IMPROVING RESPONSIBLE PRACTICES IN THE ACT LABOUR HIRE INDUSTRY:
Discussion Paper

Workplace Safety and Industrial Relations Division
Chief Minister, Treasury and Economic Development Directorate

June 2019
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INTRODUCTION

The ACT Government has committed to licensing labour hire services operating in the ACT.

The objectives of establishing a labour hire licensing regime would be to:

- promote integrity in the labour hire industry;
- ensure that labour hire businesses operating in the ACT meet their workplace obligations and responsibilities to their workers; and
- create a framework that is effective in preventing and responding to non-compliance with workplace standards in the labour hire industry.

MAKING A SUBMISSION

This discussion paper has been developed for the purpose of seeking views on the development of a labour hire licensing scheme for the ACT, specifically on issues such as scope, coverage, criteria and compliance and enforcement approaches.

All submissions received may be published unless provided in confidence. Material provided in confidence should be clearly marked ‘IN CONFIDENCE’. For submissions received from individuals, all personal details (for example, home and email address, signatures, phone, mobile and fax numbers) will be removed for privacy reasons before being published.

Your submission can be emailed to wsir@act.gov.au or sent to:

- Regulatory Policy
- Workplace Safety and Industrial Relations Division
- GPO Box 158
- Canberra City ACT 2601

The closing date for submissions is 26 July 2019.
ISSUES FOR DISCUSSION

The following questions are being considered in developing a regulatory licensing framework that would apply to the labour hire industry in the ACT.

<table>
<thead>
<tr>
<th>Issues for discussion – mutual recognition</th>
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<tbody>
<tr>
<td>Q1. Are the requirements under the secure local jobs code applying in the ACT under the <em>Government Procurement Act 2001</em> applicable to a labour hire licensing scheme?</td>
</tr>
<tr>
<td>Q2. Do you consider that a labour hire business who has a valid secure local jobs certificate should also be required to hold a labour hire licence?</td>
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<tr>
<th>Issues for discussion – coverage: types of labour hire arrangements to be covered?</th>
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<tr>
<td>Q3. What types of arrangements do you consider should be covered under a labour hire regulatory framework? For example, there are a number of different arrangements from labour hire employee services, labour contracting services, recruitment services to employment consulting services. Please provide details.</td>
</tr>
<tr>
<td>Q4. Do you consider that group training organisations (GTOs) should be covered by a labour hire regulatory framework in the ACT? Please provide details. If no, please detail the reasons why current laws, regulations and/or standards applying to GTOs are effective.</td>
</tr>
<tr>
<td>Q5. If you consider that there are other types of labour hire arrangements that should be covered please provides details addressing the following:</td>
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<tr>
<td>• the nature of the arrangement/s (please also include ACT examples);</td>
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<td>• the industries in which these arrangement/s are most prevalent in the ACT;</td>
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<tr>
<td>• why existing laws, regulations and/or standards applying to these arrangement/s may not be effective in dealing with non-compliance in the labour hire industry.</td>
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<tr>
<th>Issues for discussion – scope and definitions</th>
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<tr>
<td>Q6. Do you consider either the Queensland or Victorian definition of ‘labour hire provider’ or ‘labour hire services’ as being appropriate for an ACT labour hire regulatory scheme? Please detail any specific inclusions or exclusions you would propose and reasons for this.</td>
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<tr>
<td>Q7. Do you consider there to be any workers or classes of workers that should be excluded under a labour hire licensing scheme as is the case in Queensland and Victoria?</td>
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<tr>
<th>Issues for discussion – licensing criteria</th>
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<tr>
<td>Q8. Do you consider the fit and proper person test as an appropriate criterion to be licensed as a labour hire operator in the ACT?</td>
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<tr>
<td>Q9. Who should a ‘fit and proper person’ test apply to in a labour hire operator, the applicant, nominated officers and/or each executive officer/director?</td>
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<tr>
<td>Q10. What criteria do you consider appropriate to include in a ‘fit and proper person’ test to obtain a licence as a labour hire provider in the ACT? For example, should the fit and proper person test look at any phoenix behaviour of the directors of a labour hire company?</td>
</tr>
<tr>
<td>Q11. Are there any additional criteria that should be considered when assessing a person’s suitability to operate as a labour hire provider in the ACT?</td>
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<tr>
<td>Issues for discussion – compliance and enforcement</td>
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<tr>
<td><strong>REPORTING ON COMPLIANCE WITH INDUSTRY STANDARDS</strong></td>
</tr>
<tr>
<td>Q12. What information would you consider appropriate for labour hire providers to provide to demonstrate compliance with their obligations?</td>
</tr>
<tr>
<td>Q13. Are there any other requirements you consider a licensee should meet in order to demonstrate their suitability to continue to operate as a labour hire provider in the ACT? Please provide details.</td>
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<tr>
<td><strong>SUSPENSION AND CANCELLATION</strong></td>
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<tr>
<td>Q14. What would you consider to be appropriate grounds for suspending a licence? Please detail reasons for this.</td>
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<tr>
<td>Q15. What would you consider are appropriate grounds to be able to cancel a licence? Please detail reasons for this.</td>
</tr>
<tr>
<td><strong>LICENCE CONDITIONS</strong></td>
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<tr>
<td>Q16. What types of conditions of licence would you consider to be appropriate in ensuring ongoing compliance by labour hire operators? Please detail reasons for each condition proposed.</td>
</tr>
<tr>
<td><strong>LICENCE REGISTER AND PUBLICATION OF CERTAIN INFORMATION</strong></td>
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<tr>
<td>Q17. What type of information should be made publicly available to assist users of labour hire services in making informed decisions about who they engage?</td>
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<tr>
<td>Q18. Are there any other mechanisms you would consider are appropriate for ensuring compliance? If so, please provide detail including reasoning.</td>
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BACKGROUND

Recent inquiries

A number of recent inquiries in Australia have highlighted the vulnerability of labour hire workers to poor treatment at work, ranging from cases of underpayment and unauthorised deductions of wages, dangerous conditions of work and substandard accommodation, to more extreme cases of exploitation akin to slavery and bonded labour.

The introduction of labour hire licensing has been considered by several of these inquiries. A summary of relevant inquiries relating to labour hire and insecure work arrangements is below.

Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT

On 22 February 2017, the Standing Committee on Education, Employment and Youth Affairs resolved to inquire into the extent, nature and consequence of insecure work in the ACT. The terms of reference asked the Standing Committee to consider a range of matters, including:

1. The extent, nature and consequence of insecure work in the ACT, including but not limited to:
   i. the use of group training, labour hire and sham contracting in particular industries and in the supply chains of particular sectors;
   ii. allegations that labour hire and sham contracting arrangements are being used to avoid workplace laws and other statutory obligations, such as underpayment of wages and entitlements and avoidance of payroll and income tax;
   iii. allegations of exploitation, harassment and other mistreatment of workers employed by group training organisations and labour hire companies;

2. The nature and consequence of insecure work arrangements in the ACT, including but not limited to:
   i. the legal rights and obligations of group training organisations, labour hire companies, host organisations and employees, along with any ambiguity that exists between these entities;
   ii. the effectiveness of existing industrial relations laws and instruments and their enforcement in the group training and labour hire industries, including occupational health and safety laws and workers' compensation laws;
   iii. the impact of poor practices, including but not limited to workplace health and safety practices, in group training, labour hire and other insecure employment arrangements on competing businesses; and

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iv. the impact on long-term workforce needs of replacing permanent employees, apprentices and trainees with casualised labour hire workers.²

The Standing Committee received 39 public submissions. It also heard evidence from a range of witnesses at public hearings held on 8 September, 12 October and 19 October 2017.³ Evidence presented to the Committee suggested that the absence of barriers to entry for the labour hire industry and the lack of visibility of ‘rogue’ operators who operate in the informal economy has led to the exploitation of vulnerable workers.⁴

The Standing Committee Chair presented Report 3 – Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT (ACT Report) to the Legislative Assembly on 8 May 2018. Both Government and non-government members of the Standing Committee supported the adoption of a national labour hire licensing scheme.⁵

Inquiry into the practices of the labour hire industry in Queensland

On 2 December 2015, the Queensland Legislative Assembly agreed to a motion that the Parliamentary Finance and Administration Committee (FAC) inquire into and report on the practices of the labour hire industry in Queensland (Queensland Inquiry). In particular, the Queensland Inquiry was required to consider the extent, nature and consequence of labour hire employment, allegations of exploitation of workers and the regulation of labour hire in Australia and effective enforcement mechanisms, including bonds, licensing, registration and other forms of compliance. The Queensland Inquiry was also required to consider allegations of whether labour hire arrangements were used to avoid workplace laws and the effectiveness of enforcing current laws and instruments.⁶

The Queensland Inquiry received a total of 41 submissions. Public and private hearings were held in May and June 2016 in Brisbane and across regional Queensland.

The FAC tabled its final report (Queensland Report) in the Queensland Parliament on 30 June 2016 which made a single recommendation that the Queensland Minister work with the Federal Government, through the Council of Australian Governments “to address the issuance of ABNs to employees as a way for labour hire companies to avoid their employer obligations?”. The Queensland Report noted that a wide range of studies have reported that labour hire workers tend to have poorer employment conditions than their direct hire counterparts, including lower rates of pay and higher rates of occupational injury. The report also considered a number of other issues of concern in the industry including the systematic avoidance of legal obligations such as payroll tax, sham contracting arrangements and phoenixing activity.

The FAC was unable to reach agreement on whether a licensing system should be introduced. However, on 30 September 2016 the Queensland Government tabled its response accepting the Queensland Inquiry Report’s single recommendation but went on to note that the exploitation of labour hire workers exposed through the Queensland Inquiry was unlikely to be satisfactorily addressed by adopting the report’s sole

² ibid, pp. ii – iii.
³ ibid, p. 2.
⁴ Standing Committee on Education, Employment and Youth Affairs, op. cit., p. 31.
⁵ ibid, p. 37; p. 2 – Dissenting Report.
recommendation. The Queensland Government’s response added that it would undertake further consideration of measures to address exploitation of vulnerable labour hire workers to ensure improved and effective regulation of the labour hire industry, including various features of a labour hire licensing scheme.\(^8\)

Queensland’s *Labour Hire Licensing Act 2017*, which establishes a mandatory licensing scheme for the Queensland labour hire industry, commenced on 16 April 2018. As of 20 May 2019, five licences had been cancelled\(^9\) and as of 22 May 2019, 52 licences were currently suspended.\(^10\)

**Victorian inquiry into the labour hire industry and insecure work**

In September 2015, the Victorian Government announced an inquiry into the labour hire industry and insecure work (Victorian Inquiry) to examine the practices of labour hire companies, insecure work, sham contracting and the abuse of visas to avoid workplace laws and undermine minimum employment standards.

The Victorian Inquiry conducted 17 days of public hearings across regional Victoria and metropolitan Melbourne, received 695 primary submissions and received extensive information, in submissions and evidence given at hearings, about the nature of labour hire arrangements in Victoria.

The Victorian Inquiry delivered its final report (Victorian Report) to the Victorian Government on 31 August 2016. The Victorian Report noted that labour hire workers are treated as a ‘second-class’ of workers who were vulnerable to exploitation at work and who, because of insecure employment, suffered financial insecurity which affected their ability to save and plan for their futures.

One of the key recommendations made in the Victorian Report is ‘that Victoria lead the way in reforming the labour hire sector, through the introduction of its own sector-specific licensing scheme’.\(^11\) The Victorian labour hire licensing scheme commenced on 29 April 2019 and requires all labour hire firms operating in Victoria to hold a valid licence.

**Labour hire licensing in South Australia**

South Australia has also recently established a labour hire licensing scheme. The *Labour Hire Licensing Act 2017 (SA)* is now in operation following amendments to the exemptions under the licensing scheme from 6 June 2019\(^12\). From 1 November 2019 all labour hire providers covered by the licensing scheme will be required to be licensed in order to provide labour hire services.

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Migrant Workers’ Taskforce

The Migrant Workers’ Taskforce (the Taskforce) was established in 2016 as part of the Australian Government’s commitment to protect vulnerable workers. The Taskforce was asked to identify further proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify any cases of migrant worker exploitation.

The then Minister for Jobs and Industrial Relations, the Hon Kelly O’Dwyer MP, released the report of the Taskforce on 7 March 2019 (Taskforce Report). The Taskforce found that labour hire operators that exploit migrant workers often create complex operating environments that make it harder to ensure compliance with the law. This can include involvement in the black economy, the use of intermediaries (e.g. accommodation providers and migration agents) and potential acts of money laundering, human trafficking and modern slavery.

The Taskforce Report recommended the Australian Government consider establishing a targeted (industry-specific) mandatory National Labour Hire Registration Scheme. The Taskforce Report indicates the proposed registration scheme would act as a form of negative licensing to prohibit labour hire businesses that contravene relevant laws from operating and describes the approach as a ‘light touch’ regulatory model.

In its response to the Taskforce Report, the Federal Government has committed to introduce a model, in consultation with stakeholders, for a National Labour Hire Registration Scheme that will reduce worker exploitation, improve accountability, provide greater transparency and drive behavioural change among labour hire operators in high-risk sectors (e.g. horticulture, meat processing, cleaning and security).

On 2 April 2019, the Australian Government further announced measures as part of the 2019-20 Budget responding to recommendations in the Taskforce Report, including for the development of a National Labour Hire Registration Scheme.

While the Federal Government has committed to consult with stakeholders on the introduction of a national registration scheme, the commitment supports a restricted regulatory model which is not considered to be appropriate for the ACT. Of the four sectors the Taskforce has deemed as ‘high risk’ sectors, only the cleaning and security sectors would be relevant in the ACT context.

The Senate Select Committee on the Future of Work and Workers

On 19 October 2017, the Senate established the Select Committee on the Future of Work and Workers (Senate Select Committee) to inquire and report on the impact of technological and other change on work and workers in Australia (Senate Inquiry), with particular reference to:

1. the future earnings, job security, employment status and working patterns of Australians;

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15 ibid, p. 99.
16 ibid, p. 106.
17 ibid, p.105.

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2. the different impact of that change on Australians, particularly on regional Australians, depending on their demographic and geographic characteristics;

3. the wider effects of that change on inequality, the economy, government and society;

4. the adequacy of Australia’s laws, including industrial relations laws and regulations, policies and institutions to prepare Australians for that change;

5. international efforts to address that change; and

6. any related matters.

The Senate Select Committee received a total of 163 submissions and held eight public hearings (one each in Brisbane, Perth, Adelaide and Canberra and two each in Sydney and Melbourne).

The Senate Select Committee tabled its final report on 19 September 2018. In its report, the Senate Select Committee commented that the committee is:

...strongly of the view that labour hire practices are in dire need of regulatory attention. While there will always be a role for short-term labour hire, to assist firms to deal with seasonal fluctuations in work, or to bring in specialist skills, the incentive to use labour hire to undercut the pay and conditions of an existing workforce must be removed. The committee therefore urges policymakers to turn their attention to implementing a national labour hire licensing scheme, as the best available tool for ensuring ethical business practices.\(^{20}\)

The report makes the following recommendations in support of the above statement.

**Recommendation 11:**

*That the Australian Government take steps to introduce a national labour hire licensing scheme along the lines outlined by the committee above. This scheme should include the following features:*

- a ‘fit and proper’ test for owners/directors of labour hire companies and their authorised representatives;
- a transparent fee structure; and
- significant penalties for host employers using unlicensed or unregistered labour hire firms.\(^{21}\)

**Recommendation 12:**

*That legislation be introduced requiring labour hire workers to have access to and be paid at least the same wages and conditions as the directly engaged employees working alongside them.*\(^{22}\)


\(^{21}\) ibid, p. 92.

\(^{22}\) ibid, p. 92.
ACT legislative requirements

The Fair Work Act 2009 (Cth) is the primary source of workplace standards and industrial obligations in the ACT, with legislative instruments and negotiated agreements operating underneath that legislation. Other legislative frameworks covering workplace standards and industrial obligations include:

- *Competition and Consumer Act 2010* (Cwlth)
- *Discrimination Act 1991* (ACT)
- *Independent Contractors Act 2006* (Cwlth)
- *Long Service Leave Act 1976* (ACT)
- *Long Service Leave (Portable Schemes) Act 2009* (ACT)
- *Migration Act 1958* (Cwlth)
- *Superannuation Guarantee (Administration) Act 1992* (Cwlth)
- *Superannuation Guarantee (Charge) Act 1992* (Cwlth)
- *Tax Administration Act 1953* (Cwlth)
- *Work Health and Safety Act 2011* (ACT)
- *Workers’ Compensation Act 1951* (ACT)

**Secure local jobs code**

In addition to the above, since 15 January 2019, businesses tendering for ACT Government funded construction, cleaning, security and traffic management work need to meet workplace standards under the Secure Local Jobs Code and hold a valid Secure Local Jobs Code Certificate (SLJC certificate). Some labour hire companies may already hold a valid SLJC certificate under these requirements.

These requirements create a fairer procurement process for ethical employers and establish a certification/auditing mechanism to ensure that businesses carrying out territory funded work are meeting their industrial and workplace obligations.

Businesses who hold a valid SLJC certificate are required to comply with the secure local jobs code and meet the workplace standards set out in the Code, including standards applying to:

- pay and employment conditions;
- insurance, tax and superannuation;
- health and safety, including training and inductions;
- collective bargaining, freedom of association and representation rights.

In order for a business to obtain a SLJC certificate they must engage an approved auditor to assess whether the business meets the secure local jobs requirements. The information that is required by an approved auditor includes business or instalment activity statements and ATO business portal activity.

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evidence of superannuation scheme payments, ACT Long Service Leave Authority certificate of currency (if applicable), workers’ compensation certificate of currency, public liability insurance certificate of currency, ACT payroll tax returns for the past 24 months (if applicable) and any relevant enterprise agreement or applicable modern award.

Compliance under the secure local jobs framework is monitored and there are mechanisms in place for making complaints about non-compliance. Non-compliance may be actioned via a number of regulatory tools including working with the business to rectify non-compliance, conducting an investigation or requesting an audit. In relation to non-compliance with other legislation, instances of non-compliance a complaint or non-compliance may be referred to the relevant regulatory authority for the legislation.

A breach of the code may lead to suspension or cancellation of a businesses’ SLJC certificate or the addition of a condition on the certificate. Infringement points may also be issues for non-compliance and if 100 infringement points are accumulated over a two-year period, a businesses’ SLJC certificate may be suspended or cancelled.

**IMPROVING RESPONSIBLE PRACTICES IN THE ACT LABOUR HIRE INDUSTRY: DEVELOPING A LICENSING SCHEME**

**Labour hire licensing scheme**

The ACT Government has committed to developing a labour hire licensing scheme for the ACT in the absence of a national scheme.

Licensing is a powerful regulatory approach that can simultaneously track traders entering and leaving an industry, screen new entrants and monitor and enforce ongoing compliance with industry standards.

State-based labour hire licensing schemes are already in operation in Queensland\(^\text{24}\) and Victoria\(^\text{25}\). Under these schemes, all individuals and corporations who provide, or who intend to provide, labour hire services are required to hold a valid labour hire licence. In Queensland, the requirement to hold a valid licence extends to labour hire providers who are based interstate or overseas and who supply workers in Queensland.

Both Queensland and Victoria publish a licence register which helps enable people who wish to use labour hire services find a licenced labour hire provider. Strong penalties for operating without a licence and for using an unlicensed labour hire provider also help ensure the effectiveness of the schemes.

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\(^{24}\) Queensland’s labour hire licensing scheme commenced on 16 April 2018 with a 60 day transition period.

\(^{25}\) Victoria’s labour hire licensing scheme commenced on 29 April 2019 with a 6 month transition period.
Issues to consider in developing a licensing scheme

Scope

Who should the scheme cover?
In developing a licensing scheme for the ACT the following considerations are relevant:

- what types of labour hire arrangements should be covered?
- who might a labour hire provider be?
- what might labour hire services look like? and
- who might a labour hire worker be?

Types of labour hire arrangements

Labour hire or ‘on-hire’ arrangements typically involve a triangular relationship in which a labour hire company has a commercial contract to supply a worker to perform work for a host agency. Generally, the host agency pays the labour hire firm, and the labour hire firm then pays the worker. The worker does not usually have a contract with the host agency.26

Group Training Organisations

GTOs operate across Australia. Some specialise in servicing particular industries, while others may cater for an entire region, covering many industries.

A GTO is responsible for selecting and recruiting apprentices and trainees and undertaking employer responsibilities for wages, allowances, superannuation, workers compensation, sick/holiday pay and other employment benefits. The GTO is also responsible for managing the quality and continuity of training.

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both on and off the job, and for providing the additional care and ongoing support necessary for the apprentice to successfully complete the training contract.\textsuperscript{28}

Like all employers operating in the Territory, GTOs are required to comply with relevant industrial relations, work health and safety, workers’ compensation, superannuation, taxation and migration laws.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{model.png}
\caption{Model representing a group training arrangement.\textsuperscript{29}}
\end{figure}

In addition to meeting their employer obligations to Australian Apprentices, GTOs must also meet their obligations under the \textit{Training and Tertiary Education Act 2003}, which specifies that all employers of Australian Apprentices must comply with the \textit{National Code of Good Practice for Australian Apprenticeships}.

Since 2018, all GTOs who have an active training contract in the ACT must be registered and meet the \textit{National Standards for Group Training Organisations}\textsuperscript{30} (National Standards for GTOs).\textsuperscript{31} Once registered, GTOs are able to promote themselves as a quality GTO, use the national GTO logo and access Commonwealth, State and Territory government programs and incentives.

While GTOs have previously been considered in the context of labour hire arrangements it will be necessary to examine the existing registration requirements applying to GTOs to determine whether it is appropriate for GTOs to be captured under a licensing scheme.

\textbf{GTO registration requirements}

GTO registration is managed via an application process, which, together with compliance monitoring, is managed by each state or territory. Skills Canberra, Chief Minister, Treasury and Economic Development Directorate is responsible for the registration and compliance monitoring of GTOs for the ACT. The registration period for newly registered organisations and the registration renewal for GTOs with less than


10 Australian Apprentices in the previous 12 months is 1 year. The registration renewal of GTOs with 10 or more Australian Apprentices in the previous 12 months is 3 years.\(^\text{32}\)

To become an ACT registered GTO, an organisation must:

1. conduct a self-assessment against the National Standards for GTOs
2. prepare and submit a GTO Application Form, Compliance Assessment Report and provide other supporting materials; and
3. participate in a compliance audit conducted by an appointed independent auditor.\(^\text{33}\)

**Self-assessment against the National Standards for GTOs**

The National Standards for GTOs provide a framework to ensure GTOs operate ethically and enhance the reputation of group training as a model of employment. The self-assessment involves GTOs reviewing their organisation’s systems, processes and services against the National Standards for GTOs. The self-assessment is designed to assist the GTO to identify areas of non-compliance or any deficiencies in its operations that need to be rectified prior to completing the Compliance Assessment Report.\(^\text{34}\)

**Application form and Compliance Assessment Report**

The Compliance Assessment Report allows a GTO to identify and record evidence that demonstrates compliance against each of the National Standards for GTOs. Supporting documents, including any employee, host, and/or apprentice/trainee handbooks, should be attached to the Compliance Assessment Report as supporting evidence.\(^\text{35}\) The Australian Government Department of Education and Training has prepared an *Evidence Guide* to assist GTOs comply with the National Standards for GTOs.\(^\text{36}\)

**Compliance audit**

The purpose of the compliance audit is to validate the GTO’s claim that their operational systems and processes meet each of the Standards. The GTO is given reasonable opportunity to demonstrate compliance and receives an audit report containing the audit findings.

The audit comprises three stages:

1. **Desk Audit** – the auditor reviews the Group Training Application Form, Compliance Assessment Report and supporting evidence, and documents the initial findings against each of the standards in the Compliance Assessment Report.

2. **Interviews with a sample of trainees/apprentices and host employers** – a sample of the GTO’s trainees/apprentices and host employers are interviewed by telephone prior to the site audit. Information from the interviews contribute to the audit findings and may also be used to inform the scope of the audit.

3. **Site audit** – Following the desk audit, a site audit is conducted at the GTO’s premises on a prearranged date to validate the GTO’s compliance. During this audit, the auditor asks to see specific evidence of the GTO’s processes and may interview management and inspect the premises. The length of the site audit is usually between 1-2 days, depending on the size of the

\(^\text{32}\) Skills Canberra, op. cit., p. 10.
\(^\text{33}\) ibid, p. 6.
\(^\text{34}\) ibid, p. 6.
\(^\text{35}\) ibid, p. 6.
GTO. If the GTO has a multi-site operation, the auditor may choose to inspect a sample of sites.\textsuperscript{37}

The compliance audit may result in:

- the auditor finding the GTO is fully compliant and making a recommendation that the GTO be approved for registration;

- the auditor identifying non-compliance for the GTO and recommending further evidence be provided in order for the GTO to comply fully with the National Standards for GTOs (GTOs are given up to 30 days to address non compliances and a follow-up audit may be necessary); or

- the auditor finding the GTO is not compliant and not recommending the GTO’s registration.

A GTO must meet the Standards fully for the auditor to recommend registration. No interim registration is considered.\textsuperscript{38}

Registration renewal of GTOs

If, as a result of a compliance monitoring audit a GTO cannot demonstrate that it fully complies with the National Standards for GTOs, and it fails to demonstrate compliance required by the auditor within the specified timeframe, the auditor may recommend that the GTO’s registration be suspended or cancelled. If a recommendation for cancellation is made, a GTO is given 30 days from the date of notification to lodge an appeal prior to the decision being made.\textsuperscript{39}

\textbf{Labour hire provider}

Below is an overview of how the terms ‘labour hire provider’ and ‘labour hire services’ are defined under the Queensland and Victorian labour hire licensing schemes. Both the Queensland and the Victorian labour hire licensing schemes are able to provide exceptions to persons who might otherwise be considered to provide labour hire services.

\textbf{Queensland}

In Queensland, a labour hire provider is a person who, as part of carrying on a business, supplies labour hire workers to do work for another person or business (the labour hire user).

Examples of what is considered to be a labour hire provider in Queensland include:

- a contractor who supplies workers to a farmer or fruit grower to pick produce for the farmer or grower;

- a group training organisation or principal employer organisation that supplies an apprentice or trainee to a host employer; and

- an employment agency that on-hires temporary administration staff to a business.

Under the Queensland labour hire licensing scheme, recruitment and permanent placement services, volunteering arrangements, workplace consultants and genuine subcontracting arrangements (e.g. those often used in the building and construction industry) do not fall within the labour hire licensing scheme.

\textsuperscript{37} Skills Canberra, op. cit., p. 8.
\textsuperscript{38} ibid, p. 9.
\textsuperscript{39} ibid, p. 11.
Victoria

In Victoria, a labour hire provider is a business that has an arrangement with one or more individuals under which the business:

- supplies the individuals to perform work in and as part of a host’s business or undertaking and the provider is obliged to pay the individual for performance of the work; or

- in the course of providing recruitment or placement services, recruits individuals for, or places the individuals with a host who has to pay the individuals to perform work in and as part of the host’s business or undertaking and the provider procures or provides accommodation for the individuals for some or all of the period that they are working with the host; or

- in the course of conducting contractor management services, recruits the individuals as independent contractors to perform work in and as part of a host’s business or undertaking and manages the contract performance by the independent contractors.

Labour hire worker

Below is a description of ‘labour hire worker’ under the Queensland and Victorian labour hire licensing schemes. Both the Queensland and the Victorian labour hire licensing schemes include provision for an individual or group of individuals to not be considered workers for the purposes of the scheme.

Queensland

Under the Queensland labour hire licensing scheme, an individual is a worker for a provider if the individual enters into an arrangement with the provider under which the provider may supply, to another person, the individual to do work and the provider is obligated to pay the worker, in whole or in part, for the work. A worker includes apprentices and trainees under a training contract entered into with a provider who is a group training organisation or principal employer organisation under Queensland’s Further Education and Training Act 2014.

Businesses that only supply the following type of workers do not require a labour hire licence in Queensland:

- a high income employee who earns an annualised income of more than $145,400 per annum and is not covered by an industrial award or agreement;

- an employee who is employed by an 'employing/service entity' within a business group and works only for and within that single recognisable business; and

- an 'in-house employee' who temporarily works for another person or business. For example:
  - a lawyer employed by a law firm is seconded for a period of time to a client of the law firm to do work for the client; or
  - a consultant employed by a consultancy business is supplied to a business to conduct a review for the other business; or
  - a person employed by a community care organisation on an ongoing basis and who usually works for the organisation in a variety of locations, including in another person's home.
Victoria
Under the Victorian labour hire licensing scheme, workers are generally individuals employed and paid by labour hire providers and supplied to host businesses, farms or organisations on a full-time, part-time or casual basis. In addition, if a person supplied by a labour hire provider is entitled to be paid by a host, that person will be a worker under the Victorian scheme if the labour hire provider also procures or provides accommodation for the person. A worker also includes a person who is an independent contractor supplied to a host by a labour hire provider if the labour hire provider continues to manage the performance of the contract — for example by providing administrative and payroll functions or performance management in relation to the contractor.

Excluded classes of workers under the Victorian labour hire licensing scheme include secondees, workers provided between entities that are recognised as one business, a director provided by a small body corporate, public sector employees, students and persons undertaking vocational placements. Providers that supply only individuals in one or more of these classes are not be regarded as labour hire providers in Victoria and are not be required to be licensed.

Licensing criteria
Under a licensing framework, conditions and criteria would operate to ensure that applicants and licensees are meeting relevant obligations and standards (e.g. qualification requirements). This helps to maintain the integrity of the regulated activity by ensuring that only people who are deemed suitable to hold a licence at the time of application are granted a licence.

In determining the relevant obligations and standards applicable to labour hire arrangements, the following tests are considered to be relevant.

‘Fit and proper person’ test
A ‘fit and proper person’ test could be applied as the benchmark for operating as a labour hire provider in the ACT, the purpose of which would be to assess the likelihood a particular business will comply with relevant laws and will treat its workers fairly. The test would also support the integrity of the ACT labour hire industry by prohibiting persons who have demonstrated non-compliance with relevant laws from being able to operate.

A ‘fit and proper person’ test could be applied to all people relevant to the licence including:

- each applicant;
- each proposed nominated officer; and
- if the applicant is a corporation, each executive officer/director of the corporation.

The ‘fit and proper person’ test could include assessing a person’s character, criminal history, their compliance with relevant laws, their compliance with labour hire licensing laws (including labour hire licensing schemes operating interstate) and whether they have been insolvent or disqualified from managing corporations.

A ‘fit and proper person’ test was one of the features recommended by the Senate Inquiry and one of the licensing criteria recommended by the Government members of the ACT Inquiry. A ‘fit and proper person’ test is also a key feature of both the Queensland and Victorian labour hire licensing schemes.
Examples of relevant laws

- *Competition and Consumer Act 2010* (Cwlth)
- *Discrimination Act 1991* (ACT)
- *Fair Work Act 2009* (Cwlth)
- *Independent Contractors Act 2006* (Cwlth)
- *Long Service Leave Act 1976* (ACT)
- *Long Service Leave (Portable Schemes) Act 2009* (ACT)
- *Migration Act 1958* (Cwlth)
- *Superannuation Guarantee (Administration) Act 1992* (Cwlth)
- *Superannuation Guarantee (Charge) Act 1992* (Cwlth)
- *Tax Administration Act 1953* (Cwlth)
- *Work Health and Safety Act 2011* (ACT)
- *Workers’ Compensation Act 1951* (ACT)

In relation to the director of a labour hire company, it may also be relevant to consider as part of the criteria for a fit and proper person any history of phoenix behaviour as this would not be considered as a direct breach of the above legislation.

**Compliance and enforcement**

An appropriate compliance and enforcement strategy is critical in ensuring the effectiveness of any regulatory framework such as a licensing scheme. Possible approaches to compliance and enforcement activities are outlined below.

**Reporting on compliance with industry standards**

Reporting is an effective monitoring and compliance mechanism as it requires licensees to provide regular information on their operations and governance arrangements and gives the licensing body the opportunity to review such information to ensure continuing compliance with relevant laws and industry standards. Submitting regular reports to confirm compliance with industry standards is a core licensee obligation under the Queensland labour hire licensing scheme (which has six monthly reporting)⁴⁰ and Victorian labour hire licensing scheme (which has 12 monthly reporting)⁴¹. Ongoing reporting could apply as an obligation a licensee must meet in order to continue to operate as a labour hire provider in the ACT.

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⁴⁰ *Labour Hire Licensing Act 2017* (QLD), s. 31.
⁴¹ *Labour Hire Licensing Act 2018* (VIC), s. 34.
Establishing reporting requirements for labour hire providers would support the integrity of the ACT labour hire industry by providing that licensing is conditional upon providing regular and ongoing information about certain matters which may include:

- employment arrangements (e.g. whether an employment relationship is casual or permanent, industrial instruments, information about temporary work visas)
- the type of work carried out and details of the industries in which the work is carried out
- host employers
- accommodation and other goods or services provided to workers (e.g. transport, meals)
- compliance with relevant laws during the reporting period (e.g. incidents that were notified or were required to be notified under a workplace law, the number of workers’ compensation applications, etc.)

To help ensure timely and accurate reporting, consideration could be given to whether a penalty and/or the possibility of the suspension or cancellation of a licence, could encourage compliance and act as an effective deterrent against providing false or misleading information.

It is important to balance the need to collect sufficient information to enable an assessment of continued compliance with relevant laws, with the need to minimise the possible administrative burden on labour hire providers. Of consideration are the frequency of reporting, the requirement to resubmit information that has not changed and whether certain matters (e.g. a major change to the operations of business) need to be notified soon after they occur rather simply included as part of a periodic report.

Information about a provider’s compliance with certain laws could assist labour hire service users to make an informed decision when engaging a labour hire provider. Consideration should be given to whether certain information provided as part of the periodic reporting could or should be made publicly available and the potential benefits of doing so.

**Suspension and cancellation**

An effective compliance mechanism of licensing schemes is the power to suspend or cancel a registration or licence as it provides an incentive for operators to comply with requirements. For example, a licence could be temporarily suspended in response to a minor breach of a requirement or cancelled in response to a major breach, multiple breaches or for ongoing non-compliance. A licence is not usually in-force for the period of suspension and anyone undertaking the licensed activity during this time or engaging someone with a suspended licence could be guilty of an offence. Further, a suspension or cancellation of a licence could be taken into account when issuing a new licence (e.g. in another jurisdiction).

Both the Queensland and the Victorian labour hire licensing schemes include a number of grounds on which a licence can be suspended or cancelled.\(^{42}\) Using these as a guide, appropriate grounds for the suspension or cancellation of a licence under an ACT labour hire licensing scheme could include the following:

- the licence is was obtained because of materially incorrect or misleading information;

\(^{42}\) Labour Hire Licensing Act 2017 (QLD), s. 22; s. 24. Labour Hire Licensing Act 2018 (VIC), s. 39; s. 40; s. 41.
• the licensee, their employee or a representative of the licensee has contravened a condition of a licence;

• the licensee or an employee or representative of the licensee has failed to comply with, has contravened or is contravening a provision of the law under which the licence is made;

• the licensee or an employee or representative of the licensee has contravened or is contravening a relevant law (e.g. a workplace relations law, work health and safety law);

• the licensee is no longer a fit and proper person to be the holder of a labour hire licence; or

• the issuing authority believes that unless the licence is suspended, substantial harm or determent will be caused to one or more persons.

Publishing information about suspended and cancelled licences assists users of labour hire services to quickly and easily identify whether a labour hire provider they may wish to engage falls into one of these categories. Details of suspended and cancelled licences in Queensland are currently published on the Labour Hire Queensland website. Victoria’s Labour Hire Licensing Authority has the power to take a similar approach. Consideration should be given to the whether the ACT should also publish information about suspended and cancelled licences.

**Licence conditions**

Under a licensing scheme, attaching a condition to a licence may provide the flexibility to grant a licence to, or to continue the licence of, a person who meets the necessary requirements for licensing but who may be deemed as being a higher risk applicant or licensee. Licence conditions are generally imposed automatically when a licence is issued or after a licence is issued or afterwards, if a new risk has emerged since the licence was issued. The authority who imposes the condition usually has the authority to vary it, should this be necessary (e.g. in response to increased or reduced compliance by a licensee).

Regulatory schemes generally include the following:

• the power to impose, vary or revoke a condition;

• the type of conditions that may be imposed; and

• the requirement for a licensee to comply with a condition of a licence.

For labour hire licensing, conditions could, for example include:

• placing restrictions or limitations upon licensees operating in certain sectors where there is a higher prevalence of vulnerable workers;

• placing restrictions or limitations upon licensees operating in environments where there is a high likelihood of worker exploitation; and/or

• placing restrictions or limitations upon individual licensees based on individual risks.

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44 Labour Hire Licensing Act 2018 (VIC), s. 49.
Licence register and publication of certain information

The purpose of a public license register is to enable service users to verify they are dealing with legitimate licensed labour hire businesses. A list of licensed labour hire providers in Queensland is available on the Queensland Labour Hire Licensing website. The type of information published in Queensland’s register is outlined below. Victoria will also maintain a public register of labour hire licences once its transition period for obtaining a licence concludes at the end of October 2019. Information which must be included in Victoria’s licence register is similar to that of Queensland. In developing an ACT licence register, consideration should be given to the type of information that could assist labour hire service users to make an informed decision when engaging a labour hire provider.

Information included in Queensland’s labour hire licence register

- Licence number
- Licensee’s full name and contact details
- Business name, ABN and address of the business subject of the licence
- Full name and contact details of each nominated officers for the licence
- Details of any executive officers for the licence
- Date the licence was issued and expiry date
- Number of licences held
- Whether accommodation is provided to workers
- Whether the business supplies workers on visas
- Industries in which workers are provided
- Locations (within the state) where work is carried out by the workers
- Any conditions imposed on the licence
- Details of any notifiable incidents
- Details of any enforcement action taken against the licensee

Both the Queensland and Victorian labour hire licensing schemes allow additional information to be published, which would assist service users to make an informed decision about labour hire providers. This includes:

- the name and business name of an applicant for a licence, if the application is refused or withdrawn, including where the Licensing Authority refuses to renew a licence; (VIC)
- information about enforcement action including about prosecutions and the suspension or cancellation of a licence; (QLD, VIC) and

46 Labour Hire Licensing Act 2018 (VIC), s. 48.
47 Labour Hire Licensing Act 2017 (QLD), s. 105; Labour Hire Licensing Act 2018 (VIC), s. 49.
• information about a former licensee who has surrendered a licence. (QLD, VIC)

In addition, Victoria’s Labour Hire Licensing Authority must, as soon as reasonably practicable after receiving an application for, or the renewal of, a labour hire licence, publish certain information about the application.\(^\text{48}\) Publishing this information, together with the ability for an interested person\(^\text{49}\) to make an objection to an application for a licence or the renewal of a licence assists with the effective administration of the scheme by potentially uncovering information which could affect an applicant’s suitability for licensing.

Consideration should also be given to whether any of the abovementioned information should be published as part of an ACT labour hire licensing scheme and the potential benefits of doing so.

**CONCLUSION**

The above information and submissions received will play an important role in considering the development of a labour hire licensing scheme for the ACT.

As a labour hire licensing scheme would be a new requirement applying in the ACT, this paper provides a critical opportunity for stakeholders and the community to contribute to the effective design of a scheme that would ensure the integrity of labour hire businesses operating in the ACT.

In particular, the effectiveness of the design will be supported by the operators captured within the scope of a licensing scheme and the ability to use appropriate and responsive compliance tools and mechanisms to ensure that labour hire operators meet, and continue to meet an expected level of workplace standards.

\(^{48}\) *Labour Hire Licensing Act 2018 (VIC)*, s. 8.

\(^{49}\) A person or organisation who has an interest in the protection of workers or the integrity of the labour hire industry. This may include, for example, a local council, a worker, a union, an industry peak body or another labour hire provider.
Improving Responsible Practices in the ACT Labour Hire Industry: Discussion Paper

Chief Minister, Treasury and Economic Development Directorate

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