

Article

EMPLOYMENT LAW



Weatherill Labor Government to Regulate Labour Hire From March Next Year

By Jonathon Ikonomopoulos

In our Spring Report we reported on the Weatherill State Government's decision to seek to regulate the labour hire industry by introducing the *Labour Hire Licensing Bill 2017* (SA) ("**Bill**").

The stated objectives of the Bill are to:

- Protect workers from exploitation by providers of labour hire services.
- Protect licensed labour hire businesses from predatory business practices that may be engaged in by persons unsuitable to be licensed to provide labour hire services.
- Promote the integrity of the labour hire industry.

A controversial aspect of the Bill when it was first introduced to Parliament was section 6, which defined the scope of the operation of the proposed regulatory licensing scheme in the following terms:

"A person provides labour hire services if, in the course of carrying on a business, the person supplies, to another person, a worker to do work."

The observation made in our Spring Report was that the scope of the Bill was so broad in its proposed form that it would establish a regulatory licensing scheme that applies to all South Australian industries that operate to provide varying levels of skilled labour - rather than only targeting those who are exploiting vulnerable workers in the context of a labour hire agreement.

Not surprisingly, the business community and the labour hire industry, in particular, expressed their disquiet about the negative impact of the proposed broad scope of the Bill.

In response the Weatherill Government has introduced an amendment to section 6 (which defines the scope of the Bill)

such that it is now proposed to read as follows:

*"A person (a **provider**) provides **labour hire services** if, in the course of conducting a business, the person supplies, to another person, a worker to do work in and as part of a business or commercial undertaking of the other person."*

The amendment to section 6 sought to narrow the definition of labour hire services so as to capture those who are providing labour in the setting of a tripartite service arrangement, which traditionally involves an agent (or provider), a worker and a third person.

On 28 November 2017 during a second reading speech, Hon. Kyam Maher provided an insight into the Weatherill government's understanding of the scope of the Bill as follows:

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“I wish to make clear that businesses that undertake recruitment leading to direct employment or permanent job places, genuine independent contracting arrangements and workforce consulting services are not within the scope of the bill, neither are work experience or student practical placements organised by an educational institution as part of a course. A number of stakeholders submitted that an arrangement where a worker employed by a business to deliver a service in a domestic capacity, such as a plumber, would be captured by the bill. It is not the intention of the bill to capture such arrangement, and the government has filed an amendment to clarify this.”

“We do intend to capture employment arrangements in which a labour hire agency supplies the labour of a labour hire worker to a host employer and there is no direct employment or contractual relationship between the host employer and the labour hire worker; rather, the labour hire worker is engaged by the labour hire agency. The meaning of ‘worker’ in the bill at clause 7 must be considered when determining if labour hire services are being provided. The definition of ‘worker’ in clause 7 limits the scope of the bill by defining the nature of the agreement between the provider and the worker. A person is only

taken to provide labour hire services if the individual they make available to another person is a worker for the purpose of this bill.”

“In this bill, an individual is a worker if they enter into an agreement with the provider for that provider to supply them to another person to work for that person. This is, essentially, a person who is on the books of the labour hire provider and who may or may not be provided for work at a future time. Other employment agreements, such as for plumbers working in a firm for a wage, are not the same. Their agreement is that they will be doing work for the firm. The bill includes a regulation-making provision that can deal with other arrangements that are not generally within the scope of labour hire, and a government amendment enables circumstances in which a person does not provide labour hire services to be prescribed by the regulations.”

The Bill subsequently reached the Committee Stage, where Hon. Kyam Maher moved for a further amendment to section 6 which incorporated the inclusion of the following clause note under the meaning of labour hire services:

“The definition of labour hire services is mainly directed at engagement arrangements generally referred to in industry as ‘on-hire’ but also

includes other engagement arrangements that (unless exempted in accordance with this Act) satisfy the requirements of this section because the nature or structure of the engagement or arrangement involves a worker being supplied in circumstances where the provider has a pre-existing agreement with the worker under which the provider may, from time to time and at the provider’s discretion, send the worker to work in another person’s business or commercial undertaking but be paid by the provider for the work.”

As part of that further amendment, an explanatory memorandum was also included for the purposes of providing further clarification as to what satisfies the definition of labour hire services:

“Guy runs a plumbing business and has an employment contract with Tracey under which Tracey is paid to come to work each day at the plumbing business and be assigned work. Corey runs a grape growing business at which there is a problem with the plumbing. Corey enters into a contract with Guy to diagnose and fix the problem at the business and so Guy sends Tracey to Corey’s grape growing business to do the work. Guy does not provide labour hire services in sending Tracey to do work at Corey’s business.”

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“Richard runs a manufacturing business for which he requires a production worker to work on the production line assembling components. Amy has a pre-existing arrangement with Steve under which Amy may, from time to time and at Amy’s discretion, send Steve to do work for other persons for which Steve will be paid by Amy. Richard enters into a contract with Amy under which Amy will supply Steve to Richard to perform the work in the manufacturing business. Amy provides labour hire services in supplying Steve to do work at and as part of Richard’s business.”

On 29 November 2017, the Legislative Counsel passed the Bill, accepted all amendments and fixed 18 March 2018 as a commencement date for the Labour Hire Licensing Act 2017 (Act). This means labour hire businesses will have the next quarter in which to prepare for the commencement of the Act.

The Weatherill Government’s amendment coupled with the clause note and the explanatory memorandum represents a genuine attempt to address concerns about the scope of the Act, however, such an approach creates uncertainty for businesses until such time as the relevant Courts and Tribunals are called upon to

interpret and determine what businesses are included within the scope of the Act.

We will keep you informed of any decisions from the Courts and Tribunals and advise you if any measures need to be taken to minimize risks to your business and its operations. In the meantime, please contact us if you require assistance preparing for the new requirements and obligations to be imposed by the Act from its commencement in March 2018.



MORE INFO

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