



National Labour Hire Regulation: Towards a single national scheme - Consultation paper

Department of Employment and Workplace Relations

April 2023

About the Australian Fresh Produce Alliance

The Australian Fresh Produce Alliance (AFPA) is made up of Australia's key fresh produce growers and suppliers. The members include:

- Costa Group
- Perfection Fresh
- Montague
- Pinata Farms
- Fresh Select
- Mackay's Banana Marketing
- Driscoll's
- Australian Produce Partners
- Premier Fresh Australia
- Rugby Farming
- Freshmax
- Fresh Produce Group.

These businesses represent:

- half the industry turnover of the Australian fresh produce (fruit and vegetables) sector - \$4.5 billion of the \$9.1 billion total
- a quarter of the volume of fresh produce grown in Australia - 1 million of the 3.9 million tonne total
- more than a third of fresh produce exports - \$410 million of the \$1.2 billion export total
- more than 1,000 growers through commercial arrangements, and
- more than 15,000 direct employees through peak harvest, and up to 25,000 employees in the grower network.

The key issues the AFPA is focusing on include:

- packaging and the role it plays in product shelf life and reducing food waste landfill,
- labour and the need for both a permanent and temporary supply of workers,
- market access to key export markets for Australian produce,
- product integrity both within and outside of the supply chain,
- pollination and research into alternative sources, and
- water security, including clear direction as to the allocation and trading of water rights.

The AFPA's aim therefore is to become the first-choice fresh produce group that retailers and government go to for discussion and outcomes on issues involving the growing and supply of fresh produce.

Products grown by AFPA Member companies include:

Apples	Blueberries	Cherries	Nectarines	Raspberries
Apricots	Broccoli	Fioretto	Onions	Salad leaf
Asparagus	Broccolini	Green Beans	Oranges	Spinach
Avocado	Brussel Sprouts	Herbs	Peaches	Strawberries
Baby Broccoli	Butternut	Lemons	Pears	Sweet Corn
Baby Corn	Pumpkin	Lettuce	Pineapples	Table grapes
Bananas	Cabbage	Mandarins	Plums	Tomatoes
Beetroot	Cauliflower	Mango	Potatoes	Water Cress
Blackberries	Celery	Mushrooms	Cucumber	Wombok

Introduction and Principles

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

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

- The Australian Fresh Produce Alliance (AFPA) are strongly supportive of a National Labour Hire Licensing Scheme that:
 - Covers all labour hire providers in the economy and operates across all states and territories
 - Improves compliance with relevant laws and legislation among labour hire providers and improves outcomes for workers
- A National Labour Hire Licence addresses issues with a particular sector of the economy that have been identified by multiple reviews and compliance activities. Licensing a particular sector of the economy in this way must focus on improving compliance
 - If the objective of the Scheme is to improve compliance among labour hire providers, legislation that supports enacting labour hire licensing must have a fixed review point to ensure that this mechanism (licensing) is effective in achieving this objective.

Responses to Consultation Questions

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

The problem identified by multiple reviews and compliance activities is that some labour hire companies are not adhering to Australian laws and regulations to the detriment of workers, particularly foreign workers. While a small part of the national workforce is involved it is a serious issue. The object or purpose must be simple and clear to ensure alignment of objective, legislation and powers, activity and outcome. Suggest the objective should simply be:

'Deliver greater compliance with relevant laws and drive behavioural change'

The objects (transparency, accountability, level playing field, eliminate exploitation) are simply results of the object above.

Question 2. Do you have any comments about the FWO holding the dual role of national workplace regulator and national labour hire licensing regulator, or the proposed oversight board?

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

As a regulator, FWO has a significant remit and workload borne from their existing legislation and accountabilities. Suggest that a better pathway is, understanding that this licensing would require legislation, set up a new office alongside FWO which has a limited life of 10 years to achieve its objective (improved compliance with relevant laws by labour hire providers). The goal should be that labour hire becomes compliant and compliance is administered by FWO under existing laws and regulations.

If an administrative support function is required after 10 years to support licences then FWO could then play that role.

It may be an unintended consequence that if FWO administers immediately it will reduce their capacity to engage in other serious matters such as underpayment across the economy. This is a key concern of the fresh produce sector, as increased funding for FWO has been advocated for consistently, as current funding does not enable appropriate levels of enforcement.

Critical to the success of the labour hire licensing regulator will be appropriate resourcing and funding to deliver on objectives; this is relevant regardless of whether this role is performed within FWO or a separate authority.

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

A government regulator established by legislation should not have a formal tripartite mechanism as part of its operation, constitution, or legislation. The scheme and its administrative and regulatory function must retain independence. Consultative or working groups may be established by the entity to discuss issues, gather evidence, generate input and discussion on key topics but must remain independent to be effective.

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

It is imperative that the scheme applies universally. This will ensure that compliance is achieved and that there are no loopholes or exceptions, and limit unintended consequences were some operators move into industries not covered by licensing.

Question 6. Are there any reasons why traditional triangular and workforce contracting arrangements should not be captured by the scheme? How can the scheme most effectively exclude genuine subcontracting arrangements?

Traditional triangular arrangements should be a primary focus given the numbers of people often involved. Noting that workforce contracting arrangements have been a focus for trolley collection matters for example.

It is critical that genuine subcontracting arrangements ('contractor management services', 'recruitment and placement services' and 'genuine subcontracting arrangements') are excluded as there is not demonstrated evidence of problems.

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

The relevant arrangements should be tightly defined and limited. All other arrangements remain the responsibility of FWO. Increasing the scope of the scheme will blur accountability and responsibility.

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

It is important that all arrangements should apply across the economy. This will ensure that compliance is achieved and that there are no loopholes or exceptions, and limit unintended consequences were some operators move into industries not covered by licensing.

**Question 9. How can the scheme most effectively capture complex supply chain arrangements?
Question 10. Which, if any, further exclusions from the scheme should be considered?**

Regardless of the complexity of the supply chain, a simply and carefully constructed definition of labour hire activity will capture the relevant arrangements to be the subject of the licence. Consideration could be given to explicitly excluding particular types of genuine subcontracting arrangements (as per discussion paper) for absolute clarity.

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

A government regulator established by legislation should not have a formal tripartite mechanism as part of its operation, constitution, or legislation. The scheme and its administrative and regulatory function must retain independence. Consultative or working groups may be established by the entity to discuss issues, gather evidence, generate input and discussion on key topics but must remain independent to be effective.

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

The determination of adequate workplace relations expertise could form part of the fit and proper person test. There may be a range of ways in which a LHP can demonstrate adequate workplace relations expertise; this requirement is similar to becoming an Approved Employer within the Pacific Australia Labour Mobility (PALM) Scheme. Under the PALM Scheme prospective employers are required to supply evidence of appropriate and compliant workplace relations policies and procedures that would support employment of PALM visa holders. Similar thresholds and supporting documents could be considered within the fit and proper person test.

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

The fit and proper person test must ensure that checks with other relevant agencies (Question 21) are actively undertaken by the labour hire licensing regulatory agency. This should include engagement with FWO, ATO, Home Affairs and the AFP.

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

Key to the success of the labour hire licensing scheme is active enforcement of minimum standards – regardless of the visa status of labour hire employees. If there is a view that workers holding temporary work visas require specific risk management, increased monitoring for LHPs who engage temporary visa holders could be considered.

As part of the initial licence application, a LHP could be required to indicate if they currently, or intend on employing workers within relevant visa classes. A priority for this could be visa classes without Sponsorship requirements, where there is comparatively less oversight (from a regulatory perspective); this visa types could include international students and working holiday makers.

Where a LHP engages these visa holders, in particular at scale, could be subject to more active monitoring in order to address the stated higher level of vulnerability of these workers.

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

The circumstances outlined in the discussion paper that prohibit certain persons from applying for a licence or serving as a responsible officer in particular circumstances are suitable. In addition to these conditions, consideration should be given to prohibiting applicants with a history of repeated breaches of visa and sponsorship requirements/ the Migration Act.

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

A suitable timeframe to prohibit persons from applying for a licence or being a responsible officer is strongly supported.

Question 17. What mechanisms should exist under the scheme for workers or other interested parties to make representations to the FWO concerning a LHP's satisfaction of the application requirements?
Question 18. Should the FWO be required to publicise licence applications via its website?

Key to the success of the Scheme is enforcement, therefore ensuring representations from interested parties should be prioritised to support the enforcement of licensing requirements. Ensuring that there are clear, open and transparent opportunities for interested parties to report breaches of licensing conditions would provide greater benefit in addressing the Schemes objective(*Deliver greater compliance with relevant laws and drive behavioural change*) rather than enabling a channel for interested parties to campaign to a regulator about an application.

The scheme and its administrative and regulatory function must be independent and objective; enabling representations either for or against an applicant subverts the regulatory functions authority and disempowers the agencies decision making authority.

Applications should not be available publicly; only outcomes (successful, unsuccessful or pending) of applications should be available publicly via the regulator's website/on request.

Question 19. Is the proposed financial viability test appropriate?

The proposed financial viability test is appropriate, however, the test as outlined does not enable new entrants to the market to meet financial viability requirements. The current test relies on a business to be currently operating, there may however be scenarios where new LHP may choose to enter the market, and under licensing arrangements will not be able to operate (be able to demonstrate viability) without first receiving a license.

New LHP (that is companies attempting to operate from a "standing start") will require a different financial viability assessments than existing/currently operating LHPs. Options to assess new LHPs financial viability may include bank/lender supported financials/cash flow projections or other means that demonstrate viability should a license be granted.

Question 20. In addition to a police check, should a person be required to provide any other evidence when declaring they are a fit and proper person? If so, what should this information be?

Applicants must be required to disclose if they have previously been found to have breached relevant Acts (Fair Work, Migration etc), or any other breaches under other relevant program arrangements (e.g. the PALM Scheme). While these disclosures may not necessarily prohibit the applicant from receiving a license, it enables the regulator to have a more complete assessment of the applicant and potentially weight risk, consider suitable monitoring activity or additional compliance requirements should a license be granted.

Question 21. In addition to checking Director IDs and compliance with workplace laws, should the FWO check compliance with fit and proper person requirements with other relevant regulators (such as the ATO)?

In order to support robust applications, the regulator must check compliance with other agencies specifically FWO, Home Affairs, ATO and AFP.

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

The fit and proper person test must be formulated to ensure that the applicant is able/is required to demonstrate that they are either the primary owner of the entity seeking the licence or that they have management accountability. Similarly responsible officers must be employed by the entity or be a listed office holder of the company applying.

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

In addition to requirements discussed in the paper, should also consider including ensuring checks are made for relevant convictions on offences relating to drugs and trafficking. Engaging the AFP as part of the fit and proper person test would complement this condition.

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

Question 25. Should a standard licence period apply to all LHPs, or should the scheme provide for extended licence periods for LHPs which have a demonstrated pattern of compliance and proactive measures?

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

In order to support the Scheme's objective (*Deliver greater compliance with relevant laws and drive behavioural change*), the act of applying for and receiving a licence should not be the sole point/measure of compliance. Active and ongoing monitoring and enforcement will be key to deliver outcomes. On that basis, longer licence periods are appropriate, where ongoing monitoring is occurring.

Twelve (12) months is too short for a licence period. The standard licence period should be 5 years to provide business certainty and limit administrative burden. If there is a concern about the initial 'start up' phase of the scheme, perhaps the first licence could be 12 months in length, but subsequent licences be 5 years.

An extended license period for LHPs with demonstrated compliance should not be considered and a standard licence period of 5 years should apply. In order to support greater compliance among LHPs, the Scheme regulator should consider a risk based approach based on LHP profile. For example, LHP with shorter periods of operation (e.g. less than 5 years), high employment of temporary visa holders, large number of employees or other relevant measures should be subject to more active monitoring by the Scheme regulator. This type of monitoring activity may include requesting samples of payslips, review of records, interviews with workers or an audit of operations.

In order to renew a licence; the Scheme regulator should consider performing an initial review of the LHP with a view to create two renewal streams. Where there has been no substantive change to a LHP operations (stability across Directors, employee numbers – including temporary visa holders, sectoral coverage) and there has been no adverse action against the LHP a simplified renewal could take place.

Where there has been substantive change to a LHP operation, a new application for a licence, rather than a renewal may be required.

To ensure the outcome of improved compliance is achieved, an independent audit of a LHPs operation 12 months ahead of licence renewal would support this objective.

Question 27. How should fees be calculated? In considering this question, please outline your preferred approach (e.g. flat rate, consideration of the size of the business by number of employees or annual turnover, etc.) and the main advantages and disadvantages of this approach.

Fees should be proportional to complexity of application. A reasonable and transparent measure would be a fee schedule according to the number of employees (engagement in labour hire arrangements).

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

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

No changes are required.

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

The objective of the Scheme is to ‘Deliver greater compliance with relevant laws and drive behavioural change’. Accommodation and the provision of transport are beyond the scope and purpose of this Scheme and therefore LHP’s providing additional information on this should not be incorporated.

Question 31. Are there other obligations that should apply to hosts (e.g. providing access to amenities, training opportunities and job vacancies to third-party workers, or ensuring access to workplace injury management, including modified duties for injured labour hire workers)?

Host employers are required to meet obligations under Fair Work Act as employers and the purpose of LHL is to ‘Deliver greater compliance with relevant laws; these are compliance issues rather than licensing issues.

Question 32. Should hosts be subject to accessorial liability under the scheme for workplace non-compliance of the LHP or others in the supply chain?

Question 33. Should the FWO be empowered to issue guidance in specific industries to assist entities to ensure compliance with the licensing scheme throughout their supply chains?

Responsibility for non-compliance must reside with the LHP.

Keeping the objective in mind: that all workers are employed and paid correctly and lawfully, a range of significant penalties coupled with compliance and enforcement action is the best path forward.

We do not seriously contemplate making the parents responsible for the criminal acts of their adult children, and so it is with accessorial liability, there are (appropriate) limits to the application of the legal and practical constructs extending liability away from a decision maker/employer.

Recalling the objective, extending accessorial liability does not increase liability directly to the decision maker or direct employer. In our view, extending accessorial liability to third parties does increase pressure in the fresh produce supply chain but is not the most efficient or effective method in the short term, adds cost to the supply chain and is not demonstrated to achieve long term outcomes in our industry.

The primary objective of the licensing scheme is to improve compliance and accountability among LHP; in order to deliver this objective responsibility to workers must remain with the LHP.

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

At a high level, there are significant issues with requiring LHPs to hold obligations in relation to worker accommodation as part of a licensing scheme. A key issue is a worker’s right to privacy, where their employer does not impede their agency over their own private living situation – it would be the expectation of most workers in the economy that their employer is not responsible or obligated for checking their private living situation.

Where there are accommodation requirements associated with visa programs (e.g. Pacific Australia Labour Mobility (PALM) Scheme), it is important that these requirements are enforced through program obligations and mechanisms not via a licensing scheme to ensure integrity of program design.

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

In addition to the criteria listed, serious breaches in relation to visas/sponsorship or visa programs should also be considered.

Question 36. What is an appropriate exclusion period for re-applying for a licence, where a LHP has had their licence cancelled under the scheme?

An appropriate exclusion period for re-applying for a licence, where a LHP has had their licence cancelled under the scheme is 3 years.

Question 37. Is there any additional conduct that should be subject to criminal offence under the scheme? Should a defence be available under any of the provisions?

Question 38. Is there any other conduct that should be subject to a civil penalty? Should a defence be available under any of the proposed civil penalty provisions?

The offenses listed in the discussion paper should be subject to civil penalties not criminal, specifically:

- knowingly or recklessly operating a LHP without a licence (including where a licence has been suspended)
- knowingly or recklessly engaging with an unlicensed provider, or
- knowingly or recklessly disguising the true control of a LHP by a person who does not meet the fit and proper person test (akin to a 'shadow director').

The presence of a labour hire licensing scheme reflects the history of non-compliance with the labour hire sector; therefore, the objective of the scheme is to improve compliance and behavioural change among LHP. Given the absence of labour hire regulation at a national level to date, the movement to criminal penalties should be considered unwarranted with the immediate priority being the application of significant penalties for clear, deliberate and systemic non-compliance by LHP.

Once implemented, the impact of the licensing scheme should be considered and reviewed prior to the consideration of any criminal sanctions.

If criminal sanctions were to be applied as above, the threshold for the application of criminal penalties should be high. Criminal penalties must not apply to employers that have made genuinely unintentional mistakes, particularly those which are rectified once identified.

Criminal penalties should only apply where it can be proven that behaviour was part of a systemic pattern of conduct where the intent was to operate outside licensing arrangements to minimise business costs, with significant negative consequences for workers.

In terms of other matters where criminal sanctions might apply, further consideration should be given to applying criminal sanctions to the clear, deliberate and systemic employment of persons without valid working rights.

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

If the states and territories agree to have a single national scheme, it is likely that a single scheme will need to be legislated nationally and then each other jurisdiction remove their legislation and/or regulation.