



To: Review secretariat
irreviewsecretariat@dmirs.wa.gov.au

Dear Mr Ritter,

Ministerial Review of the State Industrial Relations System Interim Report

vegetablesWA is pleased to have this opportunity to provide comment and input on the proposed Terms of Reference for the forthcoming Review of the State Industrial Relations System.

While we offer more detailed comment in our Submission, our key concerns can summarised as follows:

- We seek comprehensive industry consultation, especially throughout the Award making process. Experience with the federal processes alerted industry to a concerning lack of understanding about the nature of horticultural workplaces by those charged with managing the process. In particular the price-taking nature of the industry, the razor-thin margins most growers operate under, and a lack of control over a number of variables, for example the weather, that affect the way work can be undertaken.
- Ensuring that any review of the MCE or Awards is undertaken on an 'as-needs' basis. While it is good practice to monitor and review the workings of any legislation or provision, experience with the Fair Work modern award review demonstrates just how out of hand those processes can become if not fenced in by strict framework and timelines. In opening up opportunities for additional claims to be made, it is less a review of operation, and more a free-for-all to seek increases or changes to award terms. It has also proven to be extremely expensive operation, with much needed industry resources diverted to attend to relatively trivial matters and the need for specialist legal advice, given the environment and tone in which the proceedings take place.
- Whilst a stated aim of the review process is that employee entitlements are not reduced as a result, there appears to be no equal commitment that the process seek not to increase costs for employers. This is a significant concern. With the best profit margins of less than 4% (usually much lower), a price-taking market environment, and environment and conditions volatile at the best of times, costs are always on the rise; there is little scope for horticulture producers to provide further increases to workers. The principle of no cost increases to growers should be established for the review processes.
- vegetablesWA would strongly urge consideration of this issue, whether in With at least three other states either enacted or in the process of enacting labour hire regulation, and a clear need in the horticulture industry for some form of regulation to excise those who would knowingly and willingly exploit workers, at the expense of workers and growers alike, it is in this spirit we include a submission from Dr Johanna Howe of the University of Adelaide as part of our broader submission around the Terms of Reference.

We are available for further discussion on the issues raised in our submission at any time.

Yours sincerely

A handwritten signature in black ink, appearing to read "John Shannon". The signature is written in a cursive style with a large, stylized initial "J" and "S".

John Shannon

CEO

Ministerial Review of the State Industrial Relations System Interim Report

Submission on the Proposed Recommendations and ToR

vegetables WA

Introduction

vegetablesWA has been the peak industry body representing vegetable growers in Western Australia for 70 years. Our purpose and focus is to assist growers, industry, and government to maintain a profitable and sustainable vegetable industry, both domestically and, increasingly, internationally.

Our services include advocacy & representation, development extension, value chain & export development, benchmarking, quality assurance, marketing & business services.

Our industry is changing rapidly with growing expectations around food production, access to new markets domestic and international, and growing expectations from consumers and the community. Rapidly developing technologies, changing work patterns and workers, and more complex laws and regulations require 21st century farmers to do much more than 'just' farm.

With over 1,000 members state wide, our industry comprises a majority of small to medium, family run businesses. VegetablesWA is well versed in the key issues facing growers and plays a key role in policy development. Farm employment requirements are seasonal and variable, depending on the crop, the weather, and the markets. There is a heavy reliance on Working Holiday Makers ('backpackers') and seasonal workers – either through the formal Seasonal Worker Program, or via labour hire providers.

We advocate on behalf of our members covered by the federal Fair Work jurisdiction, but the majority of our members operates within the state industrial relations system.

Industry Background

The economic value and contribution of vegetable production to Western Australia economy

"While Agriculture and Food's work is aimed primarily at building jobs and economic diversity, our activities also generate significant social and environmental benefits through research and development in the areas of land and water management, nature conservation, salinity, soil acidity and climate.

Western Australia's agrifood sector comprises some 14,500 agriculture-related businesses, with a gross value of agricultural production of \$8.2 billion in 2015/16."

Source

<file:///C:/VEG%20WA%20IRC/Western%20Australia's%20Agrifood,%20Fibre,%20Fisheries%20and%20Forestry%20Industries%202017%20-%20PDF.pdf>

- The estimated production value of Western Australia's horticulture (fresh fruit and vegetables) in 2015/16 was \$919 million (approx. 11% of total agrifood production), with \$119 million worth of fresh horticulture products exported.
- In 2016 there were 386 businesses with an area of 11 173 hectares involved in vegetable production (for human consumption). This accounts for roughly 12% of Australian production. Fifty-one industries were involved in fruit and vegetable processing
- In 2015/16 vegetables had an estimated production value of \$390 million, and an export value of \$81 million.
- Exports of fruits and vegetables have shown an increasing trend, with a 67% increase from 2012/13 to 2015/16
- Between 2010/11 and 2015/16, the export value of vegetables increased from \$67 million to \$81 million (22%).
- The value of vegetable exports to Australia in 2015/16 was 304.6\$m. Western Australia accounted for 81.0\$m or 26.6% of that total.
- Both fruit and vegetable exports were concentrated, with the top five destinations, accounting for approximately 76% of exports. The top five destinations for vegetables were the UAE, Singapore, Malaysia, Saudi Arabia, and Qatar
- Fruit (including grapes), vegetables (for human consumption), and nursery industries occupied an area of 33 093 hectares, with 1449 businesses involved in production in Western Australia.
- Of this area vegetables occupied 34% of the area and accounted for 27% of the number of businesses

Employment in the Agriculture industries

- ABS data sets the number of agriculture, forestry and fishing *businesses* in WA 2016 at 16 943, with 53% of those businesses employing one or more people.
- 2016 WA data sets the total number of *workers* across *all* Agrifood industries in WA at 183,000.
- The percentage of persons employed in Agriculture, Forestry, Fishing (2011) was estimated at 2.4% of the total Australian workforce.
- Horticulture production and packing are the most labour intensive of the agricultural industries, but with large numbers of casual, seasonal, and transient workers it is difficult to pinpoint exact numbers. Needless to say, these workers make up a significant proportion of, not only broader agricultural employment, but of State employment figures as well.
- Therefore the settings for industrial relations generally in the State, and most definitely in any new Awards must recognise and reflect the particular and specific nature of the horticulture workplace profile.

- Structured industry consultation will be especially beneficial in the Award making process.

Sources:

Western Australian Agriculture Authority (Department of Primary Industries and Regional Development) 2017
<file:///C:/VEG%20WA%20IRC/Western%20Australia's%20Agrifood,%20Fibre,%20Fisheries%20and%20Forestry%20Industries%202017%20-%20PDF.pdf>

WA Regional Data (ABS)
http://stat.abs.gov.au/itt/r.jsp?RegionSummary®ion=5&dataset=ABS_REGIONAL_ASGS2016&geoconcept=ASGS_2016&measure=MEASURE&datasetASGS=ABS_REGIONAL_ASGS2016&datasetLGA=ABS_REGIONAL_LGA2016®ionLGA=LGA_2016®ionASGS=ASGS_2016

Terms of Reference

ToR 1

- vegetablesWA supports a structure of the WAIRC that ensures its independence and provides fair and efficient employee and employer access to, and outcomes from the system. Court processes can be complicated, expensive and lengthy. Any move towards providing a streamlined and efficient system would be welcome.
- vegetablesWA has no particular objection to providing review mechanisms however, a review without necessity is pointless. There should be some trigger to determine if a review is in fact necessary.
- The key concern is to ensure to undertake the process within clear and strict guidelines and timeframes. Importantly, identify stakeholders, clarify problems, and encourage industry focussed solutions.
- The Industrial Relations Commission has its roots as being a ‘court for the common man’ a forum which can be accessed by anyone, regardless of their ability to pay for legal counsel.
- If the predominant aim of the industrial relations framework is to assist parties to resolve disputes in or about the workplace, the introduction formal and structured legal argument and process and argument is not necessarily conducive to reaching mutual agreement.
- This is not to say that those who sit on the Bench of the Industrial Relations Commission making judgements about employment law and matters should not be legally trained and competent. They should be.
- Costs should only be imposed when it is clear that action is vexatious or has been taken against Commission advice that there is no jurisdiction or there is clearly no case to answer based on actions/arguments to date – for example at a compulsory conference.

ToR 2

vegetablesWA has no comment to make on issues relating to the Public Service.

ToR 3

- vegetablesWA supports the inclusion of an equal remuneration provision in the Industrial Relations Act 1979 (WA) (IR Act), with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the WAIRC.

ToR 4

- The “gig” economy is defined as working on a task-by-task basis for different employers concurrently. It is generally short-term, flexible and a growing feature of millennial workers.
- However, it is to be hoped that there will not be yet another category of employee to consider. While its recognised that those operating in the “gig” economy see themselves as something different, the reality is they can be contracted for work in any number of existing ways currently available to them.
- If they are required short term and do their work on an hourly basis, they can be defined as casual employees. If they are employed for a defined period time or for a defined task, either in a workplace or from home, they are fixed term contract workers. If they work based on unit output they are likely to be pieceworkers (though generally these workers can be defined and covered by relevant Awards). In all situations they are covered by the MCE, if not an Award.
- Most “gig” workers operate as independent contractors/consultants and charge according to ‘market’ rates.
- The ATO provides a clear definition of what distinguishes an employee from an independent contractor, and there are penalties for sham contracting. Information and training for those managing their own businesses – eg currently offered through ATO and Chambers of Commerce, would be preferable to creating another employee category, and/or seeking to include them in a system in which they do not wish to be included.
- In a situation in which a private residence is also a place of employment for employees, inspection rights should be limited to the actual place where the business is conducted. There should be no automatic right to inspect other parts of the structure identified as private residences.
- Volunteering Australia define volunteering as “time willingly given for the common good and without financial gain”. WAIRC should give consideration to including some form of definition (for the purposes of the Act). There is potential for having any definition subjected to constant challenge to accommodate different interpretations, so protection should be provided under the normal mechanisms for employees who believe they have a dispute about the nature or conduct of their employment status.

ToR 5

- vegetablesWA has no specific objection to the establishment and consolidation of various provisions under one heading of State Employment Standards. However, the placing of all eggs in one basket is often unadvised. The need to change to one should not lead to the review of all. The process of review should not be seen or used as a mechanism for enhancing provisions.

- The current Termination, Change and Redundancy provisions are from the Metal Trades TCR case of 1984 and are in dire need of updating – they are outdated and largely irrelevant to the current environment. The process is onerous and unduly complicated, and the severance pay system skewed. An example given is where an employer must pay a 25 year-old with three years' service seven weeks' redundancy pay, while a 60-year-old who loses their job after 20 years' service is entitled to only ten weeks' pay.
- The proposal has an SES review one year after implementation, and another two years later. There is also the proposed review of Awards after three years. Three significant reviews over three years is a significant burden on all parties concerned.
- Establishing a statutory Review requires that it be undertaken. The current Fair Work Award Review has delivered little of any significant change to awards, and most would argue, little to show value for the exercise. Without evidence of the clear necessity for a review - ie clearly the system or awards are not working as they are intended to – it would be a waste of time and resources on all sides of the equation.
- All parties to the current Fair Work Award Review process have agreed to abolish the requirement for four yearly review in light of the time already expended on the first one (currently in its fifth year). While monitoring and review of implementation and effectiveness is important, substantive reviews should occur when there is demonstrable evidence it is needed to address an inconsistency, ambiguity or gap, or the provision is clearly not operating in the way it was intended.
- The framework, guidelines and timelines for any review process should be tight. Restrict the boundaries of any regular review to address clear inconsistencies, ambiguities or gaps in regulation that require clarification or to redress such issues. They should not be used every three years as a de facto industry or general bargaining mechanism to introduce new provisions or seek advances in conditions outside of the review remit.
- vegetablesWA strongly opposes the question of increased casual loading being included in considerations around the SES or MCE.
- As a price-taking industry, horticulture faces particular challenges in relation to their capacity to recoup additional operating costs. Growers do not set the price for their product, markets do, and the volatility of markets can be devastating. Running a viable business on slender margins (less than 4%) is nothing new to farmers, but an increase of 5% to casual wages can be the difference between profit and loss for the small to medium horticulture producer.
- While input costs across the board continue to rise year after year, the market price of fruit and vegetables remains stagnant. Expansion of production is now necessary in order to get the same price as ten years past. There is little room to absorb such increases, unless there is a sacrifice to the number of workers, or an increase in labour for permanent and family workers.
- vegetablesWA does **not** support the inclusion of an increased casual loading into the SES or the MCE. If the matter must be considered, at least let it be so with the full benefit of industry evidence to support our position. It will not do to have mining or hospitality or health determine what is practical and possible in horticulture.

ToR 6

- vegetablesWA acknowledges the significant changes in recent years, both in terms of the federal workplace relations jurisdiction, and in the ways that work and employment are now undertaken.
- In the horticulture industries in Western Australia, new forms of employee engagement are beginning to take shape. Whilst there is still a heavy reliance on local Australian and Backpacker casual labour to harvest produce, workers under the Seasonal Worker Program (from Timor Leste and the Pacific Islands), as well as Labour Hire operators, are more commonly providing the large numbers of temporary staff required for harvest.
- Whilst the former SWP program is gaining a reputation for providing skilled and dedicated workers to growers around the country (and reciprocal productivity benefits to growers), it is governed by the Fair Work Ombudsman, the Department of Border Protection and the Department of Employment and so problems are few.
- However, the exploitative and even criminal activities of some rogue labour hire operators have not escaped the attention of international workers, growers, consumers, and the media. It is not how the Industry wishes to operate, nor how industry wish to be perceived. While notionally excluded from this review, a review of the definition of ‘employee’ is timely to ensure both that those workers are protected, *and* that the producers using labour hire contractors (the *legal employers* of those workers) are also protected from unscrupulous operators.
- It is noted that Queensland has recently introduced legislation that requires all labour hire providers to be licensed under the Queensland government, however it is not without its problems.
- **See Appendices A1 and A2** for our comprehensive submission around Labour Hire regulation.
- vegetablesWA generally supports regulation of the labour hire industry in this state and prior and current stakeholder deliberations by other States should provide ample guidance to ensure we structure a scheme which genuinely meets the needs of business.
- The modern award making process took around two years to complete. The first four yearly review of federal ‘modern’ awards now enters its fifth year. The effort and expense required to participate meaningfully in the review process, often requiring dedicated industry and legal counsel, year on year should not be understated. The focus of the state review would, presumably, be narrower and therefore less onerous, but the lessons should be heeded nonetheless. The framework and guidelines for this process should be strict least it become lost in its own purpose.
- Dedicated support for industry stakeholders from the WAIRC would be helpful, especially where legal counsel is not available and industry representatives are required to provide input, submissions, advice and arguments to the process. The work is both financially and human resource heavy, and often taken on by industry people already spread thin across competing demands. Dedicated resources throughout the process may help alleviate the workload and guide submissions to those points most needing attention.

- An example of ambiguity is contained in the Farm Award which carries the broad phrase “other farm produce” in its coverage clause. This could lead to some confusion with the application of the Fruit Growing Award, even though that Award does at least specifically refer to fruit picking and packing.
- Any review process must:
 - Be clear about its purpose and conduct
 - Establish a clear review framework and limitations
 - Set a strict timeframe for operation and completion
 - Include specific industry intelligence/input

ToR 7

- In our experience, compliance is best understood and attained when it is linked to both risk and results – the risks to business of non-compliance (financial penalties, compensation orders, reputation, recruiting difficulties), and the confidence and freedom that comes with knowing that compliance is *not* at issue in your workplace; that employees are paid and treated fairly and in line with Award provisions.
- Information, education and resources for employers are all weapons in the compliance armoury, and the adage “prevention is better than cure” should be the focus of any compliance structure or system.
- However, wilful non-compliance and practices devised to exploit employees through underpayment, non-payment or other abuses of workplace laws cause real damage to industry reputations – as employers, and with markets and consumers. Additionally, those engaging in these practices gain a competitive advantage over growers who are doing the right thing. This is unacceptable.
- While penalties need to be severe enough to deter serious and repeat offenders, they should not be so high as to bankrupt a small business - and where practical always involve an educational component. The Fair Work Act recognises the presence or absence of dedicated HR within small businesses as a mitigating factor when considering matters of dismissal.

ToR 8

vegetablesWA has no comment on ToR 8.

Respectfully submitted,



John Shannon

CEO vegetablesWA



Appendix A1

SUBMISSION

vegetablesWA commissioned Associate Professor Joanna Howe of the University of Adelaide Law School to author this submission in relation to labour hire regulation in Western Australia.

About the author-

Dr Joanna Howe is Associate Professor of Law at the University of Adelaide and a consultant with Harmers Workplace Lawyers. She holds a Doctorate of Philosophy in Law from the University of Oxford where she studied as a Rhodes Scholar. Joanna is a leading Australian expert on the legal regulation of temporary labour migration. Joanna is the author and co-editor of three books and her work is internationally recognised. Her edited collection (with Rosemary Owens) *Temporary Labour Migration in the Global Era* is the seminal international work on the regulation of transnational migration flows between countries on a temporary basis, and her monograph *Rethinking Job Security* provides a three country study of unfair dismissal law. She is the project leader on a three year national horticulture research project investigating labour supply challenges and worker exploitation on farms. She is also a chief-investigator on an ARC Discovery grant investigating unpaid work experience. Joanna has also led significant research projects for Horticulture Innovation Australia, Fair Work Ombudsman and the Government of South Korea. Joanna is regularly invited to present evidence to Australian parliamentary inquiries and reviews into Australia's temporary labour migration program and is a prominent commentator invited by many media outlets, including 7.30, Four Corners, Radio National, The Conversation and The Australian.

1. Introduction

The absence of labour hire regulation in Western Australia warrants urgent attention by the WA IR Review. This submission makes two central recommendations: first, that Western Australia should develop a labour hire licensing scheme and second, that Western Australia should advocate through the Council of Australian Governments (COAG) for the development of a uniform national labour hire licensing scheme.

Three Australian states have currently developed legislation (or in the case of Victoria, draft legislation) introducing a state-based labour hire licensing scheme. A central aim of each of these schemes is to regulate the labour hire industry to prevent and reduce worker exploitation and to create a level playing field amongst businesses. Problematically, each of these three schemes seeks to achieve this objective in different ways through the introduction of distinct and separate regulatory apparatus.

This submission is structured as follows:

Part 2 provides background to the introduction of labour hire licensing in three Australian states.

Part 3 explains the issues relating to labour hire use in the Australian horticulture industry.

Part 4 proposes a labour hire licensing model for Western Australia.

Appendix A provides a comparative table on the Queensland (Qld), South Australian (SA) and Victorian (Vic) labour hire schemes.

2. Background – The Impetus for Labour Hire Licensing in Three States

In Qld, SA and Vic government inquiries all found that there was an ease of access, or absence of barriers to entry, for persons and corporations seeking to provide labour hire services.¹ In addition, many rogue labour hire providers were found to lack visibility by not operating under a registered business or corporate entity. They would use technology (such as mobile phones and the Internet) to avoid the detection of unlawful practices, and operate outside the reach of the regulators.² It is intended that labour hire licensing regimes, if properly enforced and monitored, should minimise the use of such practices and create a more level playing field for legitimate labour hire companies and businesses using legitimate labour hire contractors to source labour.³

However, one of the key criticisms raised is that all of the three states' labour hire licensing regimes have cast the net too wide and may capture commercial arrangements that are not conventionally regarded as labour hire and which are also not associated with the exploitation of workers. This is particularly the case with the Qld Act. Section 7 of that Act covers almost any commercial arrangement that involves the supply of a worker to do work for another person. As Charles Cameron, the CEO of the peak national labour hire body (RCSA) explains,

[t]he following situations could be impacted by this proposed law: a corporate health service that “supplies” a nurse to deliver vaccinations, or a security firm that “supplies” personnel to a school dance.⁴

¹ Economic and Finance Committee, 'Inquiry into the Labour Hire Industry' (Final Report, Fifty-Third Parliament, 18 October 2016) 6; Parliamentary Committees, 'Inquiry into the Practices of the Labour Hire Industry in Queensland' (Report No 25, 55th Parliament Finance and Administration Committee, June 2016) 15 <<http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T1028.pdf>>; Anthony Forsyth, 'Victorian Inquiry into the Labour Hire Industry and Insecure Work' (Final Report, 31 August 2016) <https://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report-.pdf>.

² Forsyth, above n 1.

³ Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016) 328 [9.305].

⁴ Charles Cameron, 'Licensing the Labour Hire Sector will Cripple South Australia's Business Community', *The Advertiser* (online), 15 July 2017 <<http://www.adelaidenow.com.au/business/sa-business-journal/licensing-the-labour-hire-sector-will-cripple-south-australias-business-community/news-story/a04a1418f4c63ad19c4fb09b7cce30fe>>.

The broad nature of the Qld Act also attracted criticism during the ACT's current Inquiry into the Extent, Nature and Consequence of Insecure Work. For example, Stephen Smith from the Australian Industry Group during the Inquiry stated:

The Queensland legislation, for example, has the most ridiculously broad definition. It is not even called labour hire; it is about the supply of labour from one person to another, being a corporate entity or a natural person, it seems. I know the government up there is looking at trying to narrow it a bit with a regulation, but it is going to cause enormous disruption. The jail term of up to three years for using an unlicensed labour hire provider is completely unfair. The way it is drafted at the moment, if a home owner called up Jim's Mowing to mow their lawn, they would be breaching that legislation.⁵

By contrast, s 7 of the SA Act and cl 7 of the Vic Bill have a narrower scope because they require the host to have a "business or undertaking" and that the work must be performed "in and as part of that business". Despite this, the SA Act and Vic Bill too may capture non-traditional labour hire arrangements such as service and secondment arrangements.⁶

Others have also contended that the labour hire regimes will not be effective in combating worker exploitation and that focus should instead turn on enforcing adequate existing civil and criminal laws that can be used to prosecute unscrupulous labour hire firms. For example, the AIG's Stephen Smith has argued:

We do not think there is a need for a licensing scheme because the laws that apply to every company and the rights that every employee enjoys apply equally to labour hire companies. We have this new piece of legislation [the *Vulnerable Workers Act*] that increases penalties by up to 20 times ... so let us let that work. It was aimed at the sorts of circumstances that are being talked about in the context of labour hire, like the horticulture industry issues ... We see these labour hire licensing schemes that are being developed as giving the union movement very extensive powers to interfere in business arrangements.⁷

Emma Germano, President of the Victorian Farmers Federation, has contended:

[Labour hire licensing schemes] fail to acknowledge or address the complexities of the issues. These licences [must] operate in conjunction with sustained education, support, monitoring, inspections, and prosecution activities, and enforcement is the crucial component. ... Without a more holistic approach to the reasons labour exploitation has occurred, any

⁵ Evidence to the Standing Committee on Education, Employment and Youth Affairs, Legislative Assembly for the Australian Capital Territory, Canberra, 19 October 2017, 162 (Stephen Smith, Head of National Workplace Relations Policy, Australian Industry Group).

⁶ Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 6th ed, 2018) [4.12].

⁷ Evidence to the Standing Committee on Education, Employment and Youth Affairs, Legislative Assembly for the Australian Capital Territory, Canberra, 19 October 2017, 163.

scheme will fail to effect change and condemn the horticulture industry in the process. There are significant number of laws and regulations already in place at both state and federal level.⁸

In relation to the horticultural industry, there are also concerns that labour hire firms will pass the additional costs on to growers who won't, in turn, be able to pass them on to the supermarkets.⁹

A state-based approach may be preferred for the time being, given that a national approach may take some time to develop or may not eventuate at all.¹⁰

However, concerns have been raised that a state-based approach will cause difficulties for labour hire providers operating nationally, as they will need to be licensed under three different regimes. There is also the concern that labour hire providers will simply move to other states and territories that have no labour hire licensing regimes in place.

In its submission to the Forsyth Inquiry into labour hire, the Gangmasters Licensing Authority stated:

If a form of licensing/regulation was introduced in Victoria, which did not operate elsewhere, it might encounter similar issues to where a labour hire company changes its approach, and only supplies labour outside of a regulated environment. Thus companies that provide labour across Australia could conceivably decide to only provide labour outside of Victoria. Any new regulation should therefore consider any unintended consequences outside its jurisdiction, and whether therefore a national approach can be adopted to avoid such risks.¹¹

Similar concerns were also raised by stakeholders during the SA Economic and Finance Committee's Inquiry into the Labour Hire Industry:

⁸ Emma Germano, 'Labour Hire: Victoria's Plan Won't Prevent Vulnerable Workers Being Exploited', *Weekly Times* (online), 20 February 2018. See also Victorian Farmers Federation, *Labor's Labour Licence Scheme* <http://www.vff.org.au/vff/Policy/Policy_Priorities/Labour_Crisis/vff/Policy___Submissions/Policy_Priorities/Labour_Crisis.aspx?hkey=39fa7285-3418-4031-b212-f03ecd0f4181>.

⁹ Warwick Long, 'Labour Hire Licensing Bill High on Victorian ALP Agenda despite Farmer Opposition', *ABC News* (online), 28 March 2018 <<http://www.abc.net.au/news/rural/2018-03-28/labour-hire-licensing-bill-high-on-victorian-alp-agenda/9587112>>. <<https://www.weeklytimesnow.com.au/news/opinion/labour-hire-victorias-plan-wont-prevent-vulnerable-workers-being-exploited/news-story/2c174d9e40cf6f519744c8c6a532bd01>>; Victorian Farmers Federation, 'Labor's Labour Licence Scheme' <http://www.vff.org.au/vff/Policy/Policy_Priorities/Labour_Crisis/vff/Policy___Submissions/Policy_Priorities/Labour_Crisis.aspx?hkey=39fa7285-3418-4031-b212-f03ecd0f4181> .

¹⁰ Forsyth, above n 1, 198.

¹¹ Gangmasters Licensing Authority, Submission No 15 to *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (24 November 2015) 8.

There is a risk that if you simply do it [introduce labour hire licensing] in South Australia you push up the cost of labour in South Australia and the businesses all move elsewhere, so it needs a consistent and national approach. ... [I]t really needs to be a much broader cross-jurisdictional or cross-border approach.¹²

[P]art of the difficulty in introducing a licensing regime, particularly where there are cross-border issues, is that if it's not a national approach, sometimes it can be a bit messy for the players in that space in trying to get that balance right between protecting workers but also making business viable and able to operate. ... [Whether it is a] federal or a joint state approach, some level of cross jurisdictional approach ... [is needed] rather than one licence type here and one licence type in Victoria. I just know from history that it makes it really hard for those who operate across borders if there is a different regime in each state.¹³

While there is currently legislation which regulates licensing of employment agents in South Australia, Employment Agents Registration Act 1993 and the Employment Agents Regulations 2010, there is no harmonisation of various regulations and no consistent national enforcement.

The lack of a single national approach to regulating the conduct of on-hire and labour-hire firms leaves the door open for a small number of unscrupulous operators to operate outside existing laws and regulations.¹⁴

Thus, in summary, this Part has shown how labour hire licensing has been, or will be introduced in three Australian states to address the problem of unscrupulous labour hire providers avoiding compliance with Australian labour law and labour standards which creates both endemic worker exploitation and an uneven playing field for businesses. Although the varied way in which these licensing schemes have been introduced is problematic (and a uniform, national approach is preferable in the case of labour hire licensing), VegetablesWA submits that there *is* a strong case for the introduction of labour hire licensing in the Western Australian jurisdiction.

3 Role of Labour Hire in the Australian Horticulture Industry

Research suggests that the horticulture industry in most countries, including Australia, depends on labour hire contractors.¹⁵ Growers are generally keen to focus their expertise

¹² Evidence to Economic and Finance Committee, Parliament of South Australia, Adelaide, 2 May 2016, 136 (Greg McCarthy, CEO of ReturnToWorkSA).

¹³ Evidence to the Economic and Finance Committee, Parliament of South Australia, Adelaide, 18 September 2015, 16 (Dini Soulio, Acting Director of SafeWork SA).

¹⁴ Recruitment & Consulting Services Association Australia & New Zealand, Submission to Economic and Finance Committee, Parliament of South Australia, 5.

¹⁵ Stephanie Barrientos, "Labour Chains" Analysing the Role of Labour Contractors in Global Production Networks' (Working Paper 153, Brooks World Poverty Institute, July 2011); Pamela K

toward producing vegetables, and are rarely experienced or interested in managing complex and fluctuating labour needs, making outsourcing of labour recruitment commonplace.

Sourcing a reliable supply of productive labour at short notice is crucial given the limited scope for mechanisation and the uncertainty over the current and future workforce due to seasonal and market fluctuations. At the same time there is increasing pressure on growers to supply quality fresh produce at competitive prices according to tightly pre-programmed schedules with large grocery retailers particularly the major supermarkets.¹⁶

Labour hire companies provide growers with a flexible approach to the engagement of labour that helps businesses cope with peaks and troughs in demand. These intermediaries come in a variety of forms, including:

- large, multinational corporations with thousands of staff which offer a range of services for a range of industries;
- mid-sized labour hire providers that service particular industries in key regions;
- small, regionally-based, industry-based or occupationally-based companies where the agency owners know each of their workers personally;
- not-for-profit groups utilising labour hire as a means to improve employment opportunities in communities;
- accommodation proprietors who procure work for backpackers; and
- operators consisting of an individual (or individuals) with a van and mobile phone, known only by their first name.¹⁷

Thus, labour hire intermediaries in horticulture provide a range of services; including, employment placement, accommodation, transport, provision of credit and training.

Labour hire companies vary in their compliance with workplace laws, awards and other industrial instruments, and health and safety legislation. When a labour hire firm is non-compliant with Australia's workplace laws this poses reputational and legal risks for growers. There is academic debate over the extent to which poor employment practices are the result of 'rogue' labour hire firms or inherent in the nature of labour hire engagement in low wage industries. The 'triangular' relationship created by the labour hire arrangement is a well-recognised source of vulnerability for workers.¹⁸ For example, in Guthman's study of organic growers in California, the very presence of labour contractors was seen as an indicator of exploitative work.¹⁹

Robinson and Helen Rainbird, 'International Supply Chains and the Labour Process' (2013) 17 *Competition & Change* 91.

¹⁶ Richard Curtain, 'New Zealand's Recognised Seasonal Employer (RSE) Scheme and Australia's Seasonal Worker Program (SWP): Why so Different Outcomes?' (Development Policy Centre, 25 May 2016).

¹⁷ Industrial Relations Victoria, Victoria State Government, *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (31 August 2016) 52 <http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report-.pdf>.

¹⁸ Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012).

¹⁹ Julie Guthman, *Agrarian Dreams: The Paradox of Organic Farming in California* (University of California Press, 2004).

Although the Victorian Government Inquiry into the Labour Hire Industry and Insecure Work (2016) noted the many legitimate roles for labour hire firms in assisting employers organise their employment relations, the inquiry noted the existence of ‘rogue’ labour hire agencies operating almost entirely outside the existing regulatory framework.²⁰ Most worryingly, the Inquiry reported that horticulture is one of the industries where non-compliance of labour hire agencies is most prevalent.

Several recent investigations into labour hire firms show that the widespread presence of non-compliant labour hire operators are undermining the good reputation and ongoing effectiveness of the horticulture industry.²¹ We suggest that the problem stems in large part from poor regulation of the industry and the ease of access, or absence of barriers to entry for those wishing to provide labour hire services. The discussion here draws on a research report *Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry* authored by a team of researchers from the University of Adelaide and University of Sydney in 2016,²² as well as already published material, including submissions the aforementioned research team contributed to two government inquiries in 2016.²³

In 2015, the Productivity Commission reported that labour hire companies ‘figure prominently in cases of migrant exploitation’ in the horticulture and food processing industries.²⁴ The Australian horticulture industry has recognised the exploitation of migrant workers employed by labour hire firms as a problem. In August 2015, the industry hosted an ‘Overseas Workers in Agriculture Forum’ and produced an industry code of conduct to encourage good practices in grower-labour hire arrangements. This forum determined the importance of working closely ‘with regulatory authorities on identifying opportunities to lift standards in the industry and prevent the existence of contract labour hire firms that do not do the right thing’.²⁵

The Fair Work Ombudsman (FWO) has tried to address problems relating to the practices of unscrupulous intermediaries in horticulture. For instance, the FWO launched a three-year

²⁰ Industrial Relations Victoria, Victoria State Government, above n 17, 47.

²¹ See, eg, Meldrum-Hanna and Russell, above n **Error! Bookmark not defined.**. See also The Fairfax media investigation in November 2016, ‘Fruits of their Labour: Investigation into Exploitation of Migrant Fruit Pickers’ *The Sydney Morning Herald* (online), 2016 <<http://www.smh.com.au/interactive/2016/fruit-picking-investigation/>>.

²² Joanna Howe et al, ‘Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry’, (Final Report, Horticulture Innovation Australia, 2017) <<https://ausveg.worldsecuresystems.com/intranet/technical-insights/docs/VG15025.PDF>>.

²³ Joanna Howe et al, Submission No 14 to the Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into the Working Holiday Maker Reform Package*, 2016; Joanna Howe et al, Submission to the Department Of Agriculture and Water Services, *Working Holiday Maker Visa Review*, 2 September 2016.

²⁴ Productivity Commission, ‘Workplace Relations Framework: Productivity Commission Inquiry Report — Volume 2’ (Final Report No 76, Commonwealth of Australia, 30 November 2015) 935 <<http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf>>.

²⁵ PMA Australia-New Zealand, “‘Overseas Workers in Agriculture’ Forum’.

education campaign in 2013 informing horticulture employees and employers of their rights and obligations at work, initiating a review of Working Holiday Makers (WHMs) and acknowledging the importance of effective regulation of temporary migrant workers in horticulture.²⁶ In 2015, the federal government announced Taskforce Cadena involving several government departments and agencies, including the FWO, with an objective of uncovering and prosecuting exploitative labour hire companies. A ministerial working group was also established to help protect vulnerable migrant workers.²⁷

Various government reports and academic studies indicate that growers' use of labour hire providers is problematic. There is abundant evidence that the effect of labour hire activities on workers can be detrimental, leading to wage underpayments with workers highly dependent on intermediaries for accommodation, credit and transport services. The use of third parties to source labour and determine wages and conditions also allows growers who access workers for non-compliant wage rates and conditions of employment to claim immunity from the legal consequences of non-compliance under the *Fair Work Act 2009* (Cth). However, there are accessorial liability provisions in the Act, which if strengthened potentially poses future risks for growers in the use of non-compliant labour hire firms.²⁸ The widespread use of intermediaries means they are able to control access to horticulture jobs, often through ethnic recruitment networks and interdependent relationships with growers, which can inhibit the employment of local workers. Most importantly, growers that use unscrupulous labour hire firms gain an unfair competitive advantage thereby unfairly penalising responsible growers who find it increasingly difficult to compete with their non-compliant counterparts.²⁹

3.1 Snapshot of Labour Hire Activities: Evidence from the National Survey of Vegetable Growers

While the scale of the problem is difficult to quantify, the Victorian Inquiry into the Labour Hire Industry and Insecure Work identified that non-complaint operators are exploiting vulnerable workers through underpayment of award wages, non-payment of

²⁶ Tess Hardy, 'Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards' (2011) 22 *Economic and Labour Relations Review* 117; Fair Work Ombudsman, *Harvest Trail Campaign* <<https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/harvest-trail-campaign>>; Fair Work Ombudsman, *Annual Report 2014–15* (28 September 2015).

²⁷ Industrial Relations Victoria, Victoria State Government, *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (31 August 2016) 52 <http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report-.pdf> 44.

²⁸ The accessorial liability provisions in the legislation are to be found in s 550(1) of the *Fair Work Act 2009* (Cth), which states that '[a] person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision'.

²⁹ Chris F Wright et al, 'Analysing the Labour Challenges of Securing Food Production in Australian Horticulture' (Paper presented at the Society for the Advancement of Socio-Economics Annual Conference, University of California, Berkeley, 24–26 June 2016) 18; *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3)* [2011] FCA 579 (31 May 2011) [38]; Di van den Broek, William Harvey and Dimitria Groutsis, 'Commercial Migration Intermediaries and the Segmentation of Skilled Migrant Employment' (2016) 30 *Work Employment & Society* 523.

superannuation, provision of sub-standard accommodation and non-observance of statutory health and safety requirements in the picking and packing of fresh fruit and vegetables.³⁰ A 2016 national survey of vegetable growers reported in our research report *Sustainable Solutions* revealed that 40% of employers surveyed had used labour hire firms to access workers and 29% had recruited through youth hostels providing a labour hire service.³¹

Use of labour hire companies is far more prevalent (61%) among businesses with more than 20 employees, but very low (10%) among micro businesses with fewer than five employees. Growers who recruited through labour hire companies were significantly more likely than average to use temporary migrants (89%) and especially WHMs (82%) than Australian workers from the local region (80%). Similarly, growers who used youth hostels to recruit were highly likely to employ temporary migrants (99%) particularly WHMs (97%), compared to Australian workers (86%) including those from the local region (83%) and from elsewhere in Australia (34%) (see Table 4.1). Among growers surveyed, 15% had a business relationship with a hostel that provided accommodation to their workers.

Growers who have difficulties recruiting workers 'always or most of the time' (50%) are significantly more likely than average to use labour hire companies than those who 'sometimes' (35%) or 'never' (40%) have such difficulties. Moreover, growers who 'never' have difficulty recruiting workers are the most likely group to use labour hire companies exclusively. By contrast, growers who have recruitment difficulties 'always or most of the time' (15%) are significantly less likely than average to recruit workers through hostels.

This survey also found a significant variation in the way growers engaged with labour hire firms. Among those who have used labour hire contract workers, 54% said that the last time they used them they were aware of the wage rate to be paid to the workers. Of these, 67% said the labour hire firm provided written documentation about the rate paid to workers, 56% said that the labour hire company set the wage rate paid to workers and 41% said the wage rate was set after discussions between the labour hire company and the grower.

³⁰ Industrial Relations Victoria, Victoria State Government, above n 17, 52; Meldrum-Hanna and Russell, above n **Error! Bookmark not defined.**; Justice and International Mission Unit, Synod of Victoria and Tasmania and Uniting Church in Australia, Submission No 29 to the Senate Education and Employment Committees, Parliament of Australia, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, May 2015; Tobi Loftus, 'Queensland Labour Company Allegedly Left Fruit Pickers from Vanuatu Without Pay', *The Sydney Morning Herald* (online), 13 January 2016 <<http://www.smh.com.au/business/workplace-relations/queensland-labour-company-allegedly-left-fruit-pickers-from-vanuatu-without-pay-20160112-gm4or5.html>>; Mark DeBono, 'Crackdown Continues on Exploitation of Migrant Workers on Victorian Farms', *ABC News* (online), 22 May 2015 <<http://www.abc.net.au/news/2015-05-22/crackdown-on-migrant-workers-on-australian-farms-continues/6491474>>.

³¹ A copy of the results of this national survey can be found in the following report – Joanna Howe et al, 'Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry', (Final Report, Horticulture Innovation Australia, 2017) <<https://ausveg.worldsecuresystems.com/intranet/technical-insights/docs/VG15025.PDF>>.

According to the survey labour hire companies and migration agents are significantly more likely than average to have been used by growers who need workers more than six months of the year. Conversely, the penetration of recruiting through youth hostels is significantly higher than average among those who only need workers six months or fewer.

A study by Underhill and Rimmer also found that 27% of farm workers surveyed received their remuneration for horticulture work from a contractor.³² This suggests that whilst some growers more closely scrutinise labour hire arrangements and oversee the wages and conditions of workers, many others do not.

3.2 Labour Hire in the West\ Australian horticulture industry

The discussion here draws on an ongoing national research project investigating labour supply challenges and the conditions of work in the Australian horticulture industry authored by the same team of researchers from the University of Adelaide and University of Sydney who wrote the aforementioned *Sustainable Solutions* report. Although this ongoing national research project (led by Associate Professor Joanna Howe) will conclude in December 2018, this section draws on evidence gleaned during a three day field trip in Western Australia on 11, 12 and 13 March 2018. During this field trip, six grower focus groups and three worker focus groups were conducted. The grower focus groups involved 34 grower participants and were held in Wanneroo, Gingin and Binningyup. The worker focus groups involved 35 worker participants, including 29 who were backpackers employed by Regional Labour Hire in Gingin and surrounding areas, and six backpackers who attended a focus group at the YHA in Perth CBD.

The evidence from these focus groups clearly exposed the significant problem of unscrupulous labour hire operation in the West Australian horticulture industry.

- In the Wanneroo grower focus groups, it was clear growers were highly insecure about their labour supply. Wanneroo is not an eligible postcode for backpackers wishing to apply for a 2nd year Working Holiday visa. Labour hire operators are very active in Wanneroo and come directly to the farm. We got the impression that many of these labour hire firms were ones which either supplied undocumented workers or were not legally compliant in how they paid workers. Growers informed us that most of these labour hire contractors were Malaysian and supplied Malaysian workers. Many Wanneroo growers were heavily reliant on labour hire contractors and felt powerless to ask to see pay slips or require compliance as they felt the contractors would then penalise them in future by sending them less workers.
- The other two grower focus groups were in Gingin and Binningyup. In these locations growers faced an oversupply of labour – backpackers would contact them directly for work on a regular basis as these two locations were the closest eligible postcodes for the WH 2nd year visa extension to Perth CBD. Because of the oversupply of

³² Elsa Underhill and Malcom Rimmer, 'Itinerant Foreign Harvest Workers in Australia: The Impact of Precarious Employment on Occupational Safety and Health' (2015) 13 *Policy and Practice in Health and Safety* 25, 27.

backpackers approaching growers directly for farm work in these two locations, none of the grower participants had needed to rely on labour hire firms or individual labour hire contractors to access workers. However, grower participants in these two locations were aware of other growers in their region who used labour hire contractors to pay below the minimum wage but to do so at arm's length through a third party.

- In all six grower focus groups in the three locations, growers expressed clear concerns that the horticulture industry in Western Australia is not a level playing field, with some growers profiting from relying on unscrupulous labour hire contractors supplying undocumented workers to the farm or visa holders being pay below the minimum wage. Many growers expressed frustration with the difficulty in ascertaining whether a labour hire firm or individual labour hire contractor is legally compliant and were supportive of the development of a licensing scheme which created a legal obligation on growers to ensure that a labour hire operator held a valid license.
- We also conducted two worker focus groups in Gingin with 29 backpackers, who had been told about the focus groups by Regional Labour Hire. We pressed the workers quite hard but were surprised to learn that their experiences of working in the West Australian horticulture industry were broadly positive. This was different to the experiences told to us by workers in our YHA Perth CBD focus group and by workers in focus groups we have conducted in other Australian locations. In the Gingin worker focus groups, their biggest complaint was the weather and how hard the work was, rather than any experiences of non-compliant or exploitative employment. All of them were paid above \$22 and most worked standard 7.5 hour days. Many of them were continuing to work in horticulture for Regional Labour Hire after the 88 days had concluded because their experience was positive. Workers in the two Gingin focus groups were largely from Taiwan and Europe. All of these workers were quite savvy about exploitation in the industry and indicated they had been careful about choosing Regional Labour Hire and had heard about its good reputation from friends.
- We also ran another **worker focus group at Perth city YHA** which 6 backpackers showed up to. None of these workers had done their farm work employed by Regional Labour Hire but each of them had experienced low pay via piece rates (e.g. \$100 per day) or substandard accommodation. They did speak broadly positively about the experience (some more than others) but when pressed it was possible to see that some had experienced some injuries, poor supervision and training. Each of these six workers had experienced skimming from their pay by labour hire contractors. 'Skimming' is a common practice, it appears, in the West Australian (and indeed, national) horticulture industry whereby unscrupulous labour hire contractors receive a lump sum of wages and associated benefits from the grower but then distribute this to workers at a rate below the legal wage for horticultural work by skimming a large amount from the lump sum for their labour hire service.

Thus, in summary, it appears that the West Australian horticulture industry does face similar issues in relation to unscrupulous labour hire operation as the horticulture industry nationally. Our research suggests that this makes it hard for ethical and legally compliant growers to be competitive in an industry where other growers are using the services of unscrupulous labour hire contractors to pay workers below the legal wage. This situation also produces a problem of endemic worker exploitation which damages the reputation of the West Australian horticulture industry.

3. 3 The International Context of Labour Hire Firms in Horticulture

Many countries overseas face similar challenges in relation to the recruitment of labour. Two international examples where greater regulation of labour hire firms has been successful are instructive for understanding how problems in the Australian vegetable industry might be addressed.

In response to growing concern over substantial recruitment fees that were forcing temporary migrant workers into exploitative work, the Canadian province of Manitoba passed legislation that required employers accessing overseas labour to register with the authorities and for foreign recruiters to be licensed under the scheme. Employer registration is the lynchpin of Manitoba's regulatory framework because it forces employers to become directly involved in the recruitment process, placing full legal responsibility for illegally charged placement fees by a foreign recruiter on the employer. This regulation has resulted in an increase in direct employer recruitment, a reduction in the reliance on intermediaries, as well as being a useful 'mechanism for screening out unscrupulous employers'. The process involves the recruiter being obliged to become a member of the Law Society of Manitoba or the Immigration Consultant of Canada Regulatory Council and must provide comprehensive financial information on the individual's business and position. This example reveals the potential for a highly regulated framework that effectively undermines the potential for intermediaries to be involved as recruiters to exploit temporary migrant workers.³³

The United Kingdom's Gangmasters Licensing Authority (GLA) provides an alternative model for labour hire regulation. The GLA is a statutory authority that regulates the supply of workers in agriculture, food processing, forestry and shellfish industries by requiring that labour hire agencies be licensed. It emerged after the drowning of Chinese undocumented migrant workers picking cockles in Morecambe Bay. Under the *Gangmasters (Licensing) Act 2004* (UK), it is illegal to operate as, or enter into an agreement with, an unlicensed gangmaster. In issuing licenses the GLA takes account of whether the applicant is a fit person and whether they meet detailed licensing standards, including being registered for tax, arranging wage payments on time and above the legal minimum, not mistreating workers and not withholding identity documents. Additionally, the GLA scrutinises license applications relying upon checks

³³ Judy Fudge and Daniel Parrott, 'Placing Filipino Caregivers in Canadian Homes: Regulating Transnational Employment Agencies in British Columbia' in Judy Fudge and Kendra Strauss (eds), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge, 2013) 85–9.

with other government departments and can decide whether an application should be awarded or a license refused.³⁴ There may be some weaknesses to the GLA model, including the regulator's inadequate civil penalties and inability to eliminate phoenixing or assist workers who lose their jobs.

Both international examples provide responses to the myriad regulatory challenges arising from the widespread use of labour hire firms in the horticulture industry. We now turn to a discussion of the potential reforms a WA government can make to address the labour hire industry.

4. Recommendations for a WA Labour Hire Licensing Scheme

We submit the WA IR Review investigate introducing a WA labour hire licensing scheme. This is necessary because the absence of regulation of labour hire has created a situation where unscrupulous labour hire has flourished and expanded. This has particular relevance to the WA horticulture industry, which is heavily reliant on labour hire to access workers. The current unregulated labour hire industry threatens the reputation (and therefore the viability) of the WA horticulture industry and undermines the integrity of labour standards applicable to farm workers in WA.

We submit that the WA labour hire licensing scheme only incorporate labour hire firms in a narrower sense than what is currently encapsulated in the Qld Act. The coverage of a WA labour hire scheme should be limited to firms who hire out workers to other businesses as their core business.

We submit that licenses should be valid for a three year period and that applicants for a license must adduce evidence to pass a certain number of tests (such as age of business, that the license holder is a 'fit and proper person' and a minimum holding amount in an Australian bank account).

We submit that the WA labour hire licensing scheme should be appropriately resourced so that it is effective and strong. The creation of a new WA licensing body, such as the proposed Victorian Labour Hire Licensing Authority, is important as this body will take carriage for ensuring oversight and enforcement of the labour hire licensing scheme. Such a scheme must incorporate a variety of oversight and enforcement appropriate penalties to deter non-compliance, a sufficient number of inspectors, annual review of license holders and the possibility of onsite, unannounced audits as important components of an effective system.

³⁴ For an overview of the GLA regime, see Mick Wilkinson with Gary Craig and Aline Gaus, 'Forced Labour in the UK and the Gangmasters Licensing Authority' (Report, Wilberforce Institute, University of Hull, 2010); Nick Clark, 'Enforcement in the Workplace' in Bernard Ryan (ed), *Labour Migration in Hard Times: Reforming Labour Market Regulation* (Institute of Employment Rights, 2013) 89; Gangmasters Licensing Authority, *Licensing Standards* (May 2012) 5 [5.5] <<http://www.gla.gov.uk/media/1596/licensing-standards-may-2012.pdf>>; A C L Davies, 'Migrant Workers in Agriculture', in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press, 2014) 79, 93.

We submit that the WA labour hire licensing authority should maintain an easily accessible online register with a list of all registered labour hire firms. The onus should be on host employers to check the register and ensure that labour hire firms they engage are holders of a valid and current license. Penalties should apply to employers who fail to meet this requirement.

Alongside the development of a WA labour hire licensing scheme, the WA government should lobby COAG to develop a federal labour hire licensing scheme. Such an approach would minimise costs for businesses operating in multiple jurisdictions and ensure consistency and uniformity of licensing conditions across Australia. This is even more pressing now, given the emergence of three separate and quite distinct labour hire licensing schemes in three Australian states (Appendix A).

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Appendix A2: Labour Hire Licensing Regimes in Qld, SA and Vic			
	Queensland	South Australia	Victoria
Act	Labour Hire Licensing Act 2017	Labour Hire Licensing Act 2017	Labour Hire Licensing Bill 2017
Regulations	Yet to be released. A consultation process is currently being undertaken. A consultation process has been undertaken to help inform the development of the regulations. ³⁵	Labour Hire Licensing Regulations 2018	Yet to be released. A consultation process has been undertaken to help inform the development of the regulations. ³⁶
Date of commence of Act and Regulations	16 April 2018.	1 March 2018.	The Bill is currently before the Legislative Council. If passed, the Act will commence no later than 1 November 2019 (cl 2).
Body responsible for processing labour hire licensing applications	No information available.	Consumer and Business Services SA ('CBS').	A Labour Hire Licensing Authority will be established under Pt 4 Div 1.
Budgets/costs	Estimated operational costs of the scheme (including compliance costs) will be at most \$5 million in the first two years and then no more than \$2 million per year thereafter.	No information is available.	The Labor Government has provided funding of \$8.5 million to establish the scheme and the Labour Hire Licensing

³⁵ Office of Industrial Relations, *Labour Hire Licensing Scheme Queensland, Consultation Paper 1: Development of Operational Regulations* <<https://s3.treasury.qld.gov.au/files/labour-hire-licensing-regs-consultation-paper-1.pdf>> ('*Consultation Paper No 1*'); Office of Industrial Relations, *Labour Hire Licensing Scheme Queensland, Consultation Paper 2: Possible Treatments to Refine the Scope of the Labour Hire Scheme* <<https://s3.treasury.qld.gov.au/files/labour-hire-licensing-regs-consultation-paper-2.pdf>> ('*Consultation Paper No 2*').

³⁶ Victoria Government, *Victoria's Labour Hire Licensing Scheme: Consultation Paper – Development of Regulations (2017)* <https://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0007/1592116/Labour-Hire-Licensing-_-Consultation.PDF>.

Appendix A2: Labour Hire Licensing Regimes in Qld, SA and Vic			
	Queensland	South Australia	Victoria
	The scheme is estimated to produce an annual revenue of \$4 million to \$10 million. ³⁷		Authority. ³⁸
Definition of “labour hire services”	<p>s 7(1): ‘[a] person (a provider) provides labour hire services if, in the course of carrying on a business, the person supplies, to another person, a worker to do work’.</p> <p>A person provides labour hire services regardless of (s 7(2)):</p> <p>(a) whether or not the worker is an employee of the provider;</p> <p>(b) whether or not a contract is entered into between the worker and the provider, or between the provider and the host organisation;</p> <p>(c) whether the worker is supplied by the provider to another person directly or indirectly through an agent or intermediary; or</p> <p>(d) 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.</p> <p>However, a person does not provide labour</p>	<p>‘A person (a provider) provides labour hire services if, in the course of conducting a business, the person supplies, to another person, a worker to do work in and as part of a business or commercial undertaking of the other person’ (s 7(1)).</p> <p>A person provides labour hire services regardless of (s 7(3)):</p> <p>(a) whether or not the worker is an employee of the person;</p> <p>(b) whether or not a contract has been entered into between the worker and the person, or between the person and the person to whom the worker is supplied;</p> <p>(c) whether the worker is supplied by the person to another person directly or indirectly through an agent or intermediaries; or</p> <p>(d) whether the work done by the worker is under the control of the person, the person to whom the worker is supplied or another person.</p>	<p>cl 7(1) (general definition): ‘A person (a provider) provides labour hire services if—</p> <p>(a) in the course of conducting a business, the provider supplies one or more individuals to another person (a host) to perform work in and as part of a business or undertaking of the host; and</p> <p>(b) the individuals are workers for the provider’.</p> <p>cl 8(1)–(2) (definition in relation to certain recruitment and placement services, and contractor management services): ‘a person (a provider) provides labour hire services if—</p> <p>(a) in the course of conducting a business of providing recruitment, placement or contractor management services, the provider recruits one or more individuals for, or places one or more individuals with another person (a host) to perform work in and as part of</p>

³⁷ Explanatory Notes, Labour Hire Licensing Bill 2017 (Qld) 3.

³⁸ Daniel Andrews, ‘New Laws to Make Things Fair for Local Labour Hire Workers’ (Media Release, 13 December 2017) <<https://www.premier.vic.gov.au/new-laws-to-make-things-fair-for-local-labour-hire-workers/>>.

Appendix A2: Labour Hire Licensing Regimes in Qld, SA and Vic			
	Queensland	South Australia	Victoria
	<p>hire services merely because the person is (s 7(3)):</p> <p>(a) an employment agent under the <i>Private Employment Agents Act 2005</i>;</p> <p>(b) a contractor who carries out construction work covered by the <i>Building and Construction Industry Payments Act 2004</i>; or</p> <p>(c) is a prescribed person under the Regulations.</p>	<p>A person is not a labour hire provider merely because they are (s 7(4)):</p> <p>(a) an employment agent under the <i>Employment Agents Registration Act 1993</i>;</p> <p>(b) a contractor who carries out construction work covered by the <i>Building Work Contractors Act 1995</i> who engages subcontractors; or</p> <p>(c) a person prescribed by the Regulations (although no persons are actually currently prescribed the Regulations).</p> <p>CBS has provided some examples on what does and does not constitute a labour hire arrangement.³⁹</p> <p>The government has also published information on the labour hire licensing regime,⁴⁰ although the accuracy of some of this information is questionable. The information seems to suggest that in order for there to be a labour hire arrangement, the host employer <i>must</i> pay the labour hire provider for providing the worker. As stated above, however, s 7(3)(b) provides that a person can be a labour hire provider regardless of whether or not a contract has</p>	<p>a business or undertaking of the host; and</p> <p>(b) in relation to recruitment and placement services only, the provider procures or provides accommodation for the individuals for some or all of the period during which the individuals perform the work; and</p> <p>(c) the individuals are workers for the provider’.</p> <p>For the purposes of cls 7(1), 8(1)–(2), a person may provide labour hire services to a host regardless of the following (cls 7(2), 8(3)):</p> <p>(a) whether a contract has been entered into between the provider and the host;</p> <p>(b) whether the individuals are supplied by the provider directly or indirectly through intermediaries; and</p> <p>(c) whether the work performed is under the control of the provider or the host.</p>

³⁹ Consumer and Business Services, ‘When a Licence is Required’ <https://www.sa.gov.au/__data/assets/pdf_file/0011/392393/Factsheet-who-needs-a-licence-examples.pdf>.

⁴⁰ Department of the Premier and Cabinet, ‘Labour Hire Licence’ (15 March 2018) <<https://www.sa.gov.au/topics/business-and-trade/licensing/labour-hire/labour-hire-licence>>.

Appendix A2: Labour Hire Licensing Regimes in Qld, SA and Vic			
	Queensland	South Australia	Victoria
		been entered into between the host employer and the labour hire business. Nothing is said about any requirement of payment from the host organisation to the provider.	
Exclusions from coverage of the Act	<p>No exclusions are specified in the Act, although the Regulations will set out exclusions from the scope of the legislation.</p> <p>During the consultation process, the Qld government sought feedback from stakeholders on the treatment of the following arrangements:⁴¹</p> <ul style="list-style-type: none"> • genuine secondments; • consultants; • whether the worker is 'director' or owner of business; • corporate group/employing entity; and • circumstances where workers are supplied to a person in a domestic setting. <p>Temporary transfer of apprentices, volunteer work and student/education internships are not intended to fall within the scope of the scheme.⁴²</p>	<p>No exclusions are specified in the Act or Regulations.</p>	<p>No exclusions are provided in the Bill, although the Regulations will set out exclusions from the scope of the legislation.</p> <p>The Consultation Paper produced by the Victorian Government suggests that the following may be excluded:</p> <ul style="list-style-type: none"> • secondments; • volunteer workers; • professional/trade services; and • arrangements between related parties.⁴³

⁴¹ Office of Industrial Relations, *Consultation Paper No 2*, above n 35.

⁴² Office of Industrial Relations, *Consultation Paper No 2*, above n 35, 5.

⁴³ Victoria Government, above n 36.

Appendix A2: Labour Hire Licensing Regimes in Qld, SA and Vic

	Queensland	South Australia	Victoria
Definition of “worker”	<p>s 8: an individual is a worker for a provider if the individual enters into an arrangement with the provider under which—</p> <p>(a) the provider may supply, to another person, the individual to do work; and</p> <p>(b) the provider is obliged to pay the worker, in whole or part, for the work.</p> <p>A worker can include an apprentice or trainee (s 8(3)).</p>	<p>s 8(1): an individual is a worker for a provider if the individual enters into arrangement with the provider under which—</p> <p>(a) the provider may supply, to another person, the individual to do work; and</p> <p>(b) the provider is obliged to pay the individual, in the whole or part, for the work.</p> <p>A worker can include an apprentice or trainee (s 8(3)).</p>	<p>cl 9(1): ‘an individual is a worker, for a provider, if—</p> <p>(a) an arrangement is in force between the individual and the provider under which the provider supplies, or may supply, the individual to one or more persons to perform the work; and</p> <p>(b) the provider is obliged to pay the individual (in whole or part) for the performance of the work by the individual, whether directly or indirectly through one or more intermediaries.</p> <p>cl 9(2): ‘an individual is a worker, for a provider, if an arrangement is in force between the individual and the provider under which the provider—</p> <p>(a) recruits the individual for, or places the individual with, one or more other persons to perform work, being persons who are obliged to pay the individual (in whole or part) for the performance of the work by the individual, whether directly or indirectly through one or more intermediaries; or</p> <p>(b) recruits the individual as an independent contractor for one or more other persons to perform work, and manages the contract performance by the independent contractor.</p> <p>cl 8(3): an individual may be a worker for a</p>

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			<p>provider regardless of the following—</p> <ul style="list-style-type: none"> (a) whether the individual is an employee of the provider; (b) whether a contract has been entered into between the individual and the provider; and (c) whether the individual is an apprentice or under a training contract.
“Fit and proper person” test	<p>The applicant must be a fit and proper person to be a holder of a licence. To determine this, the chief executive must have regard to the following matters (s 27(1)):</p> <ul style="list-style-type: none"> (a) the person’s character (e.g., their honesty, integrity and professionalism); (b) whether the person has a history of complying with the relevant laws or is able to demonstrate an ability to comply with those laws. <i>Consultation Paper No 1</i> proposes that the Regulations will require applicants to be asked about their compliance with the <i>Fair Work Act 2009</i> (Cth), <i>Migration Act 1958</i> (Cth) and additional questions may be proposed in relation to the Seasonal Workers Programme;⁴⁴ 	<p>There must be at least two responsible persons who are responsible for the day-to-day management and operation of the business. Each person must be “fit and proper” to be considered a responsible person, and thus be a holder of a licence or to be the director of a body corporate that is a holder of a licence (s 10).</p> <p>Under s 10(1) the Commissioner of Consumer Affairs can take into account the following matters:</p> <ul style="list-style-type: none"> (a) the person’s character (e.g., their honesty, integrity and professionalism); (b) whether the person has previously held a licence and, if so, whether it lapsed, or was suspended or cancelled; (c) demonstrated compliance with the 	<p>Each relevant person in relation to the application must be fit and proper (cl 17(4)(a)).</p> <p>A person is deemed to be a fit and proper person unless any of the following circumstances apply (cl 22):</p> <ul style="list-style-type: none"> (a) within the preceding 10 years, the person or the body corporate has been found guilty of committing a particular offence; (b) within the preceding 5 years, the person or body corporate has been found to have contravened a workplace law, a labour hire industry law or a minimum accommodation standard, or an enforceable undertaking relating to a workplace law, labour hire industry law or a minimum accommodation

⁴⁴ Office of Industrial Relations, *Consultation Paper No 1*, above n 35, 6.

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	<p>(c) whether the person has previously held a licence and, if so, whether it was cancelled or suspended or had conditions imposed on it;</p> <p>(d) whether the person has been convicted of an offence that affects that person's suitability to provide labour hire services;</p> <p>(e) if the person is an individual, whether the person has been an insolvent under administration under the <i>Corporations Act</i>;</p> <p>(f) whether a corporation has been placed into administration, receivership or liquidation while the person was an executive officer of the corporation;</p> <p>(g) whether the person has been disqualified from managing corporations under the <i>Corporations Act</i>;</p> <p>(h) whether the person is under the control of, or substantially influenced by, another person whom the chief executive considers is not a fit and proper person to provide labour hire services.</p> <p>In addition, the chief executive can have regard to other matters considered relevant in determining whether the person is fit and proper (s 10(2)).</p>	<p>relevant laws;</p> <p>(d) information provided to the Commissioner of Consumer Affairs by the Commissioner of Police (e.g., particular criminal convictions committed by the person);</p> <p>(e) in the case of a natural person—</p> <p>(i) whether they have sufficient business knowledge, experience and skills for the purpose of properly carrying on the business under the licence (e.g., by having an accounting or business degree); and</p> <p>(ii) whether they were previously a director of a company that held a licence and whether that licence was suspended or cancelled;</p> <p>(f) in the case of a body corporate—</p> <p>(i) whether the directors have sufficient business knowledge and experience for the purpose of properly directing the business carried on by the licence (e.g., by one of the directors having an accounting or business degree); and</p> <p>(ii) whether the body corporate is being wound up or is under official management or receivership (CBS provides that a letter from an</p>	<p>standard.</p> <p>(c) within the preceding 5 years, the person or the body corporate's licence was cancelled, suspended or revoked;</p> <p>(d) within the preceding 5 years, the person or the body corporate was insolvent or was externally administered under the <i>Corporations Act 2001</i> (Cth);</p> <p>(e) within the preceding 5 years, an officer of the body corporate was an officer of another body corporate whose licence was cancelled;</p> <p>(f) within the preceding 5 years, the applicant was an officer of a body corporate and was disqualified from managing corporations; and</p> <p>(g) any other prescribed circumstances.</p>

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		<p>accountant must be provided confirming that the applicant is solvent⁴⁵).</p> <p>Section 10(2)–(3) and the Regulations also deem particular persons to not be fit and proper (e.g., persons have committed prescribed criminal offences).</p>	
<p>Penalties for unlicensed providers and those who enter into arrangements with unlicensed providers</p>	<p>There are penalties for unlicensed persons providing labour hire services (s 10(1)):</p> <ul style="list-style-type: none"> individual: 1034 penalty units or 3 years imprisonment corporation: 3000 penalty units <p>If an unlicensed person advertises, or in any way holds out, that they can provide labour hire services then they can be subject to a penalty of up to 200 penalty units (s 10(2)).</p> <p>It is also an offence if a person enters into an arrangement with an unlicensed provider (s 11(1)):</p> <ul style="list-style-type: none"> individual: 1034 penalty units or 3 years imprisonment corporation: 3000 penalty units. 	<p>There are penalties for persons providing labour hire services who have not obtained a licence (s 11) and also for persons who have entered into arrangements with unlicensed providers (s 12):</p> <ul style="list-style-type: none"> natural person: \$140,000 or 3 years imprisonment body corporate: \$400,000 <p>But it is a reasonable excuse to not comply with s 12 if, when the person entered into the arrangement, the person providing the labour hire services was shown on the register as the holder of a licence.</p>	<p>Part 2 provides what is considered prohibited conduct.</p> <p>A person must not provide labour hire services (cl 13) or advertise that they can provide labour hire services (cl 14) unless they hold a licence.</p> <p>A person also cannot enter into an arrangement for labour hire services with an unlicensed provider, unless the provider was included in the Register as the holder of a licence or the person had a reasonable excuse for entering into the arrangement (cl 15).</p> <p>According to cl 94, cls 13–15 are civil penalty provisions.</p> <p>If cl 13 or cl 15 are breached the maximum penalty is 800 penalty units for a natural person and 3200 penalty units for a body corporate.</p>

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Department of Premier and Cabinet, *Labour Hire Licence* <<https://www.sa.gov.au/topics/business-and-trade/licensing/labour-hire/labour-hire-licence>>.

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			If cl 14 is breached, the maximum penalty is 200 penalty units for a natural person and 800 penalty unit for a body corporate.
Transitional provisions	<p>If a person supplies, to another person, a worker to do work for that other person within 60 days after the commencement of the Act (s 109(1)), the person is taken not to be a provider of labour hire services in relation to the supply until the later of the following days (s 109(2)):</p> <p>(a) the day that is 60 days after the commencement; or (b) if the person applies for a licence within 60 days after the commencement — the day the application is decided.</p>	<p>A transitional period is provided to allow industry time to be fully compliant. All labour hire providers, however, will need to be licensed by 1 September 2018.⁴⁶</p> <p>In particular, sch 1 cl 1 of the Act provides that: ‘[i]f a person supplies, to another person, a worker to do work for the other person within 6 months after the commencement of this Act, the person is taken not to be a provider of labour hire services in relation to the supply until—</p> <p>(a) after the expiry of 6 months after that commencement; or (b) if the person applies for a licence within 6 months after that commencement—the day the application is decided, whichever is later.’</p>	<p>Clause 116(1) of the Bill provides that a person will not contravene Part 2 at any time during the transition period (which, according to cl 115, is the period between the day the Act commences and 6 months after the commencement date).</p> <p>A person will also not be in contravention of cls 13 or 14 if the person applied for a licence before the end of the transition period and, at the relevant time, the application has not yet been decided (cl 116(2)).</p>
Enforcement mechanisms	Inspectors employed by the Queensland government will monitor compliance with the Act, investigate and (where necessary) take action to deal with alleged contraventions of the Act and inform providers and workers of their rights under	Authorised officers, for the purposes of the Act, are given powers to obtain information (s 35), to enter and inspect premises, vehicles, etc (s 36) and to use and inspect books and documents produced or seized (s 37).	The Labour Hire Licensing Authority will have the power to appoint inspectors (cl 64). Inspectors will have the power to inspect a labour hire provider’s documents and records (cl 67), and upon production of those documents, will be able to make

⁴⁶ Consumer and Business Services, ‘New Labour Hire Laws to Commence 1 March 2018 — CBS News’ (15 January 2018) <<https://www.cbs.sa.gov.au/labour-hire-laws/>>.

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	<p>the Act (Pt 6).</p> <p>Among other things, inspectors will be granted general power to enter places (Pt 6, Div 2) and will be able to search the premises and require labour hire providers and users to provide information (Pt 6 Div 3).</p>		<p>copies, take extracts, etc (cl 68).</p> <p>For the purposes of monitoring compliance with the Act and regulations, the inspectors will have the power to apply to the Magistrates' Court for an order requiring a person to answer questions put by the inspector or to supply information to the inspector (cl 70).</p> <p>Inspectors will also have the power to enter and search premises, and examine and seize anything found which the inspector believes on reasonable grounds to be connected with a contravention of the Act or the Regulations (Pt 5 Div 3).</p>
Licensed in another state or territory	If the person holds a labour hire licence in another state, they are still required to apply for a licence in Queensland.	If the person holds a labour hire licence from another state, they are still required to apply for a licence in South Australia. However, CBS has commented that they may not need to meet all of the eligibility criteria in relation to 'fitness and propriety and finances'. ⁴⁷	If the person holds a labour hire licence from another state, they are still required to apply for a licence in Victoria.

⁴⁷ Department of the Premier and Cabinet, above n 45.