

# **The Victorian Labour Hire Licensing Bill 2017**

## **Why it needs to be rejected**

**Briefing and Position Paper**  
**February 2018**

### **Conclusion and request**

Our request is that the Bill be rejected in full.

Our conclusion is that the Bill is a negative piece of legislation. It is a sham, we say, because it purports to achieve one objective but in fact targets a quite different objective.

The exploitation problems identified in the rural sector have effectively been addressed by the Fair Work Ombudsman. If the Victorian State Government were genuine in its desire to prevent such exploitation, it should put resources into working with the FWO and other relevant regulators to assist them.

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### 1. Overview

This Bill is a response (allegedly) to findings of vulnerable worker exploitation, particularly in the rural and cleaning sectors in Victoria. If the Bill were limited to addressing such exploitation, it might be justified.

However, the Bill is so delayed and superseded by other regulatory initiatives and enforcement activities that it has been rendered irrelevant. The Bill will not do anything to further minimize and eliminate vulnerable worker exploitation because other, far more effective, regulatory systems are in place.

The Bill, however, seeks to achieve an outcome quite separate to the protection of rural workers that supposedly lay behind its creation. The Bill is not simply an exercise in excessive regulatory overreach. Rather, it is, in effect, a reintroduction by stealth of a *de facto* and unnecessary industrial relations regulatory regime into Victoria, a regime targeted at one sector only—the entire labour hire sector. This is demonstrated in the structure of the Bill.

This submission to Victorian Members of Parliament seeks to supply facts and analysis to support the contentions made above. Our request is that the Bill be rejected.

In the body of this paper we describe in some detail the

- exploitation problems that lead to the Bill,
- remedies that have already been put in place,

and

- why the Bill will have a different outcome to that claimed as the objective of the Bill and why those outcomes are bad for Victoria.

# Summary

## Four Corners Programme

The Bill is largely a response to a hard-hitting ABC *Four Corners* programme run on 4<sup>th</sup> May 2015. The programme exposed underpayment and exploitation of rural workers, particularly migrants working on farms. Victoria featured prominently.

## Law breaking exposed

Several farms were using labour hire firms. This became a focus of attention. That is, the suggestion was/is that labour hire was the cause of the exploitation. But evidence is that the exploitation is a result of persons breaking existing laws. The solution is to be found in improved enforcement.

## Enforcement

Following the Four Corners show regulators moved in hard and fast with enforcement activities. The Fair Work Ombudsman (FWO) was, in 2015, a relatively new player in the enforcement mix, the first regulator having effective pay rate enforcement powers. The FWO

- Conducted audits of farms and labour hire firms
- Imposed enforcement undertakings on both farms and labour hire firms
- Required back-pay to affected workers
- Imposed ongoing auditing and monitoring on farms and labour hire firms

The FWO's enforcement has worked.

However the Victorian Bill ignores the development of effective enforcement by the FWO and other regulators. The Bill instead introduces a totally new and draconian system controlling who can operate a labor hire business in Victoria.

## Main features The Bill;

- Takes in all labour hire in all sectors including high-end consulting and so on. It would even, for example, require a firm who 'loans staff' to another firm to be licensed as 'labor hire' even if labor hire is not its business.
- Only provides a 3-year license that must be renewed every 3 years.
- Allows parties to object to a license, including unions and a labor hire firms competitors.
- Enables the cancelling of a license before judicial review of a cancelling can occur.

## Outcomes The Bill

- Is major regulatory overreach to a problem that has arguably been addressed through quality, targeted enforcement.
- Denies basic justice because the cancelling of a license effectively kills a business neutering the businesses capacity to appeal to the courts.
- Invites and facilitates corruption because competitors, unions and others will be able to blackmail labor hire firms for favours and money with the promise not to object to licence holding.

## Recommendation & Request

That the Bill be rejected.

## 2. Background to the vulnerable worker exploitation expose

On Monday, 4 May 2015, ABC *Four Corners* ran a hard-hitting exposé of exploitation of vulnerable workers in the rural sector with a particular emphasis on Victoria. The exposé caused an immediate eruption of regulatory enforcement by multiple government agencies to clean up the sector.

In fact, the *Four Corners* programme didn't cover the full extent of the problem. It can reasonably be alleged that the rural sector has long been engaged in significant underpayment of workers with multi-layered factors at play as follows:

2.a) Going back some 20 years, most farmers employed all their seasonal and picking workers directly.

- The payment of workers frequently and quite routinely involved cash-in-hand and undeclared payments.
- Correct and full income tax remittances were not undertaken by many farmers.
- Workers' compensation premiums were not fully declared or paid.
- Incorrect payroll tax declarations were made or not rendered at all.
- Many workers were also on social security benefits and not declaring their cash incomes.
- Many workers were not paid at or above the required minimum or award rates.
- Many workers were working illegally in that they did not have the required immigration work permits.

2.b) As a result of this situation, the Australian Taxation Office, the Immigration Department and the Social Security Department had dedicated rural enforcement teams that regularly raided farms. But most farms were relatively small family affairs scattered widely across rural sectors. Illegal workers and cash-in-hand workers were 'fleet of foot' and moved quickly. The enforcement bodies were essentially involved in a 'squeezing of the balloon' exercise. Enforcement would occur in one area and the problems would pop up somewhere else.

2.c) However, probably around the late 1980s to early 1990s significant change began in the rural sector—namely, the demise of small farms with the subsequent concentration of many small farms into much larger and more professional operations. This occurred, in particular, with farms producing vegetable, fruit and seasonal crops. The demands of economies of scale forced this consolidation, although obviously a smattering of smaller farms continued to exist.

2. d) This farm consolidation has caused a shift in the way farms engage staff, particularly their ongoing picking and seasonal staff.

- The farms have become more 'industrial' in their operations. They don't simply grow and pick produce, but process produce in state-of-the-art, high hygiene-controlled factories. They are forced to do this to meet the hygiene and quality standards demanded by the dominant buyers in the market: the big supermarket chains and franchised fast food chains.
- The consequence is that these larger farms have many permanent staff, most of them directly employed, even though they also employ seasonal and casual picking staff.

- Because the farms have become much larger in size but smaller in number, the regulators from ATO, immigration, social security, workers' compensation, payroll tax, and occupational health and safety (including food safety) have been able to be more focused and successful in their enforcement efforts. Compliance with regulatory requirements has increased significantly so that any non-compliance could be said to fall within a 'normal' range.

But

- There was a shift with seasonal and picking staff to the use of (so-called) rural based labour hire firms. This is where the problems were occurring as highlighted in the *Four Corners* show.

2. e) The *Victorian* rural labour hire sector developed and had (and retains) the following features:

- The seasonal and casual/ongoing picking workforces are primarily sourced from the Springvale/Dandenong and Footscray areas of metropolitan Melbourne.
- Significant numbers of workers are drawn from the Asian and other immigrant community groups in these locations. They are often sourced through family and close community links in these communities.
- The sourced workers move from these locations, either daily or shift residency temporarily, to farms located in Gippsland, the Dandenongs and Shepparton, with some, but more limited, activity in the Victorian wine-growing areas.
- The farmers have no direct links with these migrant communities and therefore a significant 'labour hire' sector developed in these communities.

2.f) These community-based 'labour hire' companies were (and are) generally pretty small, supplying perhaps at most 200 people, often to as few as 30–40 people to farms.

- They are owned and run by people in the communities using their community links and could be viewed as typical immigrant small businesses upon which much of Australia's economic success has been built.
- Some of these small businesses are run properly and comply, or seek to comply, with regulatory requirements. Others are 'dodgy' to say the least.
- The sorts of services they supply are not just the placement of people to work at farms but extend to organizing:
  - Transport of workers to and from the farms.
  - Worker accommodation—sometimes good, and sometimes substandard.
  - Food desired by the particular community workers.

The people running these firms are usually a family within the community who charge the workers for transport, food and accommodation along with charging the farmers for their services.

2. g) Significant problems emerged around a number of these labour hire businesses. In particular:

- Overcharging for food, accommodation and transport (some workers would claim).
- Underpaying of workers in relation to awards and minimum rates.

- The supply of illegal immigrant workers—that is, people without legal work permits
- Non-payment of income tax, superannuation, workers' compensation premiums and people working while on social security benefits.

The volume of cash payments was/is less than in the past because the larger farms tend to be paid by their clients directly into farm bank accounts. They therefore have much less cash with which they could pay workers or the labour hire businesses.

On top of this, particularly where the illegal migrant worker situation operates, there are some highly unsavoury factors, some of them quite dangerous. These include:

- Workers coming to Australia on temporary holiday, student or similar visas and paying large sums of money to 'agents' in their home country in the belief that they had acquired a work visa.
- Workers being lent money in their home country from 'agents' to acquire these scam entry visas and thus effectively becoming 'bonded' workers when in Australia.

This sort of highly illegal and criminal activity is/was at the 'edges' of the farming labour hire sector, but without doubt it is present. For example, there was a major gang operating out of Taiwan involved in this sort of activity, certainly as late as 2016. In addition, this sort of criminality can have close links and involvement with illegal prostitution (effectively people trafficking) and illegal drug trafficking. The problems were and are real and require great enforcement efforts to overcome them.

The major issue to appreciate in the context of the Victorian Labour Hire Licensing Bill is that the behaviours exposed in the *Four Corners* programme involved players in the sectors breaking multiple existing laws. That is, there was significant law breaking and even criminal activity. There is nothing wrong with the laws. The tax collection, workers' compensation, minimum pay rates laws and so on are robust. The *Four Corners* programme exposed an enforcement problem, not a regulatory problem. The problem was heavily focused on the rural labour hire businesses as exposed by *Four Corners*.

### **3. Who knew what?**

It can be reasonably assumed that the farmers caught up in the *Four Corners* exposé, either directly or as a flow-on effect, should have been aware of or at least 'red flagged' underpayment or non-compliance by the rural labour hire firms they used. We explain the reasoning below.

Underpayment was the chief allegation by *Four Corners*. The 'red flags' existed in the farmers' knowledge and analysis of the commercial rates they paid to the labour hire firms. The farmers should have been alert to this.

The commercial structure of all labour hire businesses is straightforward. Labour hire firms have the following legal obligations in terms of costs:

- Pay workers at or above minimum pay rates.
- Remit PAYG income tax withholding of workers whether the workers are employees or independent contractors.
- Register for workers' compensation, declare payrolls and remit premiums calculated on the payrolls and manage all workers' compensation claims

- Pay payroll tax if above the relevant thresholds.

Then, to cover the costs and make a profit, the firms:

- Charge the clients (users of the labour) a fee. This fee is the only commercially negotiable item they have.

In addition labour hire firms have legal obligations under

- Occupational Health and Safety laws.
- Equal Opportunity and Anti-Discrimination laws.
- Food safety laws and regulations where applicable.

In the case of the farming sector, the farmers who used labour hire firms were and are well aware of the financial costs that the labour hire firms would and should have faced. This is because the farmers were and are required at law to pay very similar costs to their directly engaged staff.

To give an example, the following scenario would apply.

Say

- the minimum pay rate under the appropriate award was \$17 an hour (and)
- Workers' compensation premiums in the sector averaged 3 per cent (and)
- Assume the labour hire firms were under the payroll tax threshold (and)
- In the labour hire sector, a firm in the lower end of the pay market needs to charge 10–12 per cent premium (minimum) to cover costs and be profitable.

Therefore, a farmer should expect to be paying the labour hire firm an absolute minimum cost constructed as follows:

$$\begin{array}{l}
 \$17.00 \text{ per hour to the worker.} \\
 \$ 0.51 \text{ per hour workers' compensation premium (3 per cent of \$17)} \\
 \underline{\$ 1.70 \text{ per hour labour hire firms margin}} \\
 = \quad \$ 19.21 \text{ per hour charged to the farmer.}
 \end{array}$$

That is, at a bare minimum, the farmers should have expected to be paying \$19.21 per hour of worker time to the labour hire firm. In some cases farmers were paying above, and sometimes well above, the \$19.21 per hour figure.

But what was also occurring at the time of the *Four Corners* programme was that quite a number of farmers were paying less than \$19 (on this scenario). Where this was occurring, it was a clear 'red flag' to those farmers involved.

Those farmers paying below the \$19.21 often offered the excuse that they were not responsible for what the labour hire firms did. Where farmers said this, they were in effect 'turning a blind eye' to situations directly under their commercial control where several things were potentially occurring, namely:

- Underpayment of the workers working on their farm/s.
- Non-payment of PAYG tax.
- Non-payment of workers' compensation premiums.

What happened was that this 'turning of blind eyes' blew up in this farming sector's face with the *Four Corners* exposé.

#### **4. What happened after the *Four Corners* programme?**

The response from regulators to the 4 May 2015 *Four Corners* show was swift, harsh and immediate.

The ATO, immigration and social security rural enforcement arms launched immediate raids of farms and labour hire firms. There were frequent road-blocks on the routes where labour hire firms bussed workers from Melbourne or regional towns.

But there was also a new regulator in play who changed the normal regulatory enforcement ‘squeezing the balloon’ situation. That regulator was (and remains) the Fair Work Ombudsman (FWO).

#### **5. Fair Work Ombudsman enforcement activity**

The Fair Work Ombudsman was established 2009. It is a comparatively new player in the regulatory and enforcement arena. But in a short space of time it has become hugely effective. In relation to the *Four Corners* exposé it has arguably closed down the problems. It is the ‘missing piece’ of the regulatory and enforcement jigsaw puzzle that can, on the evidence, be said to have cleaned up the sector. We explain this below.

In May 2015 the FWO issued a statement in response to the *Four Corners* show. The full statement is here. <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/may-2015/20150507-fwo-statement-in-response-to-4-corners>

Relevant excerpts read as follows:

- “Many of the issues canvassed by 4-Corners are well known to the Fair Work Ombudsman and we have been pro-active in bringing these issues into the public arena.”
- “We agree there is a problem with the treatment of visa-holders by labour-hire contractors operating in the horticulture and poultry processing sectors, in particular.”
- “While we have always had a strong focus in relation to visa-holders, we now give these vulnerable employees priority through our specialist Overseas Workers Team (OWT), which was established in July 2012.....”
- “In mid-2013, in response to ongoing requests for assistance from employees in the horticulture sector and our own observation that there is confusion among growers and labour-hire contractors about their workplace obligations, we launched a three year program we have named The Harvest Trail.”

The statement goes on to explain the step up in the FWO’s activities following the *Four Corners* programme.

The FWO moved in on the farms and operations covered in the *Four Corners* show, but did not stop there and did a sweep through the farming sector. The FWO conducted highly detailed forensic accounting analysis of the pay rates and related commercial structures and relationships of farms and the labour hire firms supplying them personnel. The FWO uncovered underpayments—particularly in those farms that should have known because of the ‘red flag’ low payments to labour hire firms discussed above.

As a consequence of its discoveries, the FWO has negotiated a significant number of *Enforcement Undertakings* with farmers and rural labour hire operators.

Those *Enforcement Undertakings* have required amongst many things:

- Back-pay to persons underpaid.
- The implementation of systems by farmers and labour hire operators to verify the work status of workers, payment of people according to relevant awards and so on.
- Farmers to undertake regular independent audits of their systems and for those reports to be supplied to the FWO.
- Agreement for FWO to undertake audits.

FWO *Enforcement Undertakings* are public documents published on the FWO's website. See here <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/enforceable-undertakings>

A list of *Enforcement Undertakings* for 2015–16 alone is here.

<https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/enforceable-undertakings/2015-2016-enforceable-undertakings> and every year is available and updated.

Attached to this submission (see Attachment A below) are excerpts from one Enforcement Undertaking resulting from the *Four Corners* exposé. These excerpts show the binding structure of the Enforcement Undertakings on the farmers and labour hire operators.

A full Enforcement Undertaking for one rural labour hire operator is available here. <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/june-2016/20160628-tsh-eu-presser> It binds 'Team Search Harvesting' who were/are a lettuce farm contractor who short-changed almost 100 overseas workers according to the FWO.

In addition, the FWO conducted wide-ranging investigations with Baiada, <https://www.baiada.com.au> the large poultry processor who featured prominently in the *Four Corners* show and which was accused of worker exploitation through its labour hire arrangements.

- FWO issued a statement of findings in relation to Baiada <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/june-2015/20150618-baiada-group-statement-of-findings>
- Affected workers were back-paid <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/december-2015/20151204-baiada-hotline>
- Baiada declared it has a 'moral and ethical responsibility to stamp out contractors unlawful practices at its worksites' <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/october-2015/20151026-baiada-media-release>

Other FWO outcomes in the sector include:

- A blueberry farm having to back-pay workers \$46,000 <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/november-2015/20151130-benning-eu-presser>
- Outside of the rural sector a labour hire operator faced Court over alleged sham contracting and underpayments <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/june-2015/20150609-cardamone-litigation>

The outcome of the FWO's enforcement activity was as follows:

- Several rural labour hire firms went out of business. They 'disappeared', particularly where owners could not be identified and financial and employment records were near non-existent.

- A number of labour hire firms were given a clean bill of health. The owners were upfront and cooperative. Financial and employment records were able to be audited. Several of the firms were included in Enforceable Undertakings

## 6. *Vulnerable Workers Act 2017*

In a situation parallel to that of the rural sector discussed here, Federal Parliament enacted the *Vulnerable Workers Act*. [Fair Work Amendment (Protecting Vulnerable Workers) Act 2017].

The Act came about because of very similar circumstances to those that occurred with worker underpayment in the rural sector. This time it was underpayment in the Australian franchise sector. In August 2015, *Four Corners*, *The Age* and *Sydney Morning Herald* broke a story exposing underpayment of 7-Eleven workers by 7-Eleven franchisees. (See here for *The Age* <https://www.theage.com.au/business/careers/7eleven-a-sweatshop-on-every-corner-20150827-gj8vzn.html> and here for *Four Corners* <http://www.abc.net.au/4corners/7-eleven-promo/6729716> )

It was not just 7-Eleven who became caught up in the underpayment scandal but many other high profile franchisors, including Caltex, Dominos Pizza and others.

As with the farmers with rural labour hire, franchisors argued that they were not responsible for the underpayments because they were at contractual arm's length from the workers who were employed by the franchisees. This argument ultimately did not wash with the public, the media or the Parliament.

The *Vulnerable Workers Act* holds franchisors responsible and liable for underpayment of franchisees' employees if the franchisors should have reasonably known about the underpayments. The definition of franchisor is quite broad and includes holding companies.

In relation to holding companies, the Act reads:

*Holding companies*

- (2) A person contravenes this subsection if:
- (a) the person is a body corporate; and
  - (b) a subsidiary (within the meaning of the *Corporations Act 2001*) of the body corporate who is an employer contravenes a civil remedy provision referred to in subsection (7); and
  - (c) either:
    - (i) the body corporate or an officer (within the meaning of the *Corporations Act 2001*) of the body corporate knew or could reasonably be expected to have known that the contravention by the subsidiary would occur; or
    - (ii) at the time of the contravention by the subsidiary, the body corporate or an officer (within the meaning of the *Corporations Act 2001*) of the body corporate knew or could reasonably be expected to have known that a contravention by the subsidiary of the same or a similar character was likely to occur.

The reason for highlighting the *Vulnerable Workers Act* is twofold:

- a) Federal Parliament acted to ensure that franchisors are responsible to ensure that franchisees' employees are paid according to law. This is because the franchisors exercise significant control over franchisees.

Similarly, the Fair Work Ombudsman has ensured that farmers require the labour hire firms they use to ensure that labour hire workers are paid according to law. The FWO has not done this through a specific legislative trigger but rather has negotiated contractual undertakings jointly with the farmers and labour hire firms. The FWO has achieved the outcomes sought under the *Vulnerable Workers Act* but done this through high quality enforcement action. In the end, it is enforcement that matters. A law is no good if it is ignored.

- b) The provision covering holding companies in the *Vulnerable Workers Act* are arguably important in the labour hire sector. It is sometimes the case that a user of labour will sometimes set up a subsidiary labour hire company to supply workers (effectively) to itself. It was known that some farmers had used this technique. The holding companies provision in the *Vulnerable Workers Act* would arguably encompass such arrangements, making the farmer ultimately liable for worker payment.

## 7. Interim Summary

The description of the situation detailed above and the actions taken can be summarized as follows:

- There were genuine problems of underpayment and worker exploitation in the rural sector with particular identified problems in Victoria.
- Some farmers used labour hire firms in the belief that the farmers were not responsible for what the labour hire firms did or how much they paid their workers.
- The regulators, being tax, workers' compensation, immigration and so on doubled their efforts after the *Four Corners* programme.
- The Fair Work Ombudsman moved in swiftly and undertook compliance activity specifically focused on pay rates to workers. This was the missing piece of the enforcement 'jigsaw', as the other regulators did not have authority over wages paid.
- A number of rural labour hire firms closed and 'disappeared' as a result of FWO enforcement. Others remained in business but are closely watched by the FWO and its undertakings.
- It can reasonably be said that the problems exposed by *Four Corners* have been addressed and the industry 'cleaned up'. If problems occur in the future, the enforcement regimes are in place and have proved themselves effective in tackling them.

The key to understanding why a clean-up has occurred lies in two things:

- 1) The FWO has filled a regulatory and enforcement gap that had existed for a long time. That is, tax and other authorities did not have the jurisdiction to address worker payment issues. The FWO does.
- 2) The FWO has enjoined both the farmers and the labour hire firms in the enforcement activities. That is, they have captured the commercial chain. If

the FWO had focused only on the labour hire firms, this would most likely have been ineffective as it would have enabled farmers to ‘turn a blind eye’ and claim that they had no responsibility.

## **8. Union involvement**

A backgrounding on union activity on this issue may assist a fuller understanding.

There were (and are) two unions competing for membership in the rural sector. Their membership numbers are low. Nationally, unions’ private-sector membership as a percentage of the workforce is below ten per cent. (See columnist and economist Judith Sloan in *The Australian* <https://www.theaustralian.com.au/opinion/columnists/judith-sloan/actu-boss-comes-out-swinging-untroubled-by-facts/news-story/6a5742f7927b42fae1b0bcad3f2ff801> ) It would be reasonable to assume that the rate of membership in the rural sector is below the national average.

In the face of declining membership in the late 1990s, Australian unions adopted US-based organising techniques to sustain membership. Essentially, the techniques undertaken involve extensive training of union staff <https://www.actu.org.au/education-training/organising-works> in campaigning techniques. Campaigning is focused on finding points of leverage to convince employers to ‘cooperate’ with unions. Unions, in return, remove ‘problems’ or provide benefits to employers.

One striking example of this campaign technique was exposed in the (now declared illegal) agreements between Coles and the Shop Distributive and Allied Employees Association (SDA). The SDA made arrangements with Coles that resulted in many thousands of Coles workers being underpaid. The reduced labour costs gave Coles a competitive advantage over small retailers who operate under awards. The situation was described by ex-union official and columnist for *The Australian*, Grace Collier. <https://www.theaustralian.com.au/opinion/columnists/grace-collier/employers-unions-benefit-from-secret-deals-exploiting-workers/news-story/4b5c10fd7d99f7903f6fb168854ba8c8?login=1>

In return for the low wages deal, Coles ‘encouraged’ union membership and made payments to a range of union-controlled funds. The SDA–Coles deal has been found to be illegal, has since been cancelled and new legal arrangements put in place.

What needs to be understood is that this is the current union business model. Their marketing task is to apply pressure to employers to create the unions’ revenue streams.

The relevance of this to the rural sector situation discussed in this submission is that one union, in particular, was heavily campaigning around farms in the build-up to the *Four Corners* programme. It is alleged that farmers were approached by some union officials and told directly, ‘work with us, and your problems will go away!’ These approaches were for the most part rebuffed, mainly because the farms are mostly family-owned and operated by families who typically distrust unions.

## **9. Unions and labour hire**

To provide more of a backdrop, Australian unions have a long-standing antipathy towards labour hire operations of any sort.

Publicly, unions claim that labour hire is an ‘employer’ technique to avoid responsibilities. Unions also decry labour hire as part of their campaign against ‘insecure’ work. See here <http://www.actu.org.au/actu-media/media-releases/2016/australian-unions-welcome-crackdown-on-labour-hire-and-insecure-work> and here <https://www.cfmeu.org.au/policy-research/labour-hire-and-insecure-work> as examples of union positioning. For unions it would appear, the only legitimate job is a ‘permanent’ job, as if permanency is ‘secure’.

(As an aside, Self-Employed Australia views the notion of job ‘permanency’ as a figment of the imagination that harks back to ‘older’ days. In the current economy, no job is ‘secure’ or ‘permanent’, except perhaps in the public service. For the self-employed, ‘security’, if there is such a thing, lies in the willingness and energy of people to be entrepreneurial.)

Notwithstanding Self-Employed Australia’s generally different perspective to that of the unions on many issues, in the example discussed in this submission—where farmers were turning a ‘blind eye’ to underpayment by the labour hire firms they engaged—union complaints are justified. But what unions gloss over is the fact that it was the underpayment that was illegal. It was not labour hire, as such, that was wrong (some labour hire companies were acting legally). Rather, it was the illegal activity of some labour hire firms and the willingness of some farmers to ‘turn a blind eye’ to law breaking that was the problem. That problem needed to be (and has been) addressed by enforcement of existing law.

## **10. The size and nature of labour hire in the Victorian economy**

Unions present the labour hire ‘situation’ almost as if it were a crisis. But, by any measure, labour hire activity in the economy is comparatively small. Persons working through labour hire stood at eight per cent of the workforce in 2001. By 2008, that had dropped to five per cent and has stayed there. (See Judith Sloan in *The Australian* <https://www.theaustralian.com.au/opinion/columnists/judith-sloan/actu-boss-comes-out-swinging-untroubled-by-facts/news-story/6a5742f7927b42fae1b0bcad3f2ff801> )

With a total workforce of some 12.4 million <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0> that means nationally there are some 620,000 people working through labour hire. In Victoria with a labour force of some 2.7 million <https://profile.id.com.au/australia/employment-status?WebID=110> that would suggest that there are perhaps some 135,000 people working through labour hire

In other words, the Victorian Labour Hire Licensing Bill then will have an impact on around 135,000 people.

To gain an understanding as to where these labour hire workers may be working, the following table from the 2004 Victorian Parliamentary *Inquiry into Labour Hire Employment in Victoria* is helpful. The table shows the occupation types where labour hire (including recruitment companies) have placed people across Australia. By way of explanation the table presumably shows multiple placements. That is, say, an individual placed in three different positions in one year. (Note: the Table has been converted to percentages where it actually shows raw numbers)

**Table 2.2 Number of Placements, By Occupation, 2001-02**

Chapter 2: Overview of Labour Hire Employment

Industry	Temporary/Contract Placements
General Management/Executive	0.3
Clerical	15.3
IT and Telecommunications	1.0
Banking and Finance	2.0
Operational and Technical	1.0
Trade, Labour and Related Occupations	26.6
Health Care and Medical	36.8
Hospitality, Travel and Tourism	10.5
Other	6.5
Total	100

Source: ABS, *Employment Services, 2001-02*, Cat no. 8558.0.

<https://www.parliament.vic.gov.au/papers/govpub/VPARL2003-06No100.pdf>

The table is helpful because it shows that labour hire operates overwhelmingly in the white-collar and professional areas. And probably contrary to many expectations, the traditional blue-collar jobs, although large in number, do not dominate. In the ‘Trade, Labour and Related Occupations’ category the most significant number would work in the construction sector.

On the basis of these figures, it is quite reasonable to suggest that the numbers of persons working through labour hire in the Victorian *rural* sector at any one time is probably in the hundreds of persons, maybe several thousand, but not tens of thousands.

This inevitably leads to a significant tension in relation to the Victorian Labor Hire Bill, namely:

- The Bill was born from and justified on the basis of exploitation and underpayment in the rural sector affecting several hundreds, maybe a few thousand people.

But

- The Bill will nonetheless cover and have an impact on some 135,000 people, the vast number of whom have nothing at all to do with working in the picking fields of Victorian farms.

This latter group are overwhelmingly professional people working in information technology, engineering, business analysis, medical, health and other consultancy areas. These professionals are predominantly placed into consultancy work through major and respected white-collar labour hire and recruitment firms such as Hays, Adecco, Chandler Macleod, Manpower, Paxus, Programmed—and the list goes on. These are not ‘fly by night’ businesses, but highly respected, often major international players operating in the ‘high end’ of the Victorian economy.

These professionals are not low-paid. In the information technology and related consultancy sectors, for example, rates start at around \$65 per hour (plus gst) with the most common market rates being \$90 to \$100 an hour. Rates can and do go much higher, depending on the scarcity of skills that consultants have on offer to the market.

The users or clients of these white-collar labour hire firms include all the banks and firms across the finance sector, medical and other research organisations, technology development, design, drafting, engineering companies of all sorts and, most particularly and extensively, government departments across the board.

The Labour Hire Licensing Bill needs to be seen in the context of its impact, not simply on the rural sector, but across a significant, critical and broad sweep of the ‘high end’ of the Victorian economy.

## **11. Existing registration/licensing/obligations of labour hire**

Labour hire businesses in Victoria are already subject to extensive regulation and even licensing. Labour hire businesses:

- Must register with the Victorian Work Compensation Authority, declare remuneration, pay premiums and manage claims.
- Must register with the State Revenue Office for payroll tax purposes if over the relevant threshold.
- Are required to remit income tax withholding and superannuation payments to the Australian Taxation Office for both employees and independent contractors under PAYG.
- Are subject to occupational health and safety laws with specific responsibilities to workers they place with clients.
- Are subject to equal opportunity and anti-discrimination laws and hold responsibilities under those laws.
- Are subject to all provisions of the *Fair Work Act* and the jurisdiction of the Fair Work Ombudsman in relation to employees.
- Are subject to the Unfair Contract laws administered by the Australian Competition and Consumer Commission in relation to self-employed, independent contractors.
- Are subject to the jurisdiction of the Fair Work Ombudsman under sham contracting laws in relation to self-employed, independent contractors.
- Are subject to the competition laws administered by the ACCC.
- Where they are a company (and most labour hire firms are companies) they must be registered with the Australian Securities and Investment Commission and subject to all the laws administered by ASIC.

In short, this is not an unregulated sector.

## **12. The Structure of the Labor Hire Licensing Bill**

The Bill is extraordinarily long and difficult to read. It consists of 101 pages with 119 clauses and over 20,000 words.

The Bill is supposed to be about “... protecting vulnerable workers from exploitation...”

It purports to achieve such protections by setting up a bureaucratic system of controlling who, in Victoria, can operate a labour hire business.

The core features of the Bill include the following:

- It applies across the entire labour hire sector.
- Makes provision for a three-year licence that must be renewed every three years.
- Allows a wide array of persons to object to a licence or renewal.
- The licencing authority can cancel a licence if the authority believes ‘on reasonable grounds’ that it should be cancelled.

It also includes powers, for example, where the authority can search someone’s premises without a warrant.

### Extracts from the Explanatory Memorandum

The Explanatory Memorandum to the Bill explains as follows.

#### Object

The key object of this Bill is to protect vulnerable labour hire workers from exploitation by the providers of labour hire services and hosts.

#### Purpose

The purposes of the Bill are to establish a licensing system to regulate the provision of labour hire services, to impose civil penalties upon providers and users of labour hire services who obtain those services from anyone other than licensed providers of labour hire services,...

#### Who is covered

Clause 7(1) contains the general definition of *provides labour hire services*. It states that a person (a *provider*) *provides labour hire services* if 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 the individuals are workers for the provider, within the meaning of section 9(1)

#### Includes self-employed

"Contractor management services" is not defined in the Act, but has its ordinary meaning, which covers services whereby a business recruits independent contractors on behalf of a third party (host)....

#### Fit and proper person test

Clause 22 helps to support the objects of the Act by excluding from the licensing scheme a person who has demonstrated conduct consistent with the exploitation of workers or conduct that is not compliant with the law.

#### Persons who may object

Clause 32 provides an interested person with the ability to make an objection to an application for a licence or for renewal of a licence.

*Interested person* is defined in clause 3 to mean a person or organisation who has an interest in the protection of workers or the integrity of the labour hire industry. This may include, for example, a local council, a worker, a union, an industry peak body or another labour hire provider.

#### Cancel

Clause 40 provides the Authority with the capacity to cancel a licence, where the Authority believes on reasonable grounds that a licence holder may have engaged in conduct which warrants exclusion from the labour hire industry.

#### Raid without warrant

Clause 74 provides for entry without consent or a warrant.

### 13. Our criticisms of the Bill

Our criticisms of the Bill are as follows:

#### 13. a) The Bill does nothing to add to attaining its objective of preventing exploitation of vulnerable workers.

- The identified exploitation of workers (in the rural sector) to which the Bill is a response was exploitation through illegal activity by specific players in the rural sector.
- The exploitation was not a product of labour hire as such, but involved farmers themselves as well.
- The solution required enforcement not additional regulation.
- There had been a gap in the regulatory enforcement area that has since been closed off by the Fair Work Ombudsman.
- The FWO has imposed heavy and effective oversight and enforcement on the identified problem areas, eliminating some labour hire players in the process. It now maintains an auditing, reporting and enforcement regime over rural labour hire firms and their client farms.
- If further problems in other sectors emerge, the FWO has demonstrated a striking capacity to move in, investigate and act, either on its own or in conjunction with other regulators.

#### 13. b) The Bill has an objective different to that stated.

Because the Bill applies to all labour hire firms in Victoria and not just firms in sectors where identified exploitation has been found (that is, rural and maybe others) the Bill clearly has an objective different to that stated.

That objective is for substantial control over who is allowed to run labour hire businesses in Victoria. This is an enormous intrusion into the right and ability of people to conduct business as they choose. It is akin to the State Government seeking to license every single retail business in Victoria.

#### 13. c) The Bill will in reality create opportunity for blackmail, corruption and anti-competitive activity across an important and critical sector of the Victorian economy.

We make this particular criticism because the structure of the Bill allows for, indeed almost invites, such corrupting behaviour to occur as follows:

- The three-year licence with a requirement to renew every three years sets the scene for placing enormous pressure on the labour hire firms. They will remain on permanent tenterhooks about whether their licence will be renewed or not. This puts the labour hire firms in an extremely vulnerable position subject to bureaucratic whim outside of normal commercial dynamics.
- This creates opportunity for unions, for example, to approach labour hire firms to 'cooperate' with them, namely to force union membership, make payments into union funds and other corrupting activities as identified in the Royal

Commission into Union Corruption.

<https://www.tradeunionroyalcommission.gov.au/reports/Pages/Final-Report.aspx>

The ‘payoff’ from unions to the labour hire firms would be that unions would not object to the granting or renewal of licences.

This would give unions enormous power to determine who could operate in the labour hire area, not only in such areas as construction but now, information technology and all high-end consulting.

The Bill, in effect, creates a legal process for unions to engage in market manipulation for the purposes of anti-competitive outcomes across the sector.

- The Bill creates opportunity for the suppression of competition by competitors in the sector.

The Bill enables labour hire firms to object to the issue of a licence or licence renewal of that firm’s competitor or competitors. This is extraordinary and unprecedented. It would be like licensing retailers in such a way that Coles, for example, could make application to have Woolworths closed down. This surely creates a supposedly legal mechanism for direct anti-competitive activity by one firm against another.

13. d) The Bill gives extraordinary power to the licensing authority without effective restraint or oversight. It is draconian in the extreme.

- The Bill allows for the licensing authority to cancel a licence if the authority believes ‘on reasonable grounds’ that a licence should be cancelled. The cancellation becomes immediate and the only recourse for the labour hire firms is to appeal to the Administrative Appeals Tribunal (AAT). But such an appeal process is a sham. Once the licence is cancelled, the labour hire firm is effectively closed down. It is out of business. It is dead. Any appeal to the AAT cannot be funded because income to the firm stops. Any appeal would take a considerable time. In the many months it takes to conduct an appeal the firm will have lost all of its clients.

#### **14. Conclusion and request**

Our conclusion is that the Bill is an appalling piece of legislation. It is a sham, we say, because it purports to achieve one objective but in fact targets a quite different objective.

The exploitation problems identified in the rural sector have effectively been addressed by the Fair Work Ombudsman. If the Victorian State Government were genuine in its desire to prevent such exploitation, it should put resources into working with the FWO and other relevant regulators to assist them.

Our request is that the Bill be rejected in full.

#### **15. Footnote: Why SEA is interested in the Bill**

Very large numbers of self-employed people are engaged in the consultancy and related areas. Defending and protecting the right of all people to be self-employed is our reason for being. Huge numbers of self-employed people work through labour hire and that industry must not be corrupted. We fought for close to ten years for the introduction of the unfair contract laws for self-employed people for example and do not want to see such advances diminished or corrupted.

**Attachment A:**  
**Example of an FWO Enforcement Undertaking resulting from the Four Corners exposé. Excerpts.**



Australian Government  
**Fair Work**  
OMBUDSMAN

**PROACTIVE COMPLIANCE DEED**

Between

The Commonwealth of Australia  
(as represented by the Office of the Fair Work Ombudsman)

and

XXXX Farms Pty Ltd (ACN .....)

and

XXXXXX Farms Produce Pty Ltd (ACN .....)

and

YYYYYYYYY Employment Services Pty Ltd (ACA .....)

**Identifying workers and maintaining worker records**

The ..... Farm will implement systems to enable the hours worked by all Horticulture Workers, as well as the employing entity of those workers, to be readily ascertained,

...

by .....2016, the ....Farm will contact the FWO representative to this deed to arrange a site visit by a FWO representative. During that site visit the ....Farm will demonstrate to the FWO representative the implementation of actions at 2.1(a) and 2.1(b...)

The ...Farm ...ensure that it complies with clause 15 of the *Horticulture Award 2010* in respect of any Horticulture Worker who is engaged and paid as a pieceworker; arrange payment of wages to all Horticulture Workers in a manner that complies with clause 19 of the *Horticulture Award 2010*,...

The ....Farm will provide the FWO with a report on ...date..2016, ...date... 2017 and ...date.. 2018. Each report will:

- a) set out the number of employees engaged as Horticulture Workers on any of its properties listed in Appendix A.

- b) provide evidence (including relevant records and documents), for a sample of 25 Horticulture Workers, demonstrating that ..... has complied with Clauses 3.1(e) to 3.1(k) above; and

The ....Farm will arrange, at its own expense, for an external accounting professional (e.g. Certified Practising Accountant), audit specialist or employment law specialist (**Auditor**), to commence, after ...date... 2016, ...date... 2017 and ...date...2018 (**Audits**) from the execution of this Deed, an audit of compliance with Commonwealth Workplace Laws and Fair Work Instruments, by .... and any other contractors or sub-contractors supplying Horticulture Workers.

#### **Rectification of Underpayments relating to Horticulture Workers employed by ..... and ....**

If, ....Farm identifies any Underpayments to any Horticulture Worker engaged by ..... or ..... during the period from ..date... 2014 to ...date... 2015 (whether through the investigation process specified at clauses 8 or 12 or otherwise), ....Farm will use its best endeavours to require the employing entity of the Horticulture Worker to rectify the identified Underpayment.

If a contractor or subcontractor fails to rectify any Underpayments in accordance with clause 0 above, within 30 days of the contractor being notified by ....Farm of the Underpayments, ....Farm will make an ex gratia payment to the affected Horticulture Worker to rectify the Underpayment.