hire in Singapore and the United Kingdom. A 'fit and proper' person test was also a feature of the licensing scheme recommended by the Government members of the FAC Inquiry in their Statement of Reservation and was a feature of the licensing scheme proposed in the SA Inquiry Report and the Victorian Inquiry Report. **Attachment 4** provides an overview of 'fit and proper person' tests used in business licensing schemes and proposals from submissions received in response to the Issues Paper.

4.4.2 Provision of six monthly reports on compliance with industry standards

The scheme will also require licence holders to provide regular reports to the compliance unit on their compliance with industry standards. This requirement supports and enforces the monitoring and compliance objective of the scheme. Some components of the reports will also be made publicly available on the website to inform users when making their decisions to engage a particular LHP. Any matters which are relevant to the question of whether a person is 'fit and proper person' to hold a licence should be reported within 21 days of any change, with sanctions or conditions applicable if information is not provided.

A key element of the reporting framework will be evidence that the LHP ensures a safe system of work. The State has jurisdiction in this matter and the OIR has expertise and resources to audit and ensure compliance with legal obligations. Failure to comply with reporting and/or evidence of non-compliance with licence requirements will lead to a review of and possible cancellation of the licence.

The licensing authority compliance unit will liaise with other departments including Workplace Health and Safety Queensland (WHSQ) and the FWO to ensure that any information pertaining to breaches is provided to the compliance unit as soon as practicable.

It is vital that reporting requirements strike the right balance between the need to provide sufficient information to allow an assessment of compliance with agreed industry standards and the need to minimise the administrative burden and red tape for participants.

Failure to comply with reporting obligations, providing false or misleading information or under reporting, or evidence of non-compliance with licence requirements will lead to a review of and possible cancellation of the licence, and/or other sanctions including the imposition of financial penalties.

Regular compliance reporting was amongst the recommendations for a licensing scheme proposed by the Government members of the FAC Inquiry in their Statement of Reservation and is an important component of proposed licensing schemes set out in the reports of the Commonwealth Inquiry into temporary work visa holders and of the SA Inquiry Report into the Labour Hire Industry. **Attachment 5** outlines reporting framework submissions to the Issues paper.

4.4.3 Payment of a licence fee to operate as a LHP

A licence fee will be charged to an applicant seeking to be licensed as an LHP under the scheme in Queensland. The fee would be set at a level such that it acts as a small financial barrier to entry to deter speculative applications and encourage LHPs to be licensed, but would not make it overly burdensome for small LHPs to become licensed.

Licence fees are an essential part of a licence scheme. Licence fee structures for business licensing are generally: ongoing, payable annually, and often designed to help fund the administration of the scheme to some extent. The licensing scheme proposed by the Victorian Inquiry Report included a fee. A licensing fee was also a key issue of consideration by many submissions to the Issues Paper; the NUW submitted that payment of an annual licence fee could raise sufficient capital to fund a compliance unit and could be used to guarantee employee entitlements in certain circumstances,⁶³ Maurice Blackburn Lawyers supported an annual licensing fee, suggesting that the amount would fund the licensing body and activities of the compliance unit,⁶⁴ LVRC also submitted that in discussions with growers and labour hire contractors the general consensus supported a minimal, non-refundable fee of \$550.⁶⁵ The LVRC's submission suggested that fees thereafter could be scaled by size of operation as verified in the annual audit process.

The fees charged by some other relevant business licensing schemes in Queensland include a builders licence which ranges from \$602.30 to \$1,320.55 for an individual or \$1,091.85 to \$2,394.00 for a company. A real estate agent licence requires a fee of \$1330.90. Higher licence fees apply for a liquor licence (\$7,310) and for a brothel licence (\$35,255). Some interstate comparisons include \$1,877.10 for a conveyancing licence in Victoria. The UK Gangmasters Licensing Authority adopts a tiered approach to licensing fees with application fees of £400 to £2,600 GBP with an additional inspection fee of £1,850 to £2,900 GBP depending on the size of a business.

Accordingly, what would be an appropriately set fee (i.e. comparable with other business licensing fees) has been discussed in consultation with key stakeholders and informed by the submissions to the Issues Paper. Generally, these stakeholders did not consider an appropriately set fee to be a particular issue for business provided that the amount did not place LHPs under unnecessary financial burden.

During consultation and in written submissions to the Issues Paper, most employer groups indicated that if the Government proceeded with implementing a licensing scheme that a licence fee would be an essential feature. The groups supported and accepted this, again provided that the fee did not create a financial hurdle that was overly onerous to business. In

⁶³ National Union of Workers, Submission No 32 to the Finance and Administration Committee, *Inquiry into the practice of the labour hire industry in Queensland*, April 2016, 17.

⁶⁴ Maurice Blackburn, Submission No. 26.

⁶⁵ Lockyer Valley Regional Council, Submission No. 33.

submissions to the Issues Paper, employee organisations including the QCU and NUW proposed an appropriate licensing fee. Further details of fee structures in other business licensing schemes and proposals from submissions to the Issues Paper are attached (**Attachment 6**).

For the purposes of consultation, a fee range of \$3000-\$5000 was discussed. Most stakeholders consulted did not raise any concerns about this amount or the requirement for a fee, accepting it as a standard component of a licensing scheme.

Submissions to the Issues Paper highlighted concerns that fees set at high levels could have the adverse effect of excluding some small businesses from operation. The LVRC indicated that in discussions held by the Council with growers and labour hire contractors it was generally felt that smaller or new operators who have been compliant tend to have much smaller profit margins and may be blocked from entering the industry by excessive licence fees. They submitted that when a licensing fee was discussed with these stakeholders the general consensus was that an initial fee of \$550 would not exclude even the smallest of operators. Other submissions such as the NUW also proposed that the fee should operate on a tiered system, so that it is appropriately geared to the size of the business. To minimise the financial impact on small operators while still achieving the objectives of the scheme and encouraging those operators to become licensed, it is proposed that a lower license fee of \$1000 for small LHPs be adopted.

The proposed licensing fee structure is considered to be appropriate for the Queensland labour hire licensing scheme. It is proposed that fees will be set at \$1000 for small scale LHPs, \$3000 for medium-sized LHPs, and \$5000 for a larger LHP, with the categories of small, medium and large LHPs to be defined in legislation. It is anticipated that size will be determined by gross turnover and labour hire wages paid.

As noted above there is an estimate of 1500 - 2000 LHPs in operating in Queensland. It is again noted that there may be significantly more than this given the common use of labour hire arrangements, but the precise number is difficult to quantify. Consequently the preliminary estimation of revenue that may be generated from licensing fee is of at least \$3,000,000 to \$5,000,000 based on the number of estimated LHPs in Queensland. This figure has been calculated with reference to the number of LHPs in Queensland and the proposed licensing fees. Fees at this level could be used to offset the cost of administering the scheme and the website. It is considered that appropriately set fees will also encourage all LHPs to obtain a licence, particularly given the inherent benefit that comes with being licensed or being listed on the searchable website register, with host employers required to use only licensed LHPs.

The fee structure is proposed in consideration of other factors, including: the potential number of licences which might be given, the work to set up and maintain the scheme including the administration of licensing and the website, the extent to which the fee is designed to act as a hurdle to entry or disincentive to breach obligations, as well as the negative effect of a fee keeping small scale legitimate LHPs out of the market.

The scoping of the fee has also been considered alongside other requirements of the scheme and in light of the proposed scheme not requiring LHPs to satisfy financial requirements such as a capital threshold or a bond.

The application for a licence and the payment of licence fees will be facilitated through the 'one-stop-shop' website, with alternative options (e.g. post, fax) available for entities without internet access.

4.4.4 Compliance Unit

Evidence of serious issues arising from non-compliance with existing legislation highlights the need for proactive monitoring to ensure effective regulation. Therefore, a component of the scheme is a dedicated compliance unit to act as a 'one-stop-shop'. It will be responsible for dealing with licence applications and fees; auditing and compliance requirements at application stage; ongoing auditing and reporting obligations; maintenance of the 'one-stop-shop' website, and provision of a phone line. The compliance unit will be established within an existing government department. Details of compliance units that exist in other business licensing schemes and proposals from submissions to the Issues Paper is attached (**Attachment 7**).

Under the scheme, the compliance unit will have the following objectives:

- introduce and operate a system to licence labour hire companies, including a publicly accessible register on a webpage;
- effective communication of the legal requirements for labour hire companies to become licensed and to operate and remain with the formal economy;
- impose the least possible burden on labour hire companies, employers and employees through efficient and effective processes and procedures;
- develop and promote standards for best practice in supply and use of temporary labour, in collaboration with stakeholders;
- check licence holders for continued compliance with licence conditions;
- take enforcement action against those who operate illegally or who for other reasons are judged unfit to hold a licence;
- support enforcement of the law, by or in conjunction with the enforcement authorities of other government departments, and others as appropriate, through shared information and joint working; and
- maintain a continuous review of the activities of labour hire companies and the effects of the legislation on them.

In order to achieve these objectives, the compliance unit will undertake the following tasks:

Administering a 'fit and proper person' test

The 'fit and proper person' test has been discussed above. The test will prohibit persons from operating where, for example, they have been convicted of a relevant serious offence, including fraud or dishonesty, intentional use of violence, breaches of workplace laws and breaches of occupational health and safety laws. The compliance unit will be tasked with ensuring that licence applications pass the 'fit and proper person' test requirement.

Administering a licence fee for entities seeking to be licensed as a LHP under the scheme

As outlined above, it is proposed that there will be an annual licence fee, designed to help fund the administration associated with establishing a compliance unit. The application for a licence and the payment of licence fee will be facilitated through the designated website. This website as well as application and payment will be administered by the compliance unit.

Administering a website

The compliance unit will be responsible for creating and maintaining a comprehensive website that serves as an accessible dissemination point for information and reference materials created in line with its function. Through this website, LHPs, host employers and employees will be able to: make licence applications and pay fees, make complaints, view annual

compliance reports of LHPs, view and search the register of licensed LHPs, and view reports prepared by the compliance unit both for reporting purposes and industry stakeholder use. For example, regular reporting on how industries are going, emerging issues and reports of identified non-compliant practices.

In addition, the compliance unit will also manage a phone line. In this manner the compliance unit will be able to provide information and assistance, enable businesses with limited or no access to the internet to make licensing applications and provide a confidential reporting line for allegations of non-compliance or other unlawful or exploitative practice.

Maintain a register of current licence holders

The compliance unit will also be responsible for maintaining the register of current licence holders which would be publicly available and searchable through the website. The successful establishment and administration of this service is imperative to the overall function of the scheme as it is through this avenue that host employers will need to ensure that they are using licensed providers, and workers can verify that a prospective employer is licensed.

Numerous submissions to the issues paper and other inquiries have emphasized the importance of a 'one stop shop' as being the crux of a successful licensing scheme. These comments have been summarised at **Attachment 8**.

Providing information to workers and industry

The compliance unit will provide all parties involved in labour hire with readily accessible information and resources about rights and obligations through a 'one-stop-shop' website. The compliance unit could harness resources currently under development to advise labour hire employees of their rights and entitlements, including an Application being devised in consultation with the Horticultural Workers Industry Group (HWIG).

The compliance unit would focus on engagement and awareness strategies for high risk industries as well as developing information that helps support LHPs and host employers understand their obligations and which promotes working cooperatively with industry participants to identify and deal with any emerging issues.

Sharing information

The compliance unit will create a network of shared information with other state and federal units such as WHSQ, FWO and the Fair Work Commission. This will further ensure that minimum standards and workplace laws are complied with and could assist in determining if a licence holder or potential licence holder is to be authorised, denied, revoked or suspended.

Referral of complaints and criminal offences

Similar to the sharing of information the compliance unit will also need to create networks with bodies such as the FWO, police and ATO, for when breaches of other federal and state laws are reported.

Over the last few years there has been numerous reports of underpayment of wages and unauthorised deductions, sexual harassment, workers housed in overcrowded and sub-standard accommodation, lack of proper safety equipment and appropriate training, systematic tax avoidance, sham contracting and phoenixing of companies leaving workers stranded without their entitlements. As the compliance unit will not have jurisdiction to deal with these complaints, they will be tasked with referring the allegations to the appropriate federal or state counterpart.

Check licence holders for continued compliance with licence conditions

A key function of the compliance unit will be to check licensed holders for continued compliance with licence conditions through regular inspections and enforcement. This form of proactive monitoring will be performed by conducting periodic business inspections and audits, and/or requiring occupation and industry members to report or disclose information in relation to their probity and suitability to operate (such as any changes in business ownership or operation, the commission of unlawful conduct, changes in financial status, and so on). The information acquired will then be audited for the purpose of targeted surveillance and investigation of particular sectors, entities or types of conduct within an occupation or industry.

4.4.5 Sanctions - financial penalties and criminal offences

It is proposed that compliance and ethical conduct can be achieved through the provision of offences and other sanctions for non-compliance with requirements of the scheme. In the event that the Queensland Government chooses to proceed with a state based licensing scheme, the majority of employer and employee groups considered that the introduction of penalties for both LHPs and host employers would increase the effectiveness of the scheme. These groups emphasised that creating a legal obligation for host employers to use a licensed LHP would be critical to the success of the scheme.

The CFMEU submitted that penalties should be introduced for failing to abide by any of the licensing terms, and that a reverse onus of proof should apply to any legal proceeding taken by an employee against the host employer to recover wages or entitlements. The QCU and NUW submitted that beaches of legislation introduced to regulate labour hire need to be deterred by sufficient penalties. Other union groups supported this approach. The ADCQ submitted that an obligation should be imposed on host employers to only use appropriately licensed LHPs, and that penalties should be imposed on those who use unlicensed LHPs. Maurice Blackburn Lawyers submitted that a breach of licensing requirements should attract civil penalties, including; engaging an unlicensed labour hire company; intentionally structuring an employment relationship to avoid the obligation for a labour hire company to be licensed; failure by licensed labour hire company to comply with workplace laws; employing 'authorised representatives' persons who are not fit and proper; providing false or misleading information to compliance unit; failure to provide required workplace rights and entitlements training.

The following offences are proposed for inclusion in the Queensland labour hire licensing scheme:

- operating as a LHP without a licence;
- providing false or misleading information at application or reporting;
- possessing a document (either false, improperly obtained, or belonging to someone else) with the intention of inducing someone to believe that a LHP is licensed; and
- entering into an agreement with an unlicensed labour hire provider as a host employer; and
- obstructing an inspector in the course of their duties.

Under the scheme a breach of a licence compliance requirement could also lead to a financial penalty, with a range of sanctions available up to and including revocation or suspension of the LHP's licence.

Attachment 9 provides an analysis of offences of other business licensing schemes and their applicable penalties.

4.4.6 Insurance and other financial requirements

Insurance requirements are often implemented by business licensing schemes as an additional or alternative financial hurdle to obtain a licence, and in any case, legitimate business operators should have appropriate insurances in place. It is proposed that the scheme require licence holders hold appropriate insurance as a condition of their licence. The requirement is designed to ensure that a business has strong financial viability, strength and security.

Whilst an insurance requirement was not discussed in the issues paper or subsequent submissions, it has been considered as an appropriate financial requirement as it could protect both Government and employees in the event that a business breaches their obligations.

Insurance requirements are an essential condition in many other licensing schemes in Queensland, such as electrical safety, Queensland Building and Construction Commission, and the QAssure scheme for approved suppliers to Queensland Government.

It is proposed that in order to obtain a licence to operate as a LHP in Queensland, a business could be required to provide documents or details of their insurance. The type of insurance will be subject to further development and consultation.

This condition would be coupled with a requirement that prospective licence holders provide other financial information to demonstrate their ability to carry on a business and to demonstrate viability and security of the business. This information could include documents commonly required to be provided for other business or regulatory purposes, for example: workers' compensation, profit and loss statements, and cash flow statements.

It is considered that the adoption of these financial requirements, along with a licensing fee, would provide appropriate rigour for the scheme to operate effectively and with minimal regulatory burden in addition to what businesses already need to provide for a range of other reporting purposes.

4.4.7 Recognition of comparable requirements from other licensing schemes

It is recognised that the implementation of a licensing scheme in Queensland may place some LHPs under excessive regulation where they already comply with an existing industry licence or accreditation. Consequently, it is proposed that provision for recognition that certain requirements may have already been met under other licensing schemes, regulation or accreditation be included. This recognition is in response to stakeholder concerns that some LHPs already comply with existing legislation, and that the proposed scheme would place these businesses under unnecessary regulatory burden.

A number of submissions noted that licence or accreditation schemes already exist or are under development in some industries. For example, Master Builders Association Queensland (MBAQ) note in their submission that the QBCC already has in place a rigorous licensing scheme for that industry. The RCSA has also been active in developing a national certification scheme.

To reduce the regulatory burden as well as the administrative cost of the scheme, it is appropriate that these and other specified licences or accreditations could be recognised as meeting some requirements of the labour hire licensing scheme. This would need to be determined on a scheme by scheme basis, would be subject to review and will be dealt with in a regulation.

It is considered that provision for recognition of requirements met under other schemes or accreditations where appropriate will provide some comfort to LHPs who already comply with a licensing regime in their relevant industry (such as LHPs in the building and construction industry) as it goes some way to address concerns that, 'there is no case to justify a second licence for labour hire providers.'⁶⁶

4.4.8 Non-essential elements not proposed to be included in the scheme

A capital threshold requirement, payment of a bond and mandatory workplace rights and entitlements training were also considered as potential elements of the scheme. However, it was considered that these requirements would go beyond the jurisdiction of the State (in seeking to deal with the employment relationship), place LHPs under high levels of regulatory and financial burden, or could restrict entry to the scheme for small but legitimate LHPs.

As a result, it was determined that these elements were infeasible as they are unlikely to achieve the objectives of the scheme without creating substantial detriment. The following section of this Decision RIS outlines the consideration of these elements in reaching this conclusion, as well as the stance of key stakeholders.

Threshold capital requirement

Threshold capital requirements are used to ensure businesses have adequate capital to ensure their capacity for ongoing operation. The requirement is designed to ensure that only sufficiently capitalised employers set up a business and that participants are able to fund the necessary costs of operation, including ongoing licence fees, tax liabilities and employee wages and superannuation payments.

Some submissions to the Issues Paper supported a threshold capital requirement. **Attachment 10** details the proposals of these submissions. Generally, they were in favour of an assessment of assets, revenue and cash flow to determine an appropriate capital threshold requirement.

The majority of existing state and interstate business licensing schemes do not require capital thresholds to be met for licensing purposes. The GLA also does not require that a capital threshold be met. The QBCC has general minimum financial requirements which differ for each category of licence.

The Victorian Inquiry Report did not consider that the payment of a capital threshold requirement should form part of licensing requirements, as it would be particularly burdensome for smaller LHPs. The Victorian Inquiry Report noted that the imposition of other requirements would be sufficient to impose barriers to entry to the labour hire sector that would drive out rogue elements. The Victorian Government has accepted in principle the recommendation of the Victorian Inquiry Report to establish a licensing scheme to regulate LHPs.

If a capital threshold requirement of 25% of annual turnover (for example) were to be applied to an LHP, it is estimated that an average LHP in the agriculture industry would be required to demonstrate and maintain a capital threshold amount in the vicinity of \$200,000, whilst an average LHP in the manufacturing industry is estimated to face a threshold of approximately \$600 000.⁶⁷

Generally, a LHP does not require significant capital to operate a business and the RCSCA suggests that even large LHPs operate with significant debt levels as their operating model

⁶⁶ Master Builders Queensland, submission no. 35.

⁶⁷ This figure has been formulated with reference to Dr Elsa Underhill's, submission no. 28 to the Issues Paper that a capital threshold requirement should be set at 25% annual turnover. An estimation of median annual turnover for industry specific LHPs was provided by Queensland Treasury.

typically involves lags between paying employees and being paid by host employers. Therefore while a capital threshold requirement might mitigate the risk of 'fly-by-night' LHPs, it could also exclude small ethical LHPs critical to labour supply as well as act as a disincentive for LHPs to be licensed. A threshold capital requirement would be complex for the scheme to administer and monitor given the typical operating model. For these reasons and because there is little evidence of their use in other similar business licensing schemes, the requirement to meet a capital threshold is not supported as it the same objectives can be achieved more simply and effectively by alternative means.

Bonds

The Issues Paper and submissions considered that the requirement for a payment of a bond would act as a financial hurdle, whilst providing security to employees as it could pay out their entitlements in the event of liquidation. **Attachment 11** outlines how bonds operate in other business licensing schemes and provides an overview of proposed bonds made by submissions to the Issues Paper.

Internationally, labour hire authorities differ greatly in the both the purpose of a bond and the bond amount required for a LHP to operate. For example, in the United Kingdom, the GLA requires a labour hire company to pay a non-refundable 'inspection fee' or bond which ranges from approximately \$2,950 to \$4,640, based on the provider's annual turnover. This is considerably less than the licensing requirements of Singapore, which requires payment of a 'security deposit' or bond ranging from \$19,100 to \$57,500, according to the provider's track record and volume of placements.

In the European Union, rules governing the running of an agency, such as licensing schemes or financial obligations, apply in most countries.⁶⁸ In Norway, regulations introduced in 2008 require temporary employment agencies to have regard to and supply liability and capital guarantees.⁶⁹

The Luxembourg Labour Code requires authorisation of agencies by the Ministry of Labour and Employment, as advised by the Employment agency and the Work and Mines Inspectorate, taking into account evidence of the professional worthiness and qualifications of the applicant.⁷⁰ Approval is subject to a financial guarantee to cover wage and taxation obligations in the event of failure. This is currently set at €87,000 for the first year then fixed at 11 percent of turnover⁷¹. The approval initially lasts for 12 months but can then be extended for a further 24 months before being maintained indefinitely.⁷² The QCU submitted that an amount of 11 percent of turnover is their initial position. The Australasian Meat Industry Employee's Union, the Australian Manufacturing Workers' Union (AMWU) and the Electrical Trade Union (ETU) supported the QCU in its submission. The formula used in Luxembourg was also noted by the National Union of Workers (NUW) who submitted that LHPs should be required to pay a bond. AMWU and the ETU further proposed that the amount should be held at least 12 months after the termination, revocation or expiry of a licence to protect against continued liabilities.

A bond was part of the recommendations for a licensing scheme proposed by the Government members of the FAC Inquiry in their Statement of Reservation and was also part of the licensing scheme proposed in the SA Inquiry Report. The Victorian Inquiry Report considered

⁶⁸ EurWORK 2009, 'Temporary agency work and collective bargaining in the EU'

<<https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/temporary-agency-work-and-collective-bargaining-in-the-eu>>.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

that the requirement to pay a bond amount should not form part of the licensing requirements initially, as it would be particularly burdensome for smaller LHPs.⁷³

If a bond were required, it may not be possible to use the bond to pay employee entitlements as it would be beyond the jurisdiction of the state as the FW Act 'covers the field' for private sector industrial relations. In this regard, a bond would not meet the recommended key objective of securing employee entitlements and would be more akin to a licence establishment fee held by the compliance unit and refunded to LHPs upon termination, cancellation or expiry of their licence. For reasons discussed, the requirement for payment of a bond is not proposed to form part of the Queensland labour hire licensing scheme.

Mandatory workplace rights and entitlements training

The Issues Paper and several submissions highlighted that the lack of employee awareness of workplace rights is a common factor in exploitation uncovered in labour hire. The FWO has noted this in respect of a number of cases identified under the National Harvest Trail investigation. Submissions by the NUW and QCU advocated that a scheme require LHPs provide mandatory workplace rights and entitlements training to every new employee. The NUW also advocated for the compliance unit to supply training to LHPs and host employers.

Submissions to the Issues Paper also proposed that further information on relevant award or agreement conditions should also be provided, along with information and training about other standards and entitlements such as workplace health and safety, workers compensation, anti-discrimination and harassment laws including bullying and sexual harassment, whether in legislation or company policies. **Attachment 12** outlines submissions to the Issues Paper in regards to mandatory workplace rights and entitlements training being provided to labour hire employees.

Creating a mandatory requirement for an LHP to provide employees with training on workplace rights and entitlements would be outside the scope of the State's jurisdiction as the FW Act 'covers the field' for the purposes of industrial entitlements and conditions for private sector employers.

As discussed in relation to the compliance unit, given the importance of improved knowledge and understanding of rights and obligations of all parties in labour hire, the compliance unit will provide awareness and engagement activities to all parties involved in labour hire with readily accessible information and resources about rights and obligations through a 'one-stop-shop' website. The compliance unit could harness resources currently under development to advise labour hire employees of their rights and entitlements, including an Application being devised in consultation with the HWIG.

⁷³ Economic Development, Jobs, Transport and Resources *Victorian Inquiry into the Labour Hire Industry and Insecure Work* June 2016. <http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report-.pdf>, 257.

5: Impact Analysis

The groups that will be most affected by the implementation of a government administered licensing scheme include:

- LHPs who operate in Queensland;
- host employers in Queensland who engage LHPs; and
- labour hire workers in Queensland.

The introduction of licensing and the effective enforcement of the scheme will have additional compliance cost implications for labour providers who are currently operating illegally. They will need to pay workers correctly and comply with existing legislation relating to employment, workplace health and safety, superannuation, tax etc.

Further there will be a direct cost to all LHPs as they will be charged a fee to obtain a licence. There may also be additional costs associated with other licensing requirements under the scheme. For example, a LHP may incur costs when gathering and producing the relevant documentation when providing six monthly reports on their compliance with prescribed standards and relevant legislation. However, it is considered that the impact of these costs are not overly burdensome, and are justified when considering the benefits of the licensing scheme set out below in making all LHPs licensed and thereby identifiable and accountable.

The licensing scheme may have some deterrent effect on new businesses considering supplying labour because of a perceived concern, or the fee, or the requirements to obtain a licence. It is not proposed that the scheme be overly onerous and it is clear that it is not intended to stop LHPs operating or new LHPs from starting up. It is intended to provide visibility and transparency around labour hire arrangements because of the range of issues impacting on workers but also those which occur more generally where labour hire arrangements are used, such as sham contracting, underpayment of wages or other entitlements such as superannuation.

The involvement of key stakeholder interests at every level in relation to the proposed scheme will ensure that a fair balance is struck between the interests of key stakeholders involved or affected. The labour hire licensing scheme seeks to balance its objectives with trying to minimise additional burden to business, including by a relatively low licence fee and pragmatic approach to enabling LHPs to meet requirements by using, as much as possible, information that is required for other purposes or which is simple to generate. Additionally, the scheme builds in flexibility to allow LHPs who have met requirements under other schemes or regulation to be given recognition in satisfaction of licence requirements where possible and appropriate.

Positive impacts of the scheme

It is considered that there are a number of generic benefits associated with the Queensland Government's decision to implement a licensing scheme. These include:

- a reduction in the form and scale of exploitation (fewer abuses, increased transparency in employment conditions);
- forging positive relationships with LHPs and host employers in order to uncover and terminate malpractice;
- providing valuable intelligence to other government departments (e.g. FWO, and police) in order to exert pressure on exploiters;
- improving working conditions for workers in the labour hire sector and at the same time creating a more level playing field for legitimate LHPs and host employers;

- promoting a consistent and transparent landscape to help identify and deal with the minority of LHPs who wilfully break the law;
- streamlined administrative and operational requirements through the online 'one-stop-shop' could be expected to deliver costs savings to government, licensees, host employers and consumers; and
- greater employer and consumer confidence that licensees are ethical and have satisfied an appropriate and consistent set of requirements and obligations to be licensed and to remain licensed.

It is considered that if a 'no regulation' option is implemented, these benefits could not be achieved. As discussed earlier in this Decision RIS, it is clear that in the absence of any regulation the disturbing trend of worker exploitation (**Attachment 2**) will only continue to occur.

Negative impacts of the scheme

It is considered that possible negative impacts that may stem from the implementation of this option include:

- restricting competition or entry due to the financial cost of fee as well as need to satisfy other requirements to apply for the licence;
- as the scope of the scheme is targeted at LHPs, some unscrupulous LHPs may try to find regulatory loopholes, for example, classifying themselves as 'contractors' and operating in sectors where their operation is not monitored;
- as the proposed scheme is not a national approach and would only apply to work performed in Queensland, some LHPs may choose to move their operations to other jurisdictions where there is no comparable LHP regulation;
- any licensing scheme will lead to further red tape and increase government and business costs to some extent, and the state-based nature of the scheme potentially increases this burden as LHPs may have to comply with different schemes in other jurisdictions in the future. (However, it is considered that mutual recognition arrangements may be able to minimise regulatory burden arising from other schemes if they are implemented in the future);
- an increased regulatory burden may not deter some LHPs and host employers from breaching their obligations if there is not a strong enforcement presence;
- some unethical LHPs may choose to ignore the scheme and undercut the price of those who operate ethically and in compliance with their obligations; and
- adding to regulatory burden for LHPs.

It is difficult at this stage of the development of the scheme to quantify over all costs and to what extent any additional budget allocation might be required given that the administration of the scheme is intended to use existing resources as much as possible. However, it is proposed that any additional costs that may arise will be outweighed by the scheme's aggregate benefits to workers, LHPs, host employers, and in generating consumer confidence in labour hire.

Further it is considered that the level of licence fee being considered is not overly onerous to LHPs, and that many of the requirements which will be sought as part of the application process will be generally consistent with what a feasible and legitimate business might be required to have in any case or under similar schemes. While a 'fit and proper person' test is an additional level of obligation, it is considered necessary and appropriate given the serious issues which continue to occur in labour hire arrangements.

The implementation of the scheme may impose some additional costs to Government during the establishment and implementation phase of the scheme. These costs may surround:

- developing and amending legislation;
- establishing and funding the compliance unit;
- developing a functional 'one-stop-shop' website;
- developing a register of licensees;
- educating LHPs, host employers and inspectors about their new obligations and duties; and
- raising awareness to employees, who may be vulnerable workers who do not speak English, about the new workplace requirements and avenues available to them for recourse.

However, it is anticipated that initial implementation costs will be reduced through the use of existing infrastructure and staff. This will be achieved by appropriate delegation of administrative responsibilities to existing departments capable of conducting regulatory functions. In particular, this will be achieved through the use of existing functions, facilities and staff to minimise the cost to Government. It is acknowledged that there may still be some unintended costs that cannot be covered by existing resources. However, it is envisaged that some of these costs will be able to be recovered through fees and penalties. Further, it is considered that this option will have substantial ongoing savings in operational costs, which will negate any initial establishment costs. It is considered that the licensing fee may go some way to covering the cost of administration of the licensing scheme, and the ongoing application process, administration and website costs.

Proposals to address negative impacts

It is acknowledged that the adoption of the scheme may impose costs on employers, causing them to shift resources away from other activities to achieve compliance, which they would not face under the 'status quo'. However these costs are justified as a means of improving workers protections, and in the case of labour hire employment, providing protection for workers.

Further, it is also proposed that the scheme include provision for recognition where comparable licensing requirements are met (as discussed above at 4.4.7) to be made to LHPs who already comply with specified other business licensing or accreditation requirements. This arrangement has been developed in response to concern in both written submissions and consultation that licence or accreditation schemes already exist or are under development in other industries, and that additional licensing would place an unfair regulatory burden on those businesses which comply with these alternative arrangements. Consequently it is proposed that the scheme will be able to consider whether licences or accreditations may be recognised as meeting some or all licence requirements. This will reduce both the regulatory burden and administrative cost of the scheme for both business and Government.

Evidence highlights the need for proactive monitoring to ensure effective regulation. This would be achieved by the compliance unit which as mentioned above will also process licenses and fees, process ongoing auditing and reporting obligations, and maintain the 'one-stop-shop' website and phone line and provide awareness and engagement activities. As establishing and administering the compliance unit is intended to utilise existing resources the cost to Government will be relatively low with funding drawn from the licensing revenue.

As discussed earlier in this Decision RIS, the Federal Government has not yet indicated that it will take action to implement a national labour hire licensing scheme. Consequently the Queensland Government is determined to do all it can to ensure the labour hire sector is properly regulated in the interests of workers and reputable providers alike. This is supported by an overwhelming response to the Issues Paper that no action is not adequate. Further, it

is noted that South Australia and Victoria are currently conducting reviews to implement labour hire licensing schemes in their respective states.

It is difficult to quantify the costs and benefits associated with worker exploitation, but they are invariably estimated to be highly significant. Labour hire literature consistently reports that the benefits of measures to prevent harm and abuse to workers far outweigh costs.⁷⁴ The Queensland Government's decision to proceed with this option of regulatory reform for labour hire, was also informed by a number of reviews conducted over time by both academics, other State governments, the FAC, the Commonwealth Government and union and employer groups. These reviews quantified the absence of regulation and its cost to business productivity. In brief some of these costs were considered to be; costs of medical treatment or hospitalisations associated with increased incidents involving workers, costs associated with investigation and prosecution of potential acts amounting to criminal conduct, costs of psychological care associated with workers who may have suffered emotional harm and abuse and costs to employers due to an absence of an employment workforce in regional areas. This Decision RIS therefore provides a qualitative rather than a quantitative analysis of the costs and benefits of implementing the scheme as opposed to implementing a 'no regulation' option. It is also difficult to quantify the potential for significant negative impacts on Queensland business and tourism if the reports continue in local and international media and social media of negative experiences and mistreatment of labour hire workers, including under or non-payment of wages and entitlements but also more serious incidents associated with labour hire work in high risk industries

⁷⁴ Richard Johnstone and Michael Quinlan, 'The OHS regulatory challenges posed by agency workers: evidence from Australia' (2006) 28:3 *Employee Relations* 273, Elsa Underhill and Michael Quinlan, 'Beyond statutory enforcement – alternative approaches to improving OSH in the temporary agency sector' (2011) 9:2 *Policy and Practice in Health and Safety* 109.

6: Consultation

The Queensland Government published an Issues Paper on 15 December 2016, setting out elements which might form part of a labour hire licensing scheme and seeking feedback from stakeholders on these possible components, as well as other measures to stop the exploitation and mistreatment of workers; ensure the bona fides of and provide minimum standards for labour hire companies, and improve the overall confidence in the integrity of labour hire in Queensland. Submissions closed on 6 February 2017, however a number of extensions were granted.

A total of 40 submissions were received from key stakeholders, including employer groups, union groups, community groups and special interest groups, as well as individuals. All formal written submissions were posted on the Queensland Treasury website, unless the submitter requested confidentiality. OIR considered the submissions and outcomes of consultations. A list of these submissions can be found at **Attachment 13**. Individual submissions to the Issues Paper can be found at: <https://treasury.qld.gov.au/fair-safe-work/industrial-relations/regulation-labour-hire-industry/review-submissions.php>.

The majority of the submissions received acknowledged the evidence that labour hire employees are vulnerable to poor treatment at work and cited cases of underpayment and unauthorised deductions of wages, dangerous conditions of work and substandard accommodation, to more extreme cases of exploitation akin to slavery and bonded labour.

Accordingly, the overarching recommendation of most submissions was that maintaining the status quo is not an option, and that action for reform in the labour hire sector is not only needed to protect workers from exploitation but to also support ethical LHPs.

However, amongst the submissions recommendations varied as to what is the most appropriate and effective model the Queensland Government should introduce.

A number of submissions (including employee groups, law firms, academics, individuals and associations like the LGAQ) strongly supported the implementation of a state based licensing scheme. This support can be summarised by the view of the NUW that:

Layers of contractual obfuscation arising from many labour hire and sub-contracting arrangements can often, in the NUW's experience, lead to exploitative practices such as wage theft, extreme working hours and forced job insecurity, for which the principal or host employer can avoid legal and moral responsibility. ...The result of this is the loss of decent work and growing inequality...The Queensland Government can implement changes to the system that are proposed in this submission, and also play a role to actively advocate for changes to existing Federal laws.⁷⁵

These submissions recommended that the Queensland Government implement change through a multi-layered approach to regulation that incorporates; payment of an annual licence fee to the Queensland Government, a threshold capital requirement or payment of a bond to operate a labour hire company, fundamental requirements for licence holders and related parties, a dedicated licensing body and compliance unit for monitoring and enforcing the rules of the licence, and mandatory workplace rights and entitlements training.⁷⁶

⁷⁵ NUW Submission no. 36.

⁷⁶ NUW Submission No. 46, Queensland Council of Unions Submission No. 25, Australasian Meat Industry Employee's Union Submission No. 15, Independent Education Union of Australia Qld and NT Branch Submission No. 18, Dr Elsa Underhill Submission No. 28.

Some employer and industry groups recommended that a national regulatory framework is the only reliable means of stamping out the poor and unscrupulous practices of labour contractors as it would provide consistency and transparency for employers and work seekers alike.⁷⁷ Consequently, these submissions recommended a national approach to industry self-regulation as an appropriate model for reform in the absence of action by the Commonwealth Government. The position of these submissions can be summarised by the view of the RCSA that:

The imposition of a 'catch-all' single focus state-based licensing scheme in Queensland will not stamp out illegal and illegitimate labour contractors and dodgy operators. Instead it will increase the cost for business through imposing the burden of additional compliance on the professional and legitimate employment, contracting and recruitment services industry in Queensland.

However, it is considered that while the Commonwealth has primary responsibility to reform Australia's workplaces to provide for more secure employment for Australian workers, the Queensland Government does have a role to play in supporting ethical LHPs and protecting workers from exploitation. As discussed earlier in this Decision RIS, the Queensland Government agrees that a national response is required. However, as the Commonwealth Government has failed to act, the Queensland Government will do all it can at a state level to clean up the labour hire sector. Furthermore, subsequent consultation with these groups identified that if the Queensland Government were to go ahead with its proposed state based licensing scheme, they would largely support the essential elements of the proposed scheme (outlined at option 4.4 of this Decision RIS).

A number of submissions also noted that licence or accreditation schemes already exist or are under development in some industries and that LHPs who operate within these industries should not be unnecessarily burdened by further regulation.⁷⁸ These views can be canvassed by the MBAQ submission that:

*[the Government should] exercise caution in contemplating additional regulation of labour hire businesses, or indeed any business that operates lawfully. It is very likely that an additional licensing regime will be confusing and add costs to business.*⁷⁹

In response to these concerns the scheme will consider whether licences or accreditations may be recognised as meeting some licence requirements in the form of recognition where comparable requirements have been met where appropriate (see section 4.4.7).

It is also noted that a number individuals and organisations made submissions in support of action to address systematic labour hire exploitation, but did not identify a preference as to how it should be implemented. Additionally, some submissions, including CCIQ, AI Group and MBAQ opposed the introduction of any additional state or federal regulatory scheme for LHPs. These submission cited that there is not sufficient evidence of widespread problems in the labour hire sector to warrant the introduction of any new regulation.

The Honourable Grace MP, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs also held a number meetings with stakeholders to seek further feedback on a labour hire licensing scheme in Queensland. These stakeholders included:

- Bundaberg Fruit and Vegetable Growers;

⁷⁷Recruitment & Consulting Services Association Submission No. 37, Confidential Submission No. 24 and Queensland Horticulture Council Submission No. 29.

⁷⁸ Master Builders Queensland Submission No. 35, Apprentice Employment Network Submission No. 11.

⁷⁹ Master Builders Queensland Submission No. 35.

- East Bundy Backpackers;
- Growcom;
- Chandler McLeod;
- Maurice Blackburn Lawyers;
- RCSA;
- Programmed;
- Workpac Group; and
- AWX.

OIR then undertook further consultation within the Queensland Government to discuss the viability and impacts of the elements of the proposed model. A list of these stakeholders include:

- Queensland Treasury;
- Workplace Health and Safety Queensland;
- Electrical Safety Office Queensland;
- Workers' Compensation Regulator;
- Department of Justice and Attorney-General;
- Queensland Police Service;
- Department of Transport and Main Roads;
- Department of Housing and Public Works;
- Department of Agriculture and Fisheries;
- Queensland Horticulture Interagency Working Group; and
- Workers' Compensation Policy Unit (in relation to self-insurers).

Overview of issues raised during external stakeholder consultation

OIR undertook consultation with the Department of Economic Development, Jobs, Transport and Resources Victoria and SafeWork South Australia. The States committed to liaising with each other during the development of the respective licensing schemes. This will help to ensure that requirements for a licence are similar across the jurisdictions so that the regulatory burden faced by LHPs and host employers is reduced. The key issues raised were:

- The South Australian Government, the Victorian Government and the Queensland have committed to keep each other informed in developing respective licensing schemes; and
- The Victorian Government is currently preparing a government response to the Inquiry report tabled in October 2016.

On 7 March 2017, OIR invited a number of procurement agencies, who largely represent the professional contracting sector, to discuss the impacts of the operation of a licensing scheme. Stakeholders who attended this consultation session were APSCo, Auscontact and the RCSA. Key issues raised during this consultation were:

- a preference for industry self-regulation as opposed to a regulatory licensing scheme;
- if a government implemented regulatory framework is essential, a preference for a national based approach;
- that if a state based licensing scheme was implemented it is imperative that there is a strong emphasis on obligations of the 'host employer';
- considered that a licensing application fee would be expected in the implementation regulation (regardless of which model is introduced);
- there is not much value in a regulatory scheme for the professional services sector, where instances of unethical operation are not common place and businesses already undergo compliance audits;

- if a scheme was implemented, the need for enforcement is imperative in order to stop those avoiding regulations;
- re-education of offenders as a crucial component of anujiy scheme;
- questioned whether a 'blanket approach' to regulation is really needed;
- need to ensure that small businesses are not unfairly disadvantaged;
- considered that a capital threshold requirement would be overly challenging and that it could be more useful to ensure that business comply with relevant tax and super obligations instead;
- considered that it would be overly burdensome to have both a bond and licensing fee.
- considered that in respect of a regular reporting requirement, arrangements should be made for businesses that are already required to report under different accreditation schemes;
- emphasised that it was crucial that the Government provide feedback on reports, and address any apparent problems; and
- acknowledgement that in the event that the Queensland Government introduces its proposed model, the essential elements were appropriate.

On 9 March 2017 OIR invited a number of critical stakeholders, representing the agriculture and horticulture sectors, to discuss the impacts of the operation of the proposed licensing scheme. This targeted consultation with the agriculture and horticulture sector was in response to labour hire engagements being a crucial component of rural/regional employment arrangements, particularly in relation to fruit and vegetable harvesting. However, it is noted that the problems that exist within these industries are common amongst all most every sector in which LHPs operate. Stakeholders who attended this consultation were AGHR, WHSQ, the Department of Agriculture and Fisheries, Network Ag, Queensland Agriculture Workforce Network and Growcom.

During this consultation the key issues raised included the following:

- there is a current lack of enforcement and compliance in labour hire;
- the scheme should not impose additional accessorial liability on host employers;
- if the scheme is overly onerous employment arrangements will simply move to a 'contracting' model;
- there is industry support for some type of scheme;
- ethical host employers would likely fully support a licensing model that penalises those host employers who do not comply with regulation;
- vulnerable international workers are unlikely to report instances of non-compliance;
- there should be strong pressure throughout the supply chain to use ethical LHPs;
- host employers are likely to report each other in if they are using an unlicensed LHP;
- as most ethical host employers already have to undertake due diligence checks when they engage a LHP, the scheme could actually reduce administrative burden as a licensed LHP would already have complied with these requirements; and
- the scheme should not be detrimental to host employers.

On 20 March 2017, OIR undertook further consultation with LHPs representatives, largely in the agriculture and horticulture sector. These stakeholders included Rimfire Resources, AWX, Labour Solutions, Meat Processors Group, staff360. During this consultation the key issues raised included the following:

- a preference for a national approach given that LHPs operate in more than one jurisdiction;
- a requirement for host employers to be liable for illegal operations;
- who the scheme would capture;
- whether end users, including Woolworths and Coles, would be held liable to unscrupulous activity;

- how individuals would be audited;
- commercial issues including that penalties will not deter large LHPs from exploiting workers; and
- there are many companies operating in Queensland that operate as LHP but that they do not know, or avoid to be identified as LHPs.

On 22 March 2017, OIR met with Chamber of Commerce and Industry Queensland (CCIQ), the Australian Human Resource Institute and the Information Professional Group. During this consultation, the key issues raised included the following:

- whether there is a problem in professional industries;
- that the proposed scheme may remove small business out of business;
- whether current legislative requirements are not satisfactory to deal with the issues presented;
- the requirement for businesses in Queensland to provide financial reports to a number of different Government bodies; and
- that a number of LHPs operate in different industries, and a scheme that only requires certain industries to be licensed, may not be adequate.

7: Conclusion and recommended option

Inquiries into issues relating to the use of labour hire in Queensland and in other states have supported the introduction of a licensing scheme to deter and prevent exploitation of workers, largely by driving unethical LHPs out of the market and deterring new LHPs from trying to operate outside the regulatory framework, and by making LHPs highly visible and responsible through licensing.

The essential features of the scheme are the creation of a legal obligation for LHPs to be licensed and for host employers and persons or entities engaging labour hire through a LHP to use a licensed LHP, with penalties applicable. Licensees will need to satisfy that they are a 'fit and proper person' that they have paid the licensing fee and will need to report on their compliance with industry standards and relevant legislation.

Another key feature is an easily searchable public register of licensed LHPs as part of a 'one-stop-shop' website for the licensing scheme, which would allow simple and immediate identification and verification of licensed LHPs for employees and host employers. The website would also provide relevant information, resources, links and referrals to other government agencies and regulators.

Evidence highlights the need for proactive monitoring to ensure effective regulation. A compliance unit will be necessary to deal with licence applications and fees, auditing and compliance requirements at application, and ongoing auditing and reporting obligations, maintenance of the 'one-stop-shop' website, and provision of a phone line.

It is noted that regulation can impose costs on employers, causing them to shift resources away from other activities to achieve compliance. However these costs are often justified as a means of improving protections, and in the case of labour hire, the regulatory scheme would reduce risks of exploitation for labour hire workers, as well as providing a level playing field where legitimate LHPs are not undercut by those acting unlawfully.

The submissions to the Issues Paper and subsequent consultation largely supported the Government's aim to provide greater transparency in labour hire.

OIR has considered whether the status quo, a non-regulatory approach, or a self-regulatory approach may be viable options to addressing the issues faced in labour hire.

Existing legislative requirements have not been effective in dealing with the range of issues that arise in labour hire, and particularly in high risk industries where labour hire workers are utilised such as horticulture and meat and poultry processing.

Generally, even in industries that are not associated with these high risks and such high reported incidence of exploitation, labour hire workers are at a significant disadvantage in employment, due to the insecurity and complexity of their employment, as well as confusion about who is responsible for what in a labour hire/host employer arrangement. This makes labour hire workers more vulnerable to exploitation than their directly employed counterparts, and at the same time, less likely to speak up about their concerns due to the same reasons that cause their vulnerability - fear of losing their job or not getting future work with that LHP, and, in the case of temporary visa workers from overseas, jeopardising their prospects of staying in the country or receiving a second year working holiday visa.

Most submissions to the Issues Paper were in favour of reform to address the well-documented exploitation of labour hire workers and to remove unethical LHPs. However, submissions varied as to what is the most appropriate and effective model for regulation of labour hire in Queensland. A number of submissions (including employee groups, law firms, academics, individuals and associations like the LGAQ strongly supported the implementation of a state based licensing scheme. These submissions recommended that the Queensland Government implement change through a multi-layered approach to regulation that incorporates: payment of a bond and annual licence fee to the Queensland Government; a threshold capital requirement or payment of a bond to operate a labour hire company; fundamental requirements for licence holders and related parties; a dedicated licensing body and compliance unit for monitoring and enforcing the rules of the licence; and mandatory workplace rights and entitlements training

Some industry and employer groups did not support a state based scheme because of existing industry specific licence or accreditation schemes and/or a preference for a national or self-regulation approach.

A number of individuals and organisations made submissions supporting action to address the systematic exploitation in labour hire, but did not identify a preference as to how it should be implemented. Additionally, submissions from the CCIQ, Australian Industry Group, Master Builder's Queensland and Queensland Resources Council, opposed the introduction of any additional state or federal regulatory scheme for LHPs. These submissions cited that there is not sufficient evidence of widespread problems in the labour hire sector to warrant the introduction of any new regulation.

In further consultation, stakeholders expressed concern that unlicensed LHPs who operated unethically and did not comply with regulations would be able to undercut the price of LHPs who operated ethically and in compliance with their legal obligations, as currently occurs.

There were also concerns raised in consultation that a licensing scheme might adversely affect labour supply by having the effect of excluding some small businesses from operation, some of whom operated ethically and in compliance with legal obligations and who were also critical to labour supply in rural and regional areas.

Most employer groups have expressed support for reform to address the well documented exploitation of vulnerable workers. The proposed labour hire business licensing scheme will address the concerns of many LHPs that unethical LHPs are able to undercut the price of those who operate ethically and in compliance with their obligations. However, a state based scheme was not generally supported because of a preference for a national approach, or because it is argued that existing legislative requirements already provide protections. The RCSA, which represents many of the major LHPs, is proposing a voluntary national certification scheme.

The LGAQ and the LVRC made submissions supporting a licensing scheme. The NUW and the QCU proposed a 'multi-layered' approach to licensing including an application fee, fit and proper person test, bond, a capital threshold capital requirement, compliance unit, sanctions and mandatory training on workplace rights and entitlements. The proposed labour hire business licensing scheme adopts a number of these elements and will require LHPs to hold a licence in order to operate and will require that host employers engage only licensed LHPs. This will allow LHPs to be identified and will provide data (not currently readily available) on the number and operations of LHPs and host employers.

In order to hold a licence, a LHP will be required to pass a 'fit and proper person test' and demonstrate past relevant experience and compliance with workplace relations, workplace health and safety and other relevant laws. The licence fee would be set at a rate in line with other similar State business licence fees. A compliance unit will be established and will monitor compliance through regular reporting by LHPs on their operations and on their compliance with the terms of licence holding. The unit will also undertake audits and investigations; make referrals to relevant agencies; support a 'one-stop-shop' website to provide readily accessible information and resources, links to other agencies, as well as a searchable public register of licensed LHPs. Although a number of submissions wanted to make the provision of workplace rights training an obligation on LHPs, Crown Law advice is that imposing this requirement is beyond the jurisdiction of the State as the FW Act 'covers the field' for the purposes of industrial entitlements for private sector employers. The provision of this advice and training by the compliance unit is an effective alternative and will see consistent and reliable advice and information supplied to employees.

The imposition of a capital threshold requirement would create an administrative burden for LHPs and for the administration of the scheme. A LHP does not require significant capital to operate a business and the RCSA suggests that even large LHPs operate with significant debt levels as their operating model typically involves lags between paying employees and being paid by host employers. Therefore while a capital threshold requirement might mitigate the risk of 'fly-by-night' LHPs, it could also exclude small ethical LHPs critical to labour supply as well as act as a disincentive for LHPs to be licensed. A threshold capital requirement would be complex for the scheme to administer and monitor given the typical operating model. For these reasons and because there is little evidence of their use in other similar business licensing schemes, the requirement to meet a capital threshold is not supported as the same objectives can be achieved more simply and effectively by alternative means.

The scheme will also give consideration to incorporating flexibility to give recognition of licensing requirements where comparable requirements are already met under other licensing or other regulatory scheme. A number of submissions noted that licence or accreditation schemes already exist or are under development in some industries. The scheme will be able to consider whether licences or accreditations may be recognised as meeting some or all licence requirements. This would be subject to review and will reduce the regulatory burden as well as the administrative cost of the scheme.

OIR has considered that the implementation of an independent labour hire licensing scheme in Queensland would require extensive funding by the Government to operate, and impose unwarranted financial and regulatory burden on LHPs and host employers. In this regard it is considered that the costs outweigh the benefits. However, it is considered that the functions and objectives of the GLA could be implemented and adopted through a government administered scheme as this would use existing government resources and provide better cost benefits.

As such a Government administered licensing scheme has been considered the appropriate model for regulation of LHPs Queensland. It is considered an appropriate mechanism as the introduction of this labour hire licensing scheme, coupled with a public register of licence holders, will level the playing field amongst LHPs, and provide a degree of assurance to users of labour hire services that they are engaging with legitimate providers.

In conclusion, a summary of the proposed model is for a compliance unit that is created within existing department resources, to act as a 'one stop shop' for the labour hire licensing scheme. The compliance unit will:

- assess the 'fit and proper person' test;

- facilitate the licence application and fee process online and through the post;, including handling a licensing fee;
- monitor compliance through reviewing regular reporting by LHPs on their compliance with the terms of licence holding;
- administer sanction and penalties for relevant offences;
- assess the insurance and financial requirements of licensing applications;
- share information;
- refer complaints and criminal offences to the relevant agencies;
- support a 'one stop shop' website to provide easily accessible information and resources and links to other agencies;
- provide information to workers and industry;
- maintain an online public register of licensed LHP;

8: Consistency with fundamental legislative principles

There are no fundamental legislative principles known at this time.

9: Implementation, compliance support and evaluation strategy

As the scheme is pending Government approval, a thorough implementation plan has not yet been established. However, at this stage it is considered that the scheme will be implemented and administered through existing resources within OIR.

The key milestones for the implementation of the scheme are considered to be:

- the establishment of a website;
- the establishment of a compliance unit;
- the creation of a legal obligation for LHPs and LHP users;
- the licensing of LHPs in Queensland; and
- the development of a publicly available licence register.

OIR has identified the following practical implementation and enforcement issues:

- not enough LHPs apply for licences and cost recovery is compromised (consequences for the compliance unit budget);
- legislative delays;
- failure to meet the expectations of the public and media (fail to maintain credibility); and
- loss of key skills at critical times (can result in project stalling and a loss of effectiveness).

As the scheme is subject government consideration, a monitoring and evaluation framework has not yet been developed.

The proposed licensing scheme will be subject to affirmative resolution procedures. The scheme would be phased in, to ensure that LHPs, host employers and labour hire workers are aware of their obligations and entitlements. Consultation will continue with stakeholders over the intervening period to ensure that the compliance unit will be in a position to give consideration to the operation of the licensing scheme and the conditions attached to a licence. This will ensure that there is no delay in taking work forward.

The operation of the compliance unit will be reviewed regularly to consider whether any changes to the structure of the Authority are required.

The compliance unit will also be able to identify and provide data on the number and operations of LHPs, labour hire workers and host employers. Consideration will be provided on how the compliance unit will provide public reporting on the labour hire industry following implementation of the scheme.