



Commissioner for
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Red Tape Commissioner

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31 July 2018

Mr Matt O'Connor
Deputy Secretary
Industrial Relations Victoria
Department of Economic Development, Jobs, Transport and Resources
Level 16, 1 Spring St
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Dear Mr O'Connor

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REGULATORY IMPACT STATEMENT FOR THE LABOUR HIRE LICENSING REGULATIONS 2018

I would like to thank the staff of Industrial Relations Victoria (IRV) for working with the Office of the Commissioner for Better Regulation on the preparation of the Regulatory Impact Statement (RIS) for the proposed Labour Hire Licensing Regulations 2018 (the Regulations).

Under section 10 of the *Subordinate Legislation Act 1994*, the Commissioner for Better Regulation is required to provide independent advice on the adequacy of all RISs prepared in Victoria. The Commissioner's role is to advise on the adequacy of the analysis presented in the RIS, rather than the merits or otherwise of policy or regulatory proposals. A RIS is deemed to be adequate when it contains analysis that is logical, draws on relevant evidence, is transparent about assumptions made, and is proportionate to the proposal's expected effects. The RIS also needs to be clearly written so that it can be a suitable basis for public consultation.

I am pleased to advise that the final version of the RIS received by us on 31 July 2018 meets the adequacy requirements of the *Subordinate Legislation Act 1994*.

Background

In October 2015, the Victorian Government established an Inquiry into the Labour Hire Industry and Insecure Work (the Forsyth inquiry).

The Review's final report identified a range of issues relating to risks of exploitation of labour hire workers and non-compliance of labour hire businesses with workplace laws. It found that these were problems across a range of sectors but singled out the horticulture, meat and cleaning sectors as being of particular concern.

On 20 June 2018, the Victorian Parliament passed the *Labour Hire Licensing Act 2018* (the Act), which the Government had developed in response to the Forsyth Inquiry. This Act:

- establishes a licensing scheme for labour hire businesses that provides for universal coverage (that is, it is not sector-specific);
- requires persons to be licensed to provide labour hire services;
- specifies that people who use labour hire services can only use licensed providers;
- outlines penalties for non-compliance; and

- establishes a Labour Hire Licensing Commissioner and a Labour Hire Licensing Authority (the Authority) to perform functions and powers under the Act.

Although the Act establishes the main requirements of the licensing scheme, it provides for some aspects to be determined through Regulations. Specifically, it allows for Regulations to prescribe matters including:

- exemptions from the definitions of ‘labour hire services’, and when an individual is a ‘worker’;
- licence application fees;
- additional requirements relating to: information to be provided with licence applications; the ‘fit and proper person’ criteria; compliance with legal obligations; and material to be published on the Register of labour hire providers;
- infringement penalties;
- the designated time for an application for renewal of a licence;
- the form of a notice to comply; and
- other licensing or accreditation schemes that may be recognised by the Authority (to, for example, reduce information requirements on licence applicants).

Approach to the analysis

Options examined

The options in the RIS focus on the key matters that IRV considers are needed to support the establishment of the licensing scheme, and will have the most significant impact on businesses in the labour hire sector. These are arrangements for mutual recognition with other labour hire licensing schemes, exemptions and inclusions in regard to licence requirements, and other prescribed requirements.

For each of these broad areas, the RIS explains the reason specific options are or are not examined in detail. In relation to exemptions, for example, it notes that some possible options have not been assessed because IRV considers that the ‘definition of labour hire services contained in the Act is drafted to already exclude the supply of these workers’.

The RIS also examines different ways to set fees to recover regulatory costs, including different types of fee structures.

IRV is not proposing to use certain regulation-making powers in the Act and does not, therefore, examine options for these. IRV considers that the level of detail in the Act for these matters is currently adequate to meet the objectives of the Act.

Assessing options

It is not possible to quantify the costs and benefits of different options with precision and so the RIS uses a mix of approaches to compare options — quantifying impacts where possible, and drawing on qualitative evidence where quantification was not possible. Non-fee options are assessed against the following criteria:

- alignment with the objective of the scheme — that is, to protect workers from being exploited by providers of labour hire services and hosts; and improve the transparency and integrity of the labour hire industry;
- burden on businesses;
- impact on competition and small businesses;
- implementation risks and issues; and
- government administrative and compliance burden.

Fee options are assessed in terms of how accurately they reflect regulatory costs, and their impacts on equity, certainty, administrative costs, and competition and small business.

These criteria have been used in a ‘multi-criteria analysis’ (MCA), which outlines explicitly the considerations and judgements made by IRV in assessing the options. As well as outlining the

assumptions underlying the analysis and basis for judgements made, the RIS highlights the significant uncertainties associated with the evidence base.

Proposed Regulations

The main elements of the proposed Regulations include the following.

Exemptions

The proposed Regulations provide exemptions for secondees; workers performing work for an entity or group of entities that conduct business collectively as one recognisable business; workplace learning and vocational placements; and one or two person businesses (i.e. a company with no more than two directors, where the worker provided is a director and meets certain requirements).

The RIS notes that in each of these cases, 'the analysis suggests that benefits are likely to outweigh the risks', taking into account the fact that:

Ultimately the merits of exemptions to the licensing scheme largely rest on balancing the benefits of lower regulatory burden and greater focus on high risk sectors and businesses against the risk that providing exemptions could facilitate the continuation of labour exploitation or the creation of 'loopholes' which organisations could exploit in order to subvert the licensing regime.

The exemptions do not extend to Group Training Organisations (GTOs) registered by the Victorian Registration and Qualifications Authority (VRQA). The RIS notes that this is because IRV considers that 'workers on training contracts under the ETR [Education and Training Reform] Act may be vulnerable workers and employer obligations under the ETR Act are not focussed on industrial matters in the same way as under the Victorian labour hire licensing scheme'.

Inclusions

The proposed Regulations specify that an individual performing commercial cleaning, and activities relating to horticulture, and meat manufacturing, meat processing and poultry processing is taken to be performing work in, and as part of, a business or undertaking and will fall under the definition of 'provides labour hire services'.

As noted above, the Forsyth Inquiry identified these as high-risk sectors for labour exploitation, and IRV considered there was a risk that they could otherwise be left out of the licensing scheme, because:

- 'arrangements common to the cleaning industry...such as the outsourcing of cleaning work, may mean that cleaning services are excluded from coverage of the Act'; and
- some 'horticulture, meat and poultry [businesses] may attempt to engage in avoidance arrangements ... to try and evade their obligations'.

Mutual recognition

Section 112 of the Act states that the *Mutual Recognition Act 1992* (Commonwealth) applies as if providing labour hire services were an occupation within the meaning of that statute. This means that a natural person who holds a labour hire licence in another State or Territory will, on notifying the Authority, be entitled to be registered as a licensed labour hire provider in Victoria (subject to other procedural arrangements).

In addition, section 111 of the Act also allows for possible further reduction of compliance obligations for licences or approvals that are provided under a prescribed law or scheme. The RIS considers options for reduced compliance obligations for the laws and scheme prescribed in clause 6 of the proposed Regulations. These laws and schemes are: the Queensland labour hire licensing scheme; the South Australian labour hire licensing scheme; and the scheme under which the VRQA registers an organisation as a GTO (but this does not include any organisation that provides workers other than apprentices or trainees). The RIS notes that this

may involve some implementation risks and that the exact nature of the arrangements will be subject to 'further consideration ... and may also depend on the outcome of the consultation process' on this RIS.

Fees

The proposed fees comprise an application/renewal fee payable every three years and an annual licence fee. It is proposed that there be three tiers of fees, based on firm turnover, so that larger businesses would pay higher fees. IRV considers that this is the preferred approach because it 'best balances the objectives of cost-reflectivity, equity, certainty, administrative costs and impact on competition and small business'.

Estimated costs and benefits of the Regulations

Because this licensing scheme is new, and similar schemes in Queensland and South Australia only came into operation this year, the likely impacts of the scheme generally, and the proposed Regulations in particular, are highly uncertain. The RIS notes, for example, that there is uncertainty about how many labour hire businesses operate in Victoria and will be covered by the scheme. It provides a possible indicative range of 933 to 1,541 labour hire businesses, although the actual number is unknown.

The RIS also estimates that the average time cost to businesses of complying with the licensing scheme could be between 9 and 24 hours per business over ten years, depending on the complexity of the business. Due to the uncertainty about how many businesses will be affected by the exclusions and inclusions, the RIS does not provide an estimate of the aggregate, net impact of the Regulations (incorporating, for example, the costs saved by the exclusions and imposed by the inclusions). Instead, it presents a range of possible cost impacts for each major element of the Regulations, reflecting different scenarios about the number of firms affected.

The basis of the cost estimates used to derive the fees is likewise highly uncertain, in part reflecting the fact that a new scheme and Authority are being established. The fee estimates in the RIS are based on an assumed average Licensing Authority and Licensing Commissioner cost over the next decade of \$4.5 million per year. However, the RIS notes particular uncertainty about, for example, the number and characteristics of organisations that will apply for a labour hire licence; the size and scope of the compliance and enforcement function, and how many staff the Authority will require. Changing the assumptions made about these key inputs in the fee modelling could have a significant effect on the estimated costs, fees, and the level of cost recovery in practice.

IRV considers that benefits of the proposed Regulations to businesses, workers and government will result from:

- the exemptions, which aim to target the scheme's requirements only at the most at-risk employers, thereby reducing regulatory burden on government and exempt organisations;
- the inclusions, which aim to reduce the chance of businesses inadvertently being outside the scope of the scheme, thereby helping to achieve the Act's objectives in relation to labour exploitation in high-risk sectors; and
- setting appropriate fees to achieve cost recovery and deter speculative applications.

Implementation and evaluation

The licensing scheme is anticipated to commence in the first half of 2019. The RIS notes that 'the Act and the Regulations will have a major impact on the Victorian labour hire sector', although there is uncertainty about the precise extent of the impact in practice. In this context, implementation and evaluation strategies are especially important.

Recognising this, the RIS outlines the key implementation tasks that will be required to establish the scheme, and proposed measures to address possible implementation risks. It

also notes that IRV is currently developing a stakeholder consultation and engagement plan to 'ensure that the labour hire industry is aware of the Act and Regulations, and provides information to assist organisations to comply with the new arrangements'.

The RIS also outlines IRV's commitment to review the Act five years after its enactment, as required under s. 113 of the Act, and to review fee arrangements after three years to assess whether the fees are achieving cost recovery, and the impact on industry participants.

It is government practice that this letter be published with the RIS when it is released for public consultation.

Should you wish to discuss any issue raised in this letter, or the implications of new information or policy options identified through the public consultation process for your proposal, please do not hesitate to contact me on (03) 9092 5800.

Yours sincerely



Anna Cronin
Commissioner for Better Regulation