Ai GROUP SUBMISSION

Department of Employment & Workplace Relations

National Labour Hire Regulation

1 May 2023

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to provide a written submission in response to the Australian Government's National Labour Hire Regulation Consultation Paper (**Consultation Paper**).

Ai Group is the main national employer association representing both labour hire providers (**LHPs**) and users of LHPs (**hosts**) across diverse industries. Ai Group represents small, medium and large LHPs and hosts.

The vast majority of LHPs are reputable and compliant with workplace laws. Many providers offer sophisticated compliance technologies including associated HR and workplace relations services to support the engagement of the people they supply.

Yet the premise of national licensing is that LHPs universally, are incapable, or less likely to comply with workplace laws such that a licence is needed to operate. Such a lopsided view on the industry is one Ai Group opposes.

The Consultation Paper proposes the creation of a single national labour hire licensing scheme (**the scheme**) that would take over from existing state and territory labour hire licensing schemes. It is proposed that the scheme would cover both traditional triangular arrangements and workforce contracting arrangements and would be universal in coverage, applying to all entities and persons, regardless of industry, who would meet the definition of a "labour hire provider."

Ai Group is strongly opposed to the creation of the Consultation Paper's proposed scheme.

Creating such a scheme would inappropriately regulate a vast array of commercial services as well as replicate many of the well-known problems experienced under various state and territory labour hire licensing laws.

A single national scheme as proposed, would not outweigh the adverse economic and financial consequences of excessive and disproportionate regulation to a significant number of Australian businesses and commercial arrangements, including with governments. It would drive up costs of many services in the community, including those that are government funded such as community care, health and aged care services; a sector in which labour hire used.

The relationship between the proposed scheme and the Government's proposed 'Same Job Same Pay' workplace relations reforms currently open for consultation is one that also needs to be examined.

To the extent that the two policy initiatives are being pursued by the Government, Ai Group considers that the stated purpose of national labour hire licensing and 'Same Job Same Pay' in fact differ and should therefore be treated as separate policy initiatives, notwithstanding that there may be some overlap between the two. Ai Group proposes to be heard on this issue further once more detail from the Government is released.

Ai Group's involvement in the labour hire industry and labour hire licensing

Ai Group is the main national employer association representing both labour hire providers (**LHPs**) and users of LHPs (**hosts**) across diverse industries. Ai Group represents small, medium and large LHPs and hosts.

Ai Group is a member of the Australian Government's National Labour Hire Expert Advisory Group and is represented on the ACT Government's Labour Hire Licensing Committee.

Ai Group has engaged extensively with various inquiries and legislative proposals for the development of labour hire licensing schemes, including all state and territory labour hire licensing laws.

A list of some of our earlier written submissions in respect of the various state and territory labour hire licensing schemes is set out below. These submissions identify various problems with proposed labour hire licensing schemes, many of which materialised once the schemes commenced.

These typical problems include:

- The adoption of excessively broad statutory definitions of a "provider" of "labour hire services" and of a "worker" that capture many arrangements not commonly understood as labour hire.
- The application of licensing schemes being tied to the supply of each worker, the circumstances and arrangements of which may vary from time to time.
- Only very limited categories of workers being excluded from licensing schemes which creates ambiguity and uncertainty.
- There being no ability for licensing authorities to provide private rulings or determinations.
- There being an inflexible application of licensing schemes to unplanned, ad-hoc or urgent supplies of services, which has resulted in the scheme applying to businesses that are not otherwise providers of labour hire services.
- Licensing schemes containing excessive criminal and financial penalties disproportionate to the contravention and unrelated to whether the underpayment of wages has occurred.
- Users of labour hire services being unable to readily determine whether an organisation that supplies services to them (beyond what is typically regarded as labour hire) is required to hold a licence, leading to users suspending or cancelling dealings with such providers (regardless of whether they were LHPs or not).

Some of the problems relating to the ambiguous scope were resolved by the South Australian Government in amending their licensing scheme with a more targeted approach to worker

exploitation in industries identified as 'high risk' and in adopting clearer definitions.

Ai Group's earlier submissions are set out below.

Queensland - *Labour Hire Licensing Act 2017 (Qld)*

Submission to Queensland Parliament Finance and Administration Committee (June 2017)

Submission to Office of Industrial Relations Queensland: Consultation on proposed regulation (February 2018)

South Australia - *Labour Hire Licensing Act 2017 (SA)*

Submission to the Minister of Industrial Relations (8 September 2017)

Victoria – *Labour Hire Licensing Act 2018 (Vic)*

Submission to Department of Economic Development, Jobs, Transport and Resources (Industrial Relations Victoria): Labour Hire Licensing Proposal (7 June 2017)

Submission to Industrial Relations Victoria: Consultation of Labour Hire Licensing Regulation (6 December 2017)

Submission to Industrial Relations Victoria: Exposure Draft Regulation (September 2018)

We have also raised similar issues with the Australian Capital Territory's *Labour Hire Licensing Act 2020* (ACT) that commenced operation in 2021.

In 2021, the previous Federal Government considered the need to harmonise the varying state and territory licensing schemes and engaged in consultation with the National Labour Hire Registration Scheme Advisory Group (as it was then known) about this initiative. Ai Group was broadly supportive of this objective and for that purpose, previously indicated it would consider a 'light touch' national labour registration scheme if such registration scheme:

- Was genuinely confined to the labour hire industry based on the established definition of 'on hire' under modern awards;
- Consisted of a 'light touch' regulatory approach through an online registration process;
- Did not impose obligations on host employers;
- Was free from excessive financial penalties including criminal sanctions; and
- Replaced in full the operation of current state and territory licensing schemes.

The Consultation Paper however proposes a significantly different scheme with seemingly different objectives. Ai Group has engaged with the many problems of the proposed scheme in

the response below.

Prevalence of Labour Hire

The case for the proposed licensing scheme is not supported by current labour market data on labour hire arrangements.

Since December 2019 and prior to the pandemic, the proportion of the Australian workforce engaged as labour hire employees has steadily decreased.[1]

Labour hire employees make up a very small percentage at 2.3% of the Australian workforce[2] , being the lowest proportion of the workforce since July 2017, and the same proportion as it was 10 years ago in 2013.

Any notion that labour hire arrangements are increasing in the community is simply not supported by current labour market evidence.

Further, most occupations performed as labour hire services do not commonly feature in industries identified as high-risk sectors (see for example, recommendation 14 of the Migrant Worker Taskforce Report).[3]

ABS data from 2019-202 show the occupations that were more common as labour hire services included[4]:

- Labourers;
- Technicians and trade workers;
- Machinery operators and drivers;
- Professionals; and
- Managers.

A significant proportion of these occupations demand skill or tertiary based qualifications and attract market rates of pay well above the award level or national minimum wage. Many professional and managerial employees engaged on labour hire arrangements would also generally be classed as award-free based on the seniority and nature of their responsibilities.

The decreasing proportion of labour hire workers and the prevalence of skill and qualification-based occupations, including at the professional and managerial level, in labour hire arrangements should be reasons for the Government to refrain from imposing a heavy-handed licensing scheme

[1] People working in labour supply services, Labour Account Australia, ABS
[2] ibid
[3] Recommendation 14, Report of the Migrant Workers Taskforce, 2019
[4] Labour Supply Services by Occupation of main job, Jobs in Australia, ABS

with broad universal coverage – particularly to arrangements beyond labour hire itself.

Despite Ai Group's strong opposition to the proposed model, we have engaged with the questions below. These responses should not be taken as an acceptance of the Government's policy in this area.

Question 1. Please provide any feedback on the objectives of the scheme, including any additional suggestions and/or clarifications.

The objective of the scheme should be targeted to prevent labour exploitation of more vulnerable workers, such as migrant workers working in industry sectors identified by the Migrant Workers Taskforce Report as higher risk.

The objective of the scheme should **not be** to discourage organisations across industries and government sectors from using labour hire services.

Ai Group considers that the proposed scheme's lack of focus on labour exploitation in higher risk sectors, combined with the blunt and inappropriate use of criminal sanctions, broad coverage of arrangements beyond labour hire and the use of a regulator to seek onerous levels of information from both LHPs and hosts, are design features that go to other broader motivations rather than targeted interventions applying to genuine labour exploitation.

Question 2. Do you have any comments about the FWO holding the dual role of national workplace regulator and national labour hire licensing regulator, or the proposed oversight board?

(a) The role of the FWO

The proposed scheme contemplated in the Consultation Paper would create the need for a large and well-resourced regulatory agency to administer the scheme to a level acceptable to the community. The functions of any agency in administering the scheme alone would be a major undertaking.

Proposing the FWO to both administer and regulate the scheme presents obvious advantages in the ability of the scheme to leverage the FWO's workplace relations expertise, compliance and enforcement framework and inspectorate. However, this would need to be weighed against some other important considerations – these are mentioned further below.

Should the FWO be considered as the appropriate regulatory body to administer and enforce the scheme, it is essential that these functions be separated from the role of the FWO as the national workplace regulator. The administration and enforcement of the scheme should be by a statutory appointment of a licensing commissioner, sitting in a separate, stand-alone division from the FWO proper.

The separation of the FWO's licensing scheme from its national workplace regulator functions would enable the proper resourcing and funding of the licensing scheme and to ensure this would

be separately maintained and accounted for. As referred below, the FWO would be required to receive and evaluate a significant number of licence applications containing detailed information. It will also likely receive a very large number of queries from potential LHPs or hosts seeking advice as to how any scheme covers their particular business or labour arrangement. Allocating appropriate funding for these administrative functions is essential.

Secondly, the separation of the FWO's licensing functions from its national workplace regulator functions would guard against the potential dilution of FWO functions in both areas. This is important on the issue of information sharing and the need to guard against it.

Current state and territory licensing regulators receive significant amounts of sensitive business and employee information (including personal information as defined under privacy legislation) from both licence applicants and licence holders through extensive and onerous reporting frameworks. The purpose for which that information is provided should be for obtaining a licence and not for general FWO enforcement and compliance activities.

The perception by the public that these functions could be blurred would very quickly destroy business confidence in the scheme, who may see the purpose of the scheme as an information gathering exercise for compliance and enforcement activities under existing laws. The function of workplace regulator and licensing should be separate.

The third relates to the credibility of the FWO itself. Administering licence applications is a significant undertaking for any regulator, particularly in light of the extremely broad national scheme proposed. It is conceivable that, despite its best efforts, the FWO will not be able to vouch for the future workplace compliance of every LHP it has granted a licence to.

The possibility that the FWO has granted a licence to a LHP who subsequently contravenes a workplace law, eg in relation to underpaying workers, would place the FWO in difficulty of having to both defend its actions in granting the licence, as well as potentially engage in compliance and enforcement functions, including initiating proceedings against the LHP as an employer for contravening a workplace law. The ability for the FWO to serve its role as a proactive workplace relations "compliance watchdog", at least from the perception of the public, may be difficult to manage.

This dual role of the FWO as both national workplace regulator and licensing authority is not a neat one. Rather the two functions should be clearly separated and independent from the other. To this end, we express caution around using the position of Deputy FWO as a licensing authority due to its indication that its functions are subservient to the FWO itself, despite separate stand-alone obligations in licensing laws.

Other issues we consider necessary for the FWO to consider, include:

- The FWO's capacity to field a large volume of queries from the business community as to whether or not they are covered by the scheme, in addition to questions about the scheme's other obligations.

- The FWO's capacity to evaluate commercial arrangements and assess business or financial information in relation to licence applications.

- The status of the FWO's advice to businesses regarding whether or not they are required to hold a licence or that their commercial arrangement with another business in one that is captured by the licensing scheme, noting that such advice would be readily sought by hosts.

(b) Consideration of a tripartite structure

The proposed use of a tripartite mechanism, that would provide "oversight" of the scheme raises important issues that warrant this model as inappropriate.

Ai Group does not consider it appropriate for a tripartite mechanism to "oversee" the operations of a Government-appointed regulator with powers to enforce criminal penalties. The Consultation Paper suggests that this tripartite mechanism takes the form of a Board, presumably comprising of statutory appointments reflecting equal representation from employer/business groups and unions.

Generally, there are only very limited examples in which Government-appointed regulatory bodies are accountable to a Board or other body comprising of tripartite representatives. These examples do not involve workplace laws with broad universal industry coverage, like that being proposed here with national licensing.

For instance, a tripartite representative board structure exists for the administration of the Coal Mining Industry (Long Service Leave Funding) Scheme Corporation (**Coal LSL Scheme**) and the Victorian Government's CO-INVEST construction and maintenance long service leave fund (**COINVEST Ltd**). These bodies are statutory corporations created for a specific purpose within a specific industry and involving the administration of funds. The original justification for employer and employee representation in these schemes was the targeted application that these schemes had to a particular industry entitlement where industry and worker expertise was seen as important to give effect to the efficient and appropriate running of the scheme. Yet these arrangements have attracted scrutiny. For instance, the 2021 KPMG Report, arising from its independent review of the Coal LSL Scheme recommended that the Board of the Coal LSL Scheme be reconfigured to:

- A minimum board composition of approximately 20% independent directors;

- Introduce a skills-based board with the combination of skills to be benchmarked every three years by an external organisation;

- Rotation of committee chairs;

- Board composition that is reflective of diversity of skills, age, gender, expertise and interests with mandatory refresher training on director duties.[1]

Any proposed tripartite Board to "oversee" a licensing regulator, whether stand-alone or operating within the FWO, would in Ai Group's view be inappropriate. There is potential for knowledge acquired about particular industrial relations disputes and businesses from representative organisations to be used in 'overseeing' how the FWO's licensing regulator is exercising its various functions, including the exercise of its discretion in granting or revoking licences concerning affecting business or organisations with whom representatives may have a relationship, acquiring information from LHPs and users of LHPs, initiating enforcement proceedings, including criminal penalties, against LHPs or users of LHPs.

Such a model would be vulnerable to actual or perceived conflicts of interest arising from the role played by Board representatives as agents or offices of their respective organisations and as participants on the Board. Given the various functions of the licensing regulator this has the potential to undermine the actual or perceived integrity and independence of the enforcement of what could be criminal laws. There is also the very real risk that Board members may use, or be perceived as potentially using, their role on the Board or information acquired through their role on the board in the context of their role with their respective organisations. This would undermine engagement with any licensing scheme by industry.

Put bluntly, it is highly inappropriate for unions with standing to prosecute employers for non-compliance with industrial instruments and with special rights to pursue industrial disputes and enterprise bargaining with such employers to also play a role that encompasses overseeing the licensing of such employers. The scope for inappropriate conflicts of interest to arise is obvious. We have provided further information about at question 11.

Further, while the Consultation Paper suggests that any tripartite structure be limited to the FWO's labour hire licensing regulatory function, it is unclear how that structure would impact the broader FWOs functions as a national workplace regulator.

The FWO has had a long-standing position and reputation as an independent statutory agency with enforcement and compliance powers exercised independently of other organisations such as unions or employer associations. Given that the FWO has also recently acquired the functions of the abolished Australian Building Construction Commission (ABCC), it would be prudent to ensure that the FWO's enforcement and compliance functions directed at parties engaging in unlawful conduct remain independent, and importantly, are seen to be independent, from the interests of any representative organisation exercising 'oversight' of the FWO's operations.

[1] *Enhancing certainty and fairness*; Independent review of the Coal Mining Industry Long Service Leave Fund Scheme, KPMG, 8 December 2021

The FWO's independence and current accountability framework does not however prevent it from engaging with these organisations on various workplace relations matters such as interpretations of workplace laws or its public materials.

Should the Government be minded to utilise a tripartite structure, then Ai Group suggests that an advisory panel be established with transparently publicised terms of reference, and that it is made clear that any FWO licensing regulator is not required to follow the advice of the panel. Any regulator with compliance and enforcement powers in relation to criminal penalties should not be accountable to a separate Board or body, but the Parliament.

Questions 3. Is there value in having a separate statutory role within the FWO with lead responsibility for the functioning of the national scheme?

If the licensing regulator is to be within the FWO, Ai Group suggest that a separate statutory role will be required for the scheme to be run independently to the operations of the FWO as a national workplace regulator. It is important that there be a distinction between the FWO as it currently exists and the functions of a licensing authority.

Question 4. How could a tripartite mechanism best be utilized to strengthen oversight of the operation of the scheme?

Please see answers to question 2 in respect of an advisory panel and the appropriate parameters on its role.

Question 5. Do you have any comments about the scheme applying universally?

A universal scheme is premised on the idea that all labour hire business (and other organisations captured by the scheme) are universally unwilling or incapable of complying with workplace laws and where host businesses are frequent conspirators in this objective.

For a universal scheme, this premise would extend to government entities who supply workers to third parties, or who engage LHPs to supply workers to government bodies for the provision of government services, including where government bodies may wholly engage in workforce contracting arrangements for the delivery of such services.

A universal scheme treats all industry sectors the same, regardless of any identifiable risk of labour exploitation. For instance, the proposed model will see the secondment of professional employees on market salaries being afforded the same regulatory attention as vulnerable migrant workers. Ai Group opposes this level of regulatory overreach and use of Government funding to support such a scheme.

The proposed model in the Consultation Paper is, in obvious terms, a departure from recommendation 14 of the Migrant Workers Taskforce Report and fails to reflect the Report's deliberate and targeted focus on preventing labour exploitation of more vulnerable migrant workers performing work in industry sectors identified by the Report as higher risk.

Recommendation 14 of the Migrant Workers Taskforce Report stated:

> Recommendation 14
>
> It is recommended that in relation to labour hire, the Government establish a National Labour Hire Registration Scheme with the following elements:
>
> a) focused on labour hire operators and hosts in four high risk industry sectors — horticulture, meat processing, cleaning and security — across Australia
>
> b) mandatory for labour hire operators in those sectors to register with the scheme
>
> c) a low regulatory burden on labour hire operators in those sectors to join the scheme, with the ability to have their registration cancelled if they contravene a relevant law
>
> d) host employers in four industry sectors are required to use registered labour hire operators. (emphasis added).

The effects of universal scheme is the dilution of the scheme's more protective role for more vulnerable workers.

Ai Group strongly opposes a universal licensing scheme that imposes heavy -handed regulation, across all industry sectors and occupations regardless of established risk of labour exploitation.

Question 6. Are there any reasons why traditional triangular and workforce contracting arrangements should not be captured by the scheme? How can the scheme most effectively exclude genuine subcontracting arrangements?

Ai Group strongly opposes a scheme that covers both traditional triangular arrangements and workforce contracting arrangements.

Traditional triangular arrangements

While the Consultation Paper refers to a traditional triangular labour hire arrangement for the purpose of coverage by the proposed scheme, the definitions of *labour hire providers* and *workers* in various state and territory licensing laws inappropriately expand the coverage of licensing schemes well beyond traditional triangular labour hire arrangements.

For any national labour hire regulation, labour hire should be defined in line with other workplace laws and instruments. The definition of labour hire, or rather 'on-hire', (the terms are used interchangeably within industry) in modern awards is a more appropriate and targeted definition to ensure that only genuine LHPs are captured by the scheme.

During the development of the modern award system under the Fair Work Act 2009 (**FW Act**) between 2008 and 2010, there was considerable focus on an appropriate definition for labour

hire. Ultimately, a seven Member Full Bench of the Australian Industrial Relations Commission decided upon the following definition, including the use of the term 'on-hire' rather than 'labour hire':

> "on-hire means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client".

The above definition is included in nearly all modern awards. This definition would be a far more appropriate means of identifying LHPs and labour hire services, than the definitions used in state and territory licensing schemes.

We note that the element of "*performs work under supervision of host*" is referred to in the Consultation Paper in describing the triangular arrangement at Figure 1. The reference to mere supervision, however, would capture many commercial services involving service contractors, and where the supervision of work would be provided to ensure a range of matters unrelated to labour hire arrangement, for instance, supervision to ensure the work health and safety of the contractor; to facilitate access to an area of the worksite; or to ensure the service was being carried out as per the requirements of the commercial contract. Mere supervision of contractor arrangement is not indicative of a triangular labour hire arrangement. Rather the elements of general guidance and instruction of the client (or host) are needed, as determined by a Full Bench of the AIRC.

The modern award definition is the most tried and tested way of defining labour hire and should be the basis for any proposed scheme.

Workforce contracting arrangements

The application of the scheme to workforce contracting is hugely problematic and inappropriate for coverage by the scheme. Ai Group opposes the inclusion of workforce contracting arrangements in any national scheme.

The Consultation Paper suggests that workforce contracting "*is where a business outsources its labour requirements to another business*." This assumes that the business or host would ordinarily have capacity and expertise to provide the service in-house regardless of the purpose of the business and its dominant functions. Similarly, there is no basis to determine whether 'labour requirements' mean the services of one individual at a particular point in time, or the need to engage hundreds over an extended period.

Under this definition outsourcing a labour requirement as opposed to engaging a third party for the provision of a skill or service not available within the host business is unclear.

Workforce contracting is included in a large range of commercial and business arrangements involving the supply of people to some degree or as an integrated service with other goods and services provided. This includes in the area of genuine subcontracting which we understand is not intended to be covered by the scheme. For instance, a discrete set of tasks and outcomes is

provided to a subcontractor on a particular work project, notwithstanding that these tasks and outcomes may otherwise comprise a "labour requirement" for the project owner.

It is essential that these common and genuine subcontracting arrangements not be intentionally or inadvertently subject to labour hire licensing. These arrangements are not legitimately labour hire.

The following diverse examples are examples of genuine sub-contracting that may be captured by any broad and universally applied concept of workforce contracting arrangement:

- The provision of annual maintenance services or shutdowns on manufacturing plant is generally a service that requires the labour from a third party because of the experience, expertise and equipment used in the work.
- The secondment of lawyers, including one lawyer, to a client for a limited period who, like many small to medium businesses would not employ an in-house lawyer.
- The engagement by one business of another business to install security alarms
- The provision of IT software consultants to work on IT systems that are not unique to the host employer.
- The provision of a trained and skilled machinery operator by a business who sells machinery to other businesses but where the sale of the machine is not included in the particular engagement.

The nature of subcontracting arrangements are incredibly broad and vary depending upon industry sector and the services provided. It would be objectively impossible in many cases to identify with any real precision as to whether a commercial agreement between businesses for the provision of services, constitutes a workforce contracting arrangement. Workforce contracting is an unreliable and highly subjective basis on which to identify the coverage the scheme. It should not be included to defining the scheme's coverage.

If, despite Ai Group's opposition the proposed scheme is to apply to workforce contracting arrangements then it is essential that it **be limited to** those industry sectors identified as high risk sectors by the Migrant Workers Taskforce Report.

Question 7. What, if any, other arrangements should be regulated by the national scheme, and why?

Ai Group opposes additional arrangements that should be regulated by the national scheme. The arrangements already proposed are problematic and should not proceed.

Question 8. If other arrangements should be regulated, should the regulation apply to all industries or only to specified industries that are high risk?

If the national scheme is to cover workforce contracting arrangements, then it is essential that this

be limited to those industry sectors identified as high risk by the Migrant Workers Taskforce Report.

Question 9. How can the scheme most effectively capture complex supply chain arrangements?

Complex supply chain arrangements are embedded in all industries, including in government services and contracts. We do not agree that an observation that a supply chain is complex should be reason of itself to inquire further information from LHP applicants or licence holders.

Should there be an identifiable concern beyond the complexity of supply chain arrangements, then under existing licensing schemes, the licensing regulator may exercise their discretion to request further information from LHP applicants or licence holders operating in circumstances that raise concern about the suitability of the LHP or licence holder to meet the eligibility for a licence or other licence conditions. It is important that licensing regulators may only seek additional information in certain circumstances and for the purpose of being satisfied that the applicant meets the licensing criteria.

Question 10. Which, if any, further exclusions from the scheme could be considered?

Please refer to our response to questions 5 and 6.

For any national scheme, particularly one that proposes to adopt a coverage scopy beyond the definition of on-hire in modern awards, it is essential that the following exclusions apply:

(a) persons who a provider provides to another person to do work as part of a genuine supply chain or a contracting or subcontracting arrangement that does not involve the on-hire of a worker to a host to work under the instruction of the host, including, but not limited to, a supply chain or a contracting or subcontracting arrangement in the construction industry;

(b) persons who a provider provides to another person to do work as part of the outsourcing of a business or part of a business to a third party;

(c) persons who a provider provides to another person to do work if the supply by the provider of one or more individuals to perform work for other businesses is not the main purpose of the business ordinarily carried on by the provider;

(d) persons who a provider provides to another person to do work as part of a short term, ad hoc arrangement between businesses;

(e) persons who a provider provides to another person to do work

(i) in the case of a provider that is a body corporate, for a related body corporate, within the meaning of the Corporations Act, of the provider; or

(ii) in the case of a provider that is a partner in a joint venture, for an entity that is a common joint venture partner of the provider;

(iii) in the case of a provider that is part of an entity or group of entities that jointly

carry on business as one recognised business, for another entity in the business;

(f) persons who a provider provides to another person to do work as part of a bona fide secondment arrangement;

(g) persons who a provider provides to another person to do work as part of a consultancy arrangement;

(h) persons who a provider provides to another person to do work, in the case of a provider that is a body corporate, if an individual supplied by the provider is an executive officer of the body corporate and is the only individual supplied by the provider to perform work for the host;

(i) persons who a provider provides to another person to do work if the supply of the individual or individuals to the host is not for the purposes of a business or undertaking conducted by the host, including but not limited to the situation where the supply is for the domestic or personal purposes of the host;

(j) persons who a provider provides to another person to do work as part of a group apprenticeship or trainee scheme;

(k) persons who a provider provides to another person to do work if the individual or individuals supplied to the host are Australian legal practitioners performing work for a client;

(l) persons who a provider provides to another person to do work if the individual or individuals supplied are employees of an organisation registered under the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth, in the course of providing assistance to members of that organisation; and

(m) persons who a provider provides to another person to do work as part of a work experience arrangement or an educational placement."

Alternatively, exclusions could be determined based on categories of worker:

- a worker who does not work in and as part of the business or undertaking of the host;
- genuine supply chain, contracting and subcontracting arrangements that are not labour hire;
- outsourcing of a business or part of a business;
- a worker for a provider where the supply of labour to other businesses is not a dominant purpose of the business ordinarily carried on by the provider, e.g. warranty work carried out by a manufacturer;
- short term, ad hoc arrangements between businesses (such as a worker of one farm business assisting another farm business by picking crops for a day, or the worker of one concrete business providing assistance to another concrete business during a

concrete pour);

- workers of contractors and subcontractors in the construction industry;
- workers who perform work for a related corporation or a common joint venture partner;
- the secondment of employees;
- consultants and employees of consulting firms;
- directors and business owners;
- a worker who carries out work for an individual not conducting a business or undertaking, such as in a domestic setting;
- not-for-profit group apprenticeship and trainee schemes;
- lawyers with practicing certificates;
- workers of organisations registered under the *Fair Work (Registered Organisations) Act 2009*;
- volunteers; and
- work experience/educational placements.

Licensing Requirements

Question 11. To what extent should a tripartite arrangement be involved in granting licenses under the scheme?

To no extent. The function of granting licences should be confined to an independent statutory role of licensing commissioner.

The involvement of a tripartite arrangement is inappropriate, affords limited transparency and could create significant conflicts of interests arising from:

- commercial relationships tripartite members or organisations have with licence applicants or existing holders;
- intimate knowledge of a particular business (as applicant or licence holder) or workforce, including industrial relations matters;
- the ability of tripartite member organisations to use involvement in licence decisions as leverage for other industrial activities;
- the perception that licence applicants or holders must be a member of a representative

group to obtain a licence.

Please see our earlier responses to question 4.

Question 12. What mechanism would best be utilized to ensure that LHPs operating under the scheme have ready access to adequate workplace relations expertise?

It is not an unreasonable expectation that a licence holder be assessed as capable of complying with relevant workplace laws as part of the decision to grant a licence. This view may be formed from the applicant's history in workplace law compliance or non-compliance.

We do not consider that legislating any specific requirement that LHPs have ready access to workplace relations expertise is necessary, but may be an area of consideration for the licensing regulator's discretion, particularly as applied to higher risk sectors. Workplace expertise can also be demonstrated in a variety of ways, such as membership with employer associations or other HR/WR networks.

Ai Group opposes any requirement, either explicit in the statute or determined by any regulator, that LHPs must employ a particular person and with a particular skills in work, health or safety and human resources. The ability of LHPs, including start-up new business LHP applicants, to immediately employ a professional person with certain qualifications or expertise would be extremely difficult and not always justified. For instance, the current state of the labour market, the size of the LHP operation and the resources available to the LHP relative to their operation would also be relevant considerations as to whether it would be appropriate to require an LHP applicant with 'a one size fits all approach' to demonstrate the ability to comply with workplace laws.

Such a requirement is not an appropriate intervention for a licensing regulator of any licensing law.

Question 13. In addition to fit and proper and financial viability requirements, are there any other key criteria that should be met for a licence to be granted?

Ai Group does not propose any further criteria for the granting of a licence. The Migrant Workers Taskforce Report recommendation referred to a "low regulatory burden" on operators to join a licensing scheme; further criteria would not achieve this.

Question 14. How should the scheme address LHP's engagement migrant workers on temporary visas?

Some state and territory schemes require may require LHP applicants to disclose in their application or through periodic reporting of whether and how many migrant workers on temporary visas are employed, or proposed to be employed. Similar provisions may be considered provided.

Question 15. Who should be prohibited from applying for a licence or being a responsible officer

(eg disqualified directors or persons convicted of certain criminal offences)?

Persons convicted of modern slavery or human trafficking criminal offences should be prohibited from applying for a licence.

Question 16. What timeframes should apply to any conduct prohibiting person from applying for a licence or being a responsible office (eg. If conduct was in the last 5 years)?

Persons convicted of modern slavery or human trafficking criminal offences should be prohibited from applying for a licence and for a period greater than 5 years, noting that these offences are likely indictable offences.

5 years is more appropriate for a person who has been a disqualified director.

Question 17. What mechanisms should exist under the scheme for workers or other interested parties to make representations to the FWO concerning a LHP's satisfaction of the application requirements?

The impact of any licensing decision not to grant a licence would in many instances result in job loss for workers. Third parties should not be provided with any standing to make representations to the FWO that could result in the revocation of a licence, particularly where that organisation, or the workers they represent are not negatively impacted by a refusal to grant a licence to a particular applicant.

Ai Group does not support this mechanism due to its potential to be weaponised by interested parties for reasons unrelated to the licensing criteria (such as unions involved in an industrial dispute or another businesses who has a competitive commercial interest in the licence not being granted.)

Further, any entertaining of a third-party intervention into a licensing application, adds to the regulatory burden by increasing uncertainty and time frames over the processing of a licence application. A licence application should not involve hearing of evidence as though it were a contested matter before a court or tribunal.

Questions 18. Should the FWO be required to publicise licence applications via its website?

Upon the commencement of state licensing schemes, it was useful for hosts of LHPs to identify whether potential LHPs had submitted their application prior to receiving their licence number. We consider there is utility in publicly identifying those entities who have applied for a licence either as part of the scheme's commencement, or, depending upon any licence term, as a way of demonstrating to potential hosts that a renewal application was on foot pending any licence term expiry.

The content of the application itself should not be published. A licence application would invariably reveal personal information (otherwise protected by privacy laws) or sensitive business information. Publication should be limited to identifying the entity only.

Financial viability test

Question 19. Is the proposed financial viability test appropriate?

The Consultation Paper does not provide much detail of any proposed financial viability test other than it would be in the form of financial documents that demonstrate the LHP's financial capacity to meet its obligations, including payment of wages and entitlements.

Existing state and territory schemes have their own variations of a financial viability test.

Ai Group does not, in principle, oppose a financial viability test provided it is targeted to an assessment of whether the LHP can meet its obligations to pay wages and entitlements.

The assessment of financial viability tests is onerous and would be a resource intensive exercise for the FWO in determining all licence applications. The assessment would also require a robust level of financial and business literacy.

Based on our experiences with state and territory licensing schemes, Ai Group is aware that the task of assessing licence applications and financial viability information is onerous and resource intensive because of the significant amounts of information applicants are required to provide. In some cases licensing regulators marshalled assessment resources to applications from high-risk sectors. In other instances, licence applicants were left waiting for many months resulting in lost commercial opportunity and job loss for workers. This raises again the need for any national scheme to be framed around the risk of labour exploitation and not the mere presence of a labour hire or workforce contracting arrangement itself.

Question 20. In addition to a police check, should a person be required to provide any other evidence when declaring they are a fit and proper person? If so, what should this information be?

Ai Group does not propose additional information to be provided.

Further, Ai Group does not support the supply of a police check for all responsible officers employed by licence applicants. Requiring a police check from all responsible officers assumes that all LHPs and responsible officers are high risk individuals prone to criminal behaviour and that they are required to provide otherwise. Ai Group strongly opposes this assumption.

Should the licensing authority want to be satisfied that a person satisfies the fit and proper criteria, then the police check should be performed by the licensing authority itself by contacting the relevant government agency or by contacting the relevant person themselves to provide one if there is a particular concern. The applicant should be asked to consent to the FWO conducting a police check as part of the application process.

Ai Group routinely hears from businesses that the supply of information to support the fit and proper person criteria is administratively onerous to satisfy for each responsible officer (however described). In some applications, large LHPs may have a large number of responsible officers. The

time delay in individuals and businesses seeking to procure their own police check from one Government agency to hand to another should be avoided.

Question 21. In addition to checking Director IDs and compliance with workplace laws, should the FWO check compliance with fit and proper person requirements with other relevant regulators (such as the ATO)?

This could be done at the FWO's discretion for higher-risk applications and provided consent is given by licence applicants and nominated persons.

Question 22. How should the fit and proper person test be formulated to capture circumstances where another person may be 'controlling' or 'influencing' the application or responsible officers?

This question would not be relevant to the vast majority of labour hire licence applications and should not form part of the standard application process. It may be a matter inquired about by the FWO based on reasonable suspicion in receiving an application.

Question 23. Are there other matters which should be included in the fit and proper person test?

Ai Group does not propose other matters but reserves further comment for any further proposal.

Duration of licence and fees

Question 24. Is 12 months appropriate as the standard licence period?

No. Ai Group opposes a 12-month licence term. Consistent with the South Australian licensing scheme, there should be no fixed licence term at all, but an annual reporting period in which the fit and proper and other licence criteria is assessed on an indefinite, ongoing basis.

A 12-month licence term is not in line with the longer duration of many commercial, business or government projects that LHPs may be involved in creating greater uncertainty around the capacity and ability to meet commercial requirements and employ LHP workers. The Consultation Paper also states that if an LHP failed to submit their renewal application, it would be unable to continue to provide labour hire services. The immediate cessation of core business would have very severe consequences, including the job loss of workers. Some large labour hire businesses employ thousands of workers – including those working on government contracts. Should an inadvertent failure to renew occur, the consequences would be very severe for both the business, employees and the client.

A licence term expiry also suggests that a formal renewal application must be made adding to the regulatory burden. Licence holders in Queensland routinely report on the excessive administrative burden under the 12-month term in the Queensland jurisdiction compared to other state schemes. The administrative burden is also in the form of delays by licensing regulators in approving the licence renewal application and its negative impact on existing and business

contracts and the jobs of workers.

A fixed licence term may also be unnecessary if the scheme is to require licence applicants to disclose a change in circumstances that could impact their ability to hold a licence.

A 12-month licence renewal process would considerably add to the FWO's workload for what may be minimal return in identifying unsuitable LHPs who were only deemed suitable in receiving a licence 12 months ago.

Question 25. Should a standard licence period apply to all LHPs, or should the scheme provide for extended licence periods for LHPs which have a demonstrated pattern of compliance and proactive measures?

Licence terms should have a strong degree of certainty and predictability. Business arrangements and the employment of workers are dependent upon certainty of licence periods. Rewarding licence holders with longer licence periods for compliance could potentially be uncompetitive by favouring established businesses over new entrants to the market.

Ai Group proposes that no licence term be applied – please see answer to question 24 above.

Question 26. What evidence should LHPs be required to provide the FWO to support consideration of a renewal application?

Ai Group proposes that no licence term be applied – please see answer to question 24 above. Any renewal application should require significantly less information than the original application.

Processing annual renewals would be a significant and resource intensive undertaking for the FWO and have a limited result in identifying unsuitable LHPs previously granted a licence.

Question 27. How should fees be calculated? In considering this question, please outline your preferred approach (eg, flat rate, consideration of the size of the business by number of employees or annual turnover etc), and the main advantages and disadvantages of this approach?

Ai Group supports a fee calculation that is fair and equitable to all LHPs of different sizes working in different industries. Ai Group understands that the scheme is to operate on a costs recovery model – we would oppose otherwise.

Question 28. Should any additional obligations be imposed on LHPs under the scheme?

No additional obligations should be imposed. The proposed scheme is already fraught with onerous obligations disproportionate to deterring labour exploitation.

Question 29. Are there any types of laws, or other obligations, that should be added or removed from the lists above?

No additional laws or obligations are proposed but Ai Group reserves its position.

Question 30. Should the scheme require LHPs to provide additional information to the FWO if the LHP intends to provide accommodation or transport?

The FWO could seek such information as part of assessing the licence application if there is a reasonable concern in a high-risk sector that accommodation and transport relate to the employment of migrant workers on temporary visas, and there is insufficient information in the application. The ability for the FWO to seek further information from LHPs should be carefully targeted to particular issues and reasonable concerns relevant to the licence criteria.

Question 31. Are there other obligations that should apply to hosts (e.g. providing access to amenities, training opportunities and job vacancies to third-party workers, or ensuring access to workplace injury management, including modified duties for injured labour hire workers)?

Ai Group opposes the premise that universally, hosts who engage LHPs are less likely to comply with the workplace laws. Ai Group opposes a national scheme that imposes obligations on the host and does not consider this to be in any way proportionate to addressing labour exploitation in high risk sectors.

If a national scheme is to impose obligations on the host, then it is essential that those obligations only apply to hosts operating in and engaging LHPs in established high-risk industry sectors as identified by the Migrant Workers Taskforce Report.

Further, Ai Group does not support the proposed host obligation of reporting any avoidance arrangement – including in high-risk sectors. Avoidance arrangements are often ambiguous and may include purposes that are lawful. The obligation is too subjective for it to be meaningfully enforced against host businesses.

Ai Group strongly opposes obligations on hosts as suggested – including access to amenities, training opportunities and job vacancies to third-party workers. Some of these obligations would be unnecessary given the broad application of WHS laws to 'workers' including labour hire workers. Other obligations are inappropriate, unworkable and are unjustified interventions on the capacity of host businesses to do these things.

Although discussed further below, Ai Group strongly opposes the imposition of criminal penalties, including on host businesses. The proposed application of a criminal penalty for knowing or recklessly engaging with an unlicensed LHPs is completely disproportionate.

The threshold of reckless is also strongly opposed. It is a disproportionate threshold.

The failure to check a website as to whether or not a provider is licensed should not be subject to a criminal penalty.

The impact on criminal penalties on hosts will lead to many host businesses taking an overly

conservative view to their approach to licensing laws. Ai Group observed this under various state and territory licensing laws where many host businesses required their suppliers of services to obtain labour hire licenses, irrespective of whether they were genuinely labour hire. Many service contractors obtained licences at significant expense adding to the cost of services. Smaller service suppliers who were not labour hire also lost contracts if they were not resourced either to apply for a licence they did not in fact need, or to procure their own legal advice advising that their business was outside the scheme's coverage.

The imposition of criminal penalties is excessive and punitive and created unnecessary cost and hardship for many supply chain businesses.

Question 32. Should hosts be subject to accessorial liability under the scheme for workplace non- compliance of the LHP or others in the supply chain?

Ai Group strongly opposes the imposition of accessorial liability for LHP non-compliance and others in the supply chain. This question proposes a significant and radical change to Australia's workplace relations laws and case law but offers no real detail.

Question 33. Should the FWO be empowered to issue guidance in specific industries to assist entities to ensure compliance with the licensing scheme throughout their supply chains?

While guidance and materials from the FWO is generally welcomed, the attempt to provide guidance or a code for industry supply chains is ambitious and unlikely to address the wide diversity of supply chain arrangements within and across industries. Supply chains frequently extend beyond Australia and are subject to laws of other countries.

Any guidance should not have any legal status and nor should it be considered by any licensing regulator or Court as relevant to whether or not an LHP or host has complied with their obligations under the scheme.

A range of commercial practices targeting supplier due diligence around modern slavery risks and labour practices have emerged under the *Modern Slavery Act 2018 (Cth)* and any guidance should not seek to blunt or interfere with these arrangements that are proving effective within industry.

Question 34. Should special obligations apply to hosts in high-risk industries with respect to worker accommodation?

Ai Group does not support additional obligations on hosts, including with respect to worker accommodation. If such measures are to be introduced, it should be strictly limited to high risk industries as defined.

Question 35. Are there any criteria that the FWO should be required to consider in deciding to suspend or cancel a licence?

The cancellation or suspension of a licence can severely and negatively impact business arrangements and the jobs of workers. Some larger LHPs have thousands of workers contracted to various governments.

The scheme should only allow the licensing authority to cancel or suspend a licence once it has applied other compliance mechanisms under the scheme to obtain compliance, including the imposition of licence conditions. This should be added to the criteria.

Question 36. What is an appropriate exclusion period for re-applying for a licence, where a LHP has had their licence cancelled under the scheme?

Decisions to cancel or suspend licences should not be made lightly and should not be framed lightly in any licensing law. See answers to question 35.

The exclusion threshold applied in state and territory licensing schemes may be relevant here.

Question 37. Is there any additional conduct that should be subject to criminal offence under the scheme? Should a defence be available under any of the provisions?

Ai Group is strongly opposed to criminal penalties under the scheme.

Operating as an LHP without a licence is not synonymous with "wage theft" or labour exploitation offences and nor does it necessarily involve the underpayment of wages. Many LHPs operating in states without licensing do this now without any harm or contravention of workplace laws. To suddenly characterize a lawful and commercial business practice as a criminal activity is a radical intervention that is unjustified.

Please answers to question 31 regarding the threshold of reckless.

Based on experiences under state and territory laws, imposing heavy penalties of a criminal nature will see larger hosts impose licence requirements on supply businesses irrespective of whether the supplier is in fact an LHP and has the potential to erode the inclusion of small business in the supply chain.

If criminal penalties are to be included, it is essential that defences are available.

Question 38. Is there any other conduct that should be subject to a civil penalty? Should a defence be available under any of the proposed civil penalty provisions?

Defences of a "reasonable excuse" should be available for civil penalty provisions.

Question 39. What is the optimal method of transitioning from state and territory licensing schemes to the national scheme?

Ai Group will engage with this question when more detail about the proposed scheme emerges. It is essential that LHPs may continue to lawfully operate under any transitional period and that hosts may continue to rely on state licensing numbers of LHPs during this time also.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

OFFICE ADDRESSES

NEW SOUTH WALES

Sydney
51 Walker Street
North Sydney NSW 2060

Western Sydney
Level 2, 100 George Street
Parramatta NSW 2150

Albury Wodonga
560 David Street
Albury NSW 2640

Hunter
Suite 1, "Nautilos"
265 Wharf Road
Newcastle NSW 2300

VICTORIA

Melbourne
Level 2 / 441 St Kilda Road
Melbourne VIC 3004

Bendigo
87 Wil Street
Bendigo VIC 3550

QUEENSLAND

Brisbane
202 Boundary Street Spring Hill
QLD 4000

ACT

Canberra
Ground Floor,
42 Macquarie Street
Barton ACT 2600

SOUTH AUSTRALIA

Adelaide
Level 1 / 45 Greenhill Road
Wayville SA 5034

WESTERN AUSTRALIA

South Perth
Suite 6, Level 3 South Shore Centre 85
South Perth Esplanade
South Perth WA 6151

www.aigroup.com.au