



The Evolving Climate of Labour Hire in Australia

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In 2002, the Australian Government Productivity Commission estimated there were approximately 270,000 people employed through labour hire, which was the equivalent to about 2.9 per cent of all employed persons.¹ Today, labour hire industries continue to employ a few hundred thousand people, equal to about 2 percent of the workforce.² It is estimated there are approximately 5,800 labour hire businesses in Australia, generating \$18.5 billion in revenue and distributing approximately \$12.7 billion in wages.³

Despite the fact the use of labour hire has remained steady over the past decade, and continues to generate many hundreds of thousands of jobs, the spotlight has been cast upon labour hire firms in the last few years. But has it gone too far?

What is labour hire?

A labour hire arrangement typically contains three parties. The essential quality of the relationship is the splitting of contractual and control relationships, whereby:

- the worker is under the direction or control of the host employer in relation to the performance of work, but is not engaged in any contractual or employment relationship with the host employer;
- the worker is paid by the labour hire firm and has a direct contractual or employment relationship with them, and
- the host employer pays the labour hire firm for the labour provided by the worker and has a direct contractual relationship with the labour hire firm.⁴

Why is the spotlight on labour hire?

Labour hire has typically been frowned upon due to the placement of casual employees who are often performing work similar to those employed by the host employer on a permanent basis. Unions argue the denial to casual employees of annual leave and personal leave, and any enterprise specific terms and conditions applying to those they work alongside at the host employer, is unfair.

Further, there have been a number of complaints of underpayments by lower skilled and low paid workers by labour hire providers which have led the Fair Work Ombudsman (**FWO**) to conduct several investigations

¹ Productivity Commission Staff Working Paper, Melbourne, February 2005.

² Opinion piece by Ai Group Chief Executive, Innes Willox – Time to end unfair attacks on labour hire industry, 6 September 2018, p 1

³ Inquiry into the practices of labour hire industry in Queensland, Report No 25, Finance and Administration Committee (June 2016) (**ILH**), p 10

⁴ **ILH**, p 8

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and prosecutions in the past five years. The FWO has wide ranging powers to investigate and prosecute labour hire entities and host employers over breaches of the FW Act, including failures to provide employees with minimum entitlements. The FWO has been utilising the ‘accessorial liability’ provisions of the FW Act to add host employers and their managers as accessories in test cases involving labour hire firms.

Developments in case law

There have been several instances this year of litigation brought by unions and employees of labour hire firms, which can be seen as attempts to limit the use of labour hire. This included a union seeking orders that the enterprise agreement of a host employer extended to labour hire employees (although in that case it didn’t, the FWC found it could)⁵, the first test case under Victoria’s equal opportunity laws⁶, overturning the approval of enterprise agreements on technical breaches of the procedural requirements in the FW Act when making an enterprise agreement⁷, the highly publicised case where it was found a casual mineworker who worked according to a roster entitled to annual leave as a permanent employee⁸, the requirement for labour hire providers to investigate allegations against employees who are excluded from site at a clients request⁹ and the testing of the vulnerable workers laws (a case which is still being heard).

Legislative trends

Each of Queensland, Victoria and South Australia have enacted legislation regulating labour hire¹⁰ (although South Australia has just announced the repeal of its law). Each of those Acts:

- have the same purpose, being to protect workers from exploitation by providers of labour hire services (and “hosts” in Victoria)¹¹;
- requires providers to be licensed, with online registers available for public inspection. Each labour hire provider must meet a fit and proper person test and

have a financially viable business.¹² It is an offence under the Licensing Acts to provide labour hire services without a licence, or to engage the services of an unlicensed provider;¹³

- impose regular reporting obligations, some of which can be made available for public inspection;¹⁴
- require fees to be paid to be licensed, and licenses must be renewed; and
- apply to work performed in the relevant states and outside of the states to the extent of their extraterritorial powers.

The LHL Act Qld has the broadest definition of ‘labour hire provider’. It includes anyone who supplies a worker to do work. A worker is supplied by the provider to do work for another person if the provider pays the person for that work.¹⁵ There are a number of exclusions to the meaning of “worker” in the *Labour Hire Regulations 2018* (Qld), including:¹⁶

- individuals employed by the provider who earn more than the high income threshold (currently \$145,400 per year), and who are not covered industrial instrument (this might include, for example, a management consultant placed with a client of a consultancy business);
- providers that are corporations – and an individual who is an executive officer of the corporation is the only individual the provider supplies, in the course of carrying on a business, to do the work (for example, an independent contractor performing their work through an interposed corporate entity);
- an in-house employee of a provider who the provider supplies to another person to do work on a “temporary” basis on one or more occasions (for example, where an employee of one entity is seconded – or ‘loaned’ – to another entity to perform work). The individual must be engaged by the first entity on a regular and systematic basis, have a reasonable expectation of continuing employment with the first entity, and primarily work for the first entity other than as a worker supplied to another person; and

⁵ *National Union of Workers v CHEP Australia Limited* [2018] FWC 3797

⁶ *ABO v NMK (Human Rights)* [2018] VCAT 909

⁷ *One Key Workforce v Construction, Forestry, Mining & Energy Union* [2018] FCAFC 77

⁸ *WorkPac v Skene* [2018] FCAFC 131

⁹ *Star v WorkPac* [2018] FWC 4991

¹⁰ Labour Hire Licensing Act 2017 (Qld) (LHL Act QLD), Labour Hire Licensing Act 2018 (Vic) (LHL Act Vic) and Labour Hire Licensing Act 2017 (SA) (LHL Act SA)

¹¹ LHL Act Qld, s 3; LHL Act Vic, s 4; LHL Act SA, s3

¹² LHL Act Qld, s 15; LHL Act Vic, s 17; LHL Act SA, s 17

¹³ LHL Act Qld, ss 10, 11, 12, 15; LHL Act Vic, ss 13, 15, 16; LHL Act SA, ss 11, 12, 13

¹⁴ LHL Act Qld, s 31; LHL Act Vic, s 34; LHL Act SA, s 20

¹⁵ LHL Act Qld, s 7

¹⁶ *Labour Hire Regulations 2018* (Qld), s 4

- individuals who are provided to another entity to perform work where the provider and the other entity are part of a group of entities that carry on business collectively as one recognisable business (for example, an employee performing work in a joint venture business between two companies).

The penalties for non compliance include fines of up to 1034 penalty units (\$130,439) or 3 years imprisonment for individuals, up to 3000 penalty units (\$378,450) for corporations and further penalties for holding out to be licenced (up to 200 penalty units)¹⁷

The National Employment Standards, Modern Awards and Enterprise Agreements all continue govern labour hire workers. The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* was enacted in September 2017, introducing s 558B of the FW Act, meaning a holding company may now be held responsible for a breach by one of its subsidiaries. The same applies to a franchisor, in relation to a breach by one of its franchisees, but only if the franchisor has 'a significant degree of influence or control' over the franchisee's affairs. In each case, the franchisor or holding company, or one of their officers, must have known about the contravention, or should reasonably have known it, or could reasonably have expected that a similar contravention would be likely to occur. Liability can be escaped if reasonable steps have been taken, on the part of the holding company or franchisor, to prevent contraventions.

Reviewing your labour hire model

Some organisations, most notably and recently, the BHP Mitsubishi Alliance (**BMA**), have decided to bring a significant component of their labour hire requirements 'in house'. In January and May 2018, BHP registered two wholly owned subsidiaries with the reported intention that each would operate as 'internal labour hire businesses' to BMA. This step effectively side-steps the labour hire licensing regime, using relevant legislative exceptions relating to companies in a joint venture.

Arising from the above, the following is a non-exhaustive list of issues labour hire firms, and users of labour hire, will need to consider.

- What do the contractual arrangements between the host employer and the labour hire firm say about having access to the host employer workplace, and

rights for the host employer to exclude individuals or the labour firm to investigate conduct issues?

- What policies and procedures will apply in the event a labour hire worker is to be excluded from the host employer's workplace?
- If employees are casuals, do the contracts specify casual loading and is there an expectation of ongoing work? Are casual employees given rosters?
- Does the degree of union involvement at the workplace indicate use of labour hire might attract negative attitudes? If so what measures might be put in place to ameliorate those attitudes?
- Are you operating in a jurisdiction that requires host employers to use licensed labour hire firms?
- Do you have procurement practices around selection and engagement of labour hire providers that are directed to ensuring any labour hire provider that is engaged will be complying at all times with its legislative obligations?

Conclusion

There can be little doubt that in recent years, significant regulation has been placed on labour hire providers, and users of labour hire services have been placed under more scrutiny than ever before. Is the scrutiny and regulation warranted, and has it gone too far?

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¹⁷ LHL Act Qld, s 10