



National Labour Hire Regulation: *Towards a single national scheme*

Consultation paper

March 2023

Towards a single national labour hire regulation scheme

As part of its *Plan to Build a Stronger Pacific Family*, the Australian Government has committed to implementing all recommendations of the *Report of the Migrant Workers' Taskforce* (MWT Report). Recommendation 14 of the MWT Report, which was released in March 2019, recommends the Government establish national labour hire regulation.

The MWT was established to identify proposals to help detect and rectify cases of migrant worker exploitation, following incidences of serious wage underpayment and compliance and regulatory weakness in certain industry sectors (including the labour hire sector). The report made clear that, in recent times, unscrupulous labour hire providers (LHPs) have profited from business models designed to avoid legal obligations and take advantage of vulnerable workers.

Consultation process

To support the implementation of this recommendation and inform the development of a national labour hire scheme, the Department of Employment and Workplace Relations (the Department) will undertake an initial stage of targeted consultation with key stakeholder groups in March 2023. During this initial stage, the Department will coordinate meetings with previously established stakeholder groups, including:

- Expert Advisory Group consisting of employer groups, peak industry bodies, unions, and civil society organisations
- Senior Officials Working Group consisting of senior officials from state and territory government agencies with responsibility for labour hire regulation, and
- Technical Advisory Group of relevant Commonwealth agencies.

Meetings will give stakeholders an opportunity to provide responses to the discussion questions in this paper. Stakeholders will have the option to provide written responses separately.

This paper seeks feedback on a number of key policy parameters for the scheme, including:

- type of scheme
- coverage
- who would need a licence under the scheme
- licensing requirements
- duration of licence and fees
- obligations for LHPs
- obligations for hosts, and
- penalties.

Following this initial stage of consultation, the Department will consider the feedback received and expects to return to stakeholders to consult on further details of the national labour hire scheme.

Meetings of Workplace Relations Ministers held during the consultation process will receive updates on consultations and provide a further forum for discussion.

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Introduction

Labour hire work (also known as on-hire or agency work) plays a role in the Australian labour market as a labour source for a range of businesses. Labour hire arrangements are commonly used by host enterprises to source workers as an alternative to direct hire and can be used to provide surge labour capacity or to deal with peak work periods. For example, labour hire is used extensively in the horticulture sector to ensure worker supply for seasonal periods and to manage peak harvest requirements where individual employers or crops require labour for a much shorter period. LHPs in Australia also assist in providing more specialised workers to businesses, including nurses, disability care workers and IT specialists.

The Australian labour hire industry is small as a proportion of the total Australian workforce. The Australian Bureau of Statistics (ABS) estimates that, in June 2022, 319,900 people had a job in labour supply services, or 2.3% of all employed people. Notwithstanding its small share of the total workforce, labour hire has a much more significant presence in particular industries and sectors and at particular times. For example, during harvest season, labour hire workers can make up a large proportion of workers engaged in the horticulture sector.

LHPs have the same obligations under Australian law as any other business, including under workplace relations, taxation, superannuation and migration law. While many LHPs do the right thing and operate lawfully, numerous reports, inquiries and investigations have shown that some LHPs are breaching their employer obligations and denying workers their lawful entitlements.¹

These reports have revealed serious cases of exploitation of workers by LHPs across the Australian labour market, but particularly in sectors such as the horticulture, meat processing, cleaning and security sectors. In addition to the impact that non-compliance has on workers and public perceptions of the labour hire industry, these practices disadvantage law-abiding businesses. All reports call for greater regulation of the labour hire industry, many through a national labour hire regulation scheme. The key findings from three of these reports are outlined below.

Report of the Black Economy Taskforce

Released in October 2017, the Black Economy Taskforce found that the labour hire sector was becoming increasingly complex and that some LHPs were participating in the black economy and exploiting workers, particularly in the horticulture and security sectors. Identified issues included non-compliance with PAYG tax withholding, use of cash to pay wages, underpayment of wages and entitlements, links to criminal activity, money laundering and migration fraud. The Taskforce recommended the Government address these issues by supporting industry-led certification schemes, noting that potential regulatory reforms to the labour hire sector more generally were at that time under consideration by the MWT.²

Migrant Workers' Taskforce

The MWT found that LHPs that exploit migrant workers often create complex operating environments that make it harder to ensure compliance with the law.

¹ Economics References Committee: Unlawful Underpayment of Employees' Remuneration Report (March 2022); Select Committee on Job Security: Third Interim Report: Labour Hire and Contracting (November 2021); Select Committee on Temporary Migration Report (September 2021); Report of the Migrant Worker's Taskforce (March 2019); Report of the Select Committee on the Future of Work and Workers: Hope is not a strategy – our shared responsibility for the future of work and workers (September 2018); Fair Work Ombudsman Harvest Trail Inquiry Report (2018); Report of the Black Economy Taskforce (October 2017); Senate Standing Committee on Education: Corporate Avoidance of the Fair Work Act Report (October 2016); Victorian Inquiry into the Labour Hire Industry and Insecure Work Final Report (August 2016); Inquiry into the practices of the labour hire industry in Queensland (June 2016).

² Report of the Black Economy Taskforce (October 2017), see p. 247 - 248.

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The MWT identified lower labour costs and competitive advantage as the main drivers of unscrupulous labour hire practice. The desire to avoid regulatory requirements of operating an employing business, the belief that monetary gains from non-compliance outweigh the risk of being caught and penalised, and the high demand and limited supply of labour in some locations and industries were also raised as contributing factors. The MWT found that non-compliance with employer obligations by LHPs can take a range of forms, including:

- wage underpayment and non-payment of superannuation
- not remitting PAYG tax and not paying workers compensation premiums
- sham contracting arrangements
- unlawful deductions and 'cash back' schemes
- provision of substandard and overpriced accommodation, and
- illegal phoenixing to avoid accrued employee obligations.

Select Committee on Job Security

Based on previous research and information provided through the Inquiry, the Committee found there were a range of concerns about the use of labour hire,³ including:

- criminal activity by labour hire firms
- issues with workplace safety
- tax avoidance and wage underpayment, and
- exploitation of vulnerable groups.

The Committee recommended the immediate introduction of a national labour hire licensing scheme that applies to all industries and requires mandatory registration and ongoing compliance with all legal obligations.

Current regulatory frameworks

Four Australian jurisdictions have established their own labour hire schemes – Queensland, Victoria, South Australia, and the Australian Capital Territory.

State and territory licensing schemes adopt a similar regulatory approach, requiring LHPs within the scope of the scheme to be licensed to operate. Each of the schemes adopts broadly similar approaches to core concepts, but there are a number of areas in which these schemes differ. For example, there are differences in the obligations placed on LHPs, application requirements, licence durations, reporting requirements, fees, and penalties for contraventions.

The Queensland, Victorian and Australian Capital Territory schemes apply across the entire labour hire industry (that is, they are not limited to specific industry sectors). The South Australian scheme currently only applies to horticulture, cleaning, meat processing, seafood processing and trolley collection, though the South Australian Government has committed to broadening the application of its scheme to the entire labour hire industry.⁴

The reach of each scheme is limited to LHPs and hosts that operate in their respective state or territory geographic boundaries. In practice, this means there is an additional regulatory burden for LHPs and hosts that operate across state and territory boundaries (depending on where they operate) to understand and comply with the requirements of multiple schemes (and pay for multiple licences).

³ Select Committee on Job Security, Third Interim Report: Labour Hire and Contracting (November 2021), p. 2.

⁴ South Australian Labor, Industrial Relations For the Future, p. 6.

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In contrast, to date, LHPs and hosts that only operate in New South Wales, Tasmania, Western Australia⁵ or the Northern Territory face no specific labour hire regulation.

Australia is not alone in seeking to regulate the labour hire sector. The Gangmasters Licensing Authority in the United Kingdom regulates labour hire in specified sectors, and evidence of its operations was considered in detail as part of the Victorian Inquiry into the Labour Hire Industry and Insecure Work, which led to the establishment of the labour hire licensing scheme in Victoria.

Licensing is also contemplated as part of the most up-to-date international labour standards on the subject (the International Labour Organization's *Private Employment Agencies Convention, 1997* and *Private Employment Agencies Recommendation, 1997*), and is a feature of workplace relations regulation in a number of other OECD countries.

Key parameters for a national model

It is proposed the Federal Government establish a **single national labour hire licensing scheme** that would take over from existing state and territory labour hire licensing schemes to ensure a single set of regulatory obligations apply to LHPs across Australia.

The **objectives** of the scheme would be to:

- provide a level playing field for business and promote accountability and transparency
- protect labour hire workers from exploitation by providers and in supply chains, and
- promote greater compliance with relevant laws and drive behavioural change.

Establishing a single national scheme would help to address continued non-compliance in the labour hire industry by ensuring all LHPs are subject to a single set of labour hire licensing requirements and obligations. It will also help to reduce regulatory and administrative duplication and ensure all labour hire workers receive the same protections regardless of where they live.

It is proposed that tripartism inform the design of the scheme to foster cooperation and ensure the effective operation of the scheme.

Regulator

It is proposed the **Office of the Fair Work Ombudsman (FWO) be the regulator responsible for administering and enforcing the national scheme**. The FWO would be able to utilise its existing regulatory expertise in relation to national workplace relations laws, leverage its existing inspectorate, and utilise established relationships with other Commonwealth regulators.

Given the importance of ensuring proper oversight of the scheme, consideration will be given to requiring a specified Deputy Fair Work Ombudsman (Deputy FWO) to have operational responsibility for national labour hire regulation. The Deputy FWO will be properly resourced and able to refer matters to the enforcement arm of the FWO or other regulators.

Consideration will be given to how a tripartite mechanism could support strong oversight of the operation of the scheme.

Type of scheme

It is proposed the scheme operate as a **'licensing' scheme**, with LHPs required to hold a licence to operate. A LHP would be required to meet and continue to meet a range of specific eligibility criteria

⁵ The Western Australian Government accepted in-principle the recommendation to establish a state labour hire licensing scheme (recommendation 22 of the Inquiry into Wage Theft in Western Australia Report (6 December 2019)).

and obligations to be granted a licence and remain licensed. Only licensed LHPs would be permitted to provide labour hire services, with penalties for LHPs and hosts that breach this requirement.

Coverage

It is proposed the scheme would be **universal in coverage**, applying to LHPs operating in all industries across Australia, consistent with existing schemes in Queensland, Victoria and the Australian Capital Territory. A single national scheme applying to all industries will promote transparency and public confidence in all LHPs across Australia. It will also provide regulatory simplicity to businesses and ensure workers are protected regardless of industry.

Discussion questions

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

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?

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

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

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

Who would need a licence under the scheme?

It is proposed the definition of labour hire services under the scheme cover both **traditional triangular arrangements** and **workforce contracting arrangements**. This is in line with the recommendation of the MWT,⁶ which argued for the need to address variations of the traditional triangular model which can be used to disguise labour hire arrangements. The definition should also promote supply chain transparency and prevent deliberate business structuring arrangements designed to avoid compliance with the scheme.

The definition of labour supply services should apply regardless of:

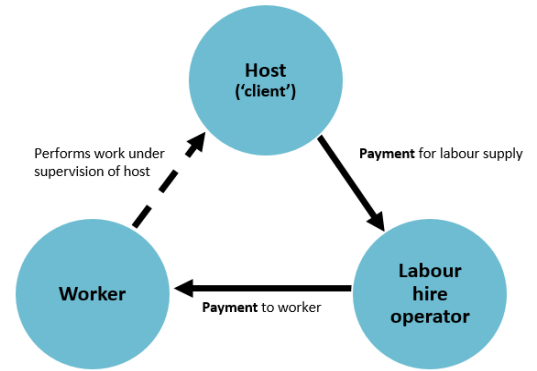
- whether or not the worker is an employee of the provider
- whether or not a contract is entered into between the worker and the provider, or between the provider and the person to whom the worker is supplied
- whether the worker is supplied by the provider to another person directly or indirectly through one or more agents or intermediaries, and
- whether the work done by the worker is under the control of the provider, the person to whom the worker is supplied or another person.

⁶ Report of the Migrant Workers' Taskforce (March 2019), p. 105.

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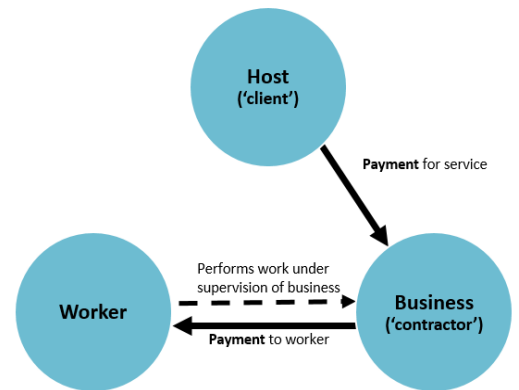
Traditional triangular arrangements – An individual/organisation would need to be licensed under the scheme if the individual/organisation supplies workers to undertake work at a host’s business. In this arrangement (see **Figure 1**), the employment or contractual relationship exists between the worker and the LHP, and the LHP pays the worker their wages and other employee entitlements. There is no direct contractual or employment relationship between the worker and the host. This may include group training organisations or employer organisations which supply apprentices or trainees to a host employer.

Figure 1. Typical triangular labour hire arrangement



Workforce contracting arrangements – In a workforce contracting arrangement (see **Figure 2**), a business outsources its labour requirements to another business (contractor) and the contractor provides a worker, from its own workforce, to perform the work. The contractor does not provide other services aside from labour (as in the case of genuine subcontracting). Examples of workplace contracting arrangements include harvesting a crop for a fee for the benefit of the grower, undertaking a cleaning service for a business or trolley collection for a supermarket.

Figure 2. Typical business to business arrangement



Other forms of labour hire and potential exclusions

The definition of labour supply services can extend to the following forms of labour supply which fall outside the scope of traditional triangular arrangements and workforce contracting arrangements, including:

- contractor management services⁷
- recruitment and placement services,⁸ and
- genuine subcontracting arrangements.⁹

These forms of relationships may be excluded from the scheme. In particular, it is not intended that genuine subcontracting arrangements be captured by the definition of labour supply services.

⁷ Contractor management services cover services where a business (the provider) recruits independent contractors on behalf of a third party (the host) and manages the performance of the contractor even though the contractor may be engaged and paid by the hosts.

⁸ Recruitment and placement services typically involve one party (the recruiter) recruiting or placing a worker to perform work for another party (the host). The recruiter does not pay the worker, as the worker is paid by the host either directly or indirectly through one or more intermediaries. In some circumstances, a recruiter may also provide or procure accommodation for some or all of the period that the individuals are working for the host. Numerous reports, such as the Senate Standing Committee on Job Security, Third Interim Report: Labour Hire and Contracting (November 2021), reported exploitation by recruiters through overcharging for accommodation, offering substandard accommodation, or withholding pay of workers for, amongst other things, alleged damage to accommodation.

⁹ An example of a genuine subcontracting arrangement is where a business (e.g. a building company) subcontracts the entirety of a discrete piece of work to a subcontractor (e.g. an electrician), and the subcontractor has full control and legal responsibility for the work done.

Discussion questions

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?

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

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

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

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

Licensing requirements

LHPs would need to be licensed before they provide a labour hire service. To apply for or renew a licence under the scheme, the LHP would need to provide a range of information about the business, including the labour hire services provided (or proposed to be provided).

Consideration will be given to how a tripartite mechanism could support strong decision-making for granting licences under the scheme, particularly in relation to high-risk industries.

Criteria for granting a licence

The FWO may grant a licence only if it is satisfied:

- each applicant and responsible officer¹⁰ is a **fit and proper person**, and
- the LHP is **financially viable**.

Fit and proper person tests are used across legislative frameworks to promote honesty, integrity and professionalism within an industry and are a feature of all state and territory labour hire licensing schemes.

The financial viability test is designed to ensure LHPs can meet operating costs and expenses, payment of wages and entitlements and other obligations such as PAYG and payroll tax. The majority of existing labour hire licensing schemes require LHPs to meet a financial viability test.

It is also proposed that LHPs have ready access to **adequate workplace relations expertise** (which may include work health and safety expertise). This could be a separate requirement, or form part of the fit and proper person test.

It is expected that LHPs have ready access to adequate workplace relations expertise to address issues of non-compliance with employment minimum standards found in past inquiries.¹¹ Consideration will be given to how the scheme gives effect to this expectation, for instance by imposing a requirement

¹⁰ Depending on the size of the business, a 'responsible officer' would be responsible for carrying on, controlling or taking part in the management of the LHP, such as the owner/operator of the business, a director or a chief executive officer.

¹¹ This requirement would align with the provisions of the UK Gangmasters and Labour Abuse Authority's licensing standards that require, in determining if a provider is a fit and proper person, that the authority determine whether its principal manager has the competency and capability to hold a licence, having regard to understanding of the licensing standards and sufficient management processes. It would also align with Article 14 of the International Labour Organization's *Private Employment Agencies Recommendation, 1997*, which provides that "Private employment agencies should have properly qualified and trained staff".

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for LHPs to engage responsible officers or senior managers with human resources and work health and safety qualifications or experience, through membership of an employer association which provides relevant advisory services to its members, or some other means.

A person will need to remain a fit and proper person at all times throughout the licensing period. If, at any time while a licence is in force, the FWO decides the licensee or a responsible officer is no longer a fit and proper person to provide labour hire services, it may suspend or cancel the licence.

It is proposed that a responsible officer be responsible for the day-to-day business of the LHP and not be under the control of another person that the FWO considers is not a fit and proper person to provide labour hire services – that is, there are no ‘shadow director’-type arrangements through which another entity or person controls or directs the LHP.

In deciding to grant a licence, it is proposed the FWO may impose conditions to which the licence is subject. The LHP should be advised of the reason for imposing the condition/s when it is advised of the decision to grant the licence.

A licensee or responsible officer would be required to advise the FWO of any changes in circumstances that engage the requirements under the fit and proper person test, or which are prescribed by the scheme. The FWO would also rely on information received from the public, other Commonwealth regulators or gathered through audits or investigations when considering whether a person remains a fit and proper person.

It is proposed a police check be submitted for each responsible officer to enable the FWO to check the person’s criminal history. The FWO would check the Director ID for any relevant responsible officers to ensure they are not disqualified from managing a corporation, in addition to checking whether the LHP has been investigated for non-compliance with workplace laws.

It is proposed the scheme prohibit certain persons from applying for a licence or serving as a responsible officer in particular circumstances; for instance, if the person has been disqualified from being a director or been convicted of criminal offences relating to labour exploitation, modern slavery or human trafficking. Consideration will be given to the appropriate timeframes that should apply to the relevant conduct.

Model financial viability test

To demonstrate that a LHP is financially viable, it is proposed the application be accompanied by prescribed information in the form of financial documents that demonstrates the LHP’s financial capacity to meet its obligations, including payment of wages and entitlements.

The regulator may require the applicant to verify prescribed information by statutory declaration.

Model fit and proper person test

In deciding whether a person is a fit and proper person to provide labour hire services, the regulator must consider:

- a) whether the person:
 - has a history of compliance with relevant laws (see ‘**Obligations for LHPs**’ below), and
 - is able to demonstrate an ability to comply with relevant laws
- b) whether the person has previously held a licence that has been cancelled, or been subject to other compliance and enforcement action under the scheme
- c) whether the person has been convicted of an offence or civil contravention against a relevant law or another law that affects the person’s suitability to provide labour hire services

- d) if the person is an individual:
- i. the individual's character, including their honesty, integrity and professionalism, and whether they had previously been involved in a business whose licence was cancelled or suspended
 - ii. whether a corporation has been placed into administration, receivership or liquidation while the individual was an officer of the corporation, and
 - iii. whether the individual person has been disqualified from managing corporations under the Corporations Act
- e) any other matter the regulator considers relevant.

Discussion questions

Licensing requirements

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

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

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

Question 14. How should the scheme address LHPs' engagement of migrant workers on temporary work visas?

Question 15. Who should be prohibited from applying for a licence or being a responsible officer (e.g. disqualified directors or persons convicted of certain criminal offences)?

Question 16. What timeframes should apply to any conduct prohibiting persons from applying for a licence or being a responsible officer (e.g. if conduct was in the last 5 years)?

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?

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

Financial viability test

Question 19. Is the proposed financial viability test appropriate?

Fit and proper person test

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?

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)?

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

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

Duration of licence and fees

It is proposed that the standard licence period be 12 months. Consideration will be given to whether the scheme should provide for extended licence periods for LHPs which have a demonstrated pattern of compliance and proactive measures to promote best practice.

A LHP would need to apply to renew its licence by submitting an application, failing which the licence would expire and the LHP would be unable to continue providing labour hire services.

It is proposed the renewal application will require the LHP to review and update the details provided in its previous application and re-declare the fit and proper persons test and financial viability. The LHP will also be required to disclose:

- disciplinary or enforcement action and litigation taken or on foot against the licence holder
- claims for compensation made by labour hire workers, and
- work health and safety incidents required to be notified to the relevant regulator.

In considering whether to grant the renewal, the FWO must be satisfied that the applicant continues to comply with the licensing requirements.

It is proposed the full cost of administering the scheme (aside from initial establishment costs) be recovered from LHPs. No fee structure has been proposed yet. Cost recovery will be subject to further consultation with stakeholders once a national model has been refined.

Discussion questions

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

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?

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

Question 27. How should fees be calculated? In considering this question, please outline your preferred approach (e.g. 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.

Obligations for LHPs

It is proposed that LHPs be required to comply with a set of conditions under the scheme, including that they:

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- meet annual reporting requirements and notify prescribed changes in circumstances
- not enter into avoidance arrangements and report such arrangements if known
- make documents available for inspection by inspectors, provide information on request and comply with audit and inspection obligations
- not provide false or misleading information under any aspect of the scheme
- not coerce or encourage another person not to provide information under the scheme
- provide workers with adequate induction training
- if engaging working holiday makers—be registered with the Australian Taxation Office¹²
- provide written terms of engagement to workers for each assignment
- only utilise another licensed LHP if subcontracting any labour supply requirements
- comply with any industry-specific obligations
- comply with any licence conditions imposed by the FWO.

Industry-specific obligations may be appropriate to ensure targeted regulation is only applied in high-risk industries and does not create unnecessary red tape in other sectors. For instance, clear safety and welfare concerns have been identified in certain sectors through various inquiries which may not arise in others (e.g. professional services). The Licensing Standards issued by the UK Gangmasters and Labour Abuse Authority provide examples of sector-specific standards which may be appropriate in high-risk sectors.

Consideration will be given to whether and how the scheme should incorporate obligations on LHPs to limit fees and charges that can be imposed on workers and to provide specific information to the FWO if the LHP provides accommodation and/or transport to workers.

Penalties would apply for not complying with these obligations, depending on the risk identified by the FWO (see '**Compliance and enforcement**' below).

The scheme would provide a critical additional mechanism for the Government to target regulatory non-compliance in the labour hire sector across a range of legislative frameworks, by preventing LHPs from operating in the sector where they are not compliant with their legislative obligations. It is proposed that this will occur through requiring LHPs to comply with relevant laws, such as:

- workplace relations laws
- anti-discrimination laws
- superannuation laws
- migration laws
- applicable business laws, such as the *Corporations Act 2001* (in the case of a corporate LHP)
- taxation laws, including state payroll tax laws
- criminal laws
- state and territory housing or accommodation standards
- state and territory road safety laws.

¹² Employers of Working Holiday visa (subclass 417) and Work and Holiday visa (subclass 462) workers must register for both PAYG withholding and as a working holiday maker employer: [Employer registration for working holiday makers \(ATO\)](#).

Discussion questions

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

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

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

Obligations for hosts

It is proposed that hosts wishing to utilise labour hire services be required to comply with five key obligations:

1. Only engage with licensed LHPs
2. Not enter into avoidance arrangements
3. Report any avoidance arrangements.
4. Facilitate and not obstruct inspections and audits of contracted LHPs, and
5. Provide information and make documents available for inspection on request to inspectors.

It is proposed that breaches of obligations 1, 2, 3, 4 and 5 would be civil penalty provisions, with an additional criminal penalty available for knowing or reckless breaches of obligation 1. The requirement that LHPs only operate with a valid licence is key to the effective operation of the scheme, therefore entering into arrangements that enable a LHP to operate unlicensed must be strongly deterred. The criminal penalty provision for obligation 1 could include a defence if the LHP was licensed at the time the host entered into an arrangement with them.

The FWO may also be empowered to issue (or register and publish) supply-chain guidance or codes of conduct, which would provide a source of non-binding advice to major commercial entities, who may not directly contract with LHPs, on how to conduct due diligence to avoid worker exploitation throughout their supply chains. Such guidance could be prepared by, or in consultation with, key industry stakeholders.

Consideration will be given to whether the scheme should highlight hosts' existing obligations to comply with the right of entry provisions under the *Fair Work Act 2009* and the *Work Health and Safety Act 2011* to ensure permit holders can access premises to exercise their rights in respect of LHP workers.

Consideration would be given to the specific issue of accommodation exploitation in identified high-risk industries and whether any obligations should apply to hosts in respect of this issue.

Discussion questions

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)?

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?

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?

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

Compliance and enforcement

It is proposed the FWO provide education and advice, including working with industry to develop best practice guidelines, to assist LHPs to understand and comply with their obligations under the scheme.

It is proposed the FWO would be able to utilise a range of enforcement tools to deal with non-compliance under the scheme, depending on the seriousness of the conduct. Inspectors would undertake audits to check compliance of LHPs with the requirements of the scheme, focusing on LHPs in a particular industry or area.

Consistent with the FWO's existing practice, it is expected that the regulator would take a risk-based and intelligence-led approach to monitoring, investigation, compliance and enforcement activities, focusing its attention on the LHPs and sectors that have the highest risk of non-compliance.

Where a LHP or host breaches an obligation under the scheme, the FWO or an inspector would be able to issue an infringement notice, enter into an enforceable undertaking, seek civil or criminal penalties through a court or suspend, apply conditions to, or cancel, a LHP's licence. Information-sharing provisions would also authorise the FWO to share relevant material with relevant regulators such as WHS regulators and police.

In determining maximum penalties for breaching these provisions, close consideration will be given to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Suspension and cancellation

It is proposed that the scheme provide the FWO with authority to suspend and/or cancel licences where the FWO:

- believes on reasonable grounds that the licensee has contravened the requirements of the scheme (including a condition of their licence)
- is not satisfied the licensee or responsible officer is compliant with relevant laws
- is no longer satisfied that the licensee or responsible officer is a fit and proper person to provide labour hire services and/or the LHP is financially viable, or
- is satisfied the licensee has given false or misleading information to the FWO or an inspector.

Before the FWO can cancel a licence under the scheme, it is proposed the FWO be required to afford procedural fairness to the LHP through a show cause notice process. A right of appeal and provision for judicial review (by the Federal Court) would also exist.

Where a licence has been cancelled, it is proposed that the LHP not be able to reapply for a licence for a prescribed period, such as five years.

Criminal offences

Criminal offences should be reserved for serious contraventions of the core feature of the national scheme. It is proposed that the scheme provide criminal offences for:

- knowingly or recklessly operating a LHP without a licence (including where a licence has been suspended)

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- knowingly or recklessly engaging with an unlicensed provider, or
- knowingly or recklessly disguising the true control of a LHP by a person who does not meet the fit and proper person test (akin to a 'shadow director').

The Department considers that criminal penalties for certain offences (including accessorial liability) is necessary to deter conduct that would undermine the scheme's effective operation. Consideration will be given to whether hosts found to have engaged unlicensed LHPs should be liable for the unpaid wages and entitlements of an unlicensed provider's workers.

Civil penalties

It is proposed that the scheme would provide civil penalty provisions for the following conduct:

- operating a LHP without a licence
- engaging an unlicensed provider
- entering into avoidance arrangements
- failure to comply with a condition of a licence
- failure to notify prescribed changes
- failure to ensure availability of nominated officers
- failure to make documents available for inspection
- threatening, intimidating or persuading another person not to provide information under the scheme
- obstructing or hindering an inspector in the exercise of their functions, or
- selling, transferring, lending or hiring out a licence to another LHP.

Discussion questions

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

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?

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?

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?

Transitional arrangements

Transition from state and territory labour hire licensing schemes

The scheme would need to provide for currently licensed LHPs under the Queensland, Victorian, South Australian and Australian Capital Territory labour hire licensing schemes to transfer to the national scheme during a transition period. Provision would also need to be made for licensees that are suspended under these licensing schemes, as well as those licensees whose licences have been cancelled and those businesses that had their licence applications refused.

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It is proposed that existing licensed LHPs be permitted to continue operating under their state and territory licences during a transition period, during which time they could apply to the FWO for a Commonwealth licence. Provision will also need to be made for information sharing between the FWO and relevant state and territory agencies to ensure all relevant information is available to the new regulator in considering licence applications.

Stakeholder views are sought on the best way to conduct this transfer to support existing licensees while protecting the integrity of the new national scheme.

Discussion questions

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