

The 'L' words – Liquidation and SA's new Labour Hire Licencing Laws



Directors of labour hire companies need to be across the new South Australian Labour Hire Licencing laws. The eligibility to operate in the industry will cease on the appointment of a liquidator to any company in which they act as director, as we've seen in recent years with builders, real estate agents and others subject to state based licencing.

The regulations for the new Labour Hire laws consider whether licence holders are 'fit and proper' persons, with those who are a director of a company in liquidation (among other things) banned from holding or applying for a licence. This is similar to the rules around other state based licences.

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In these other industries, directors of companies in financial difficulty have often looked to appoint a Voluntary Administrator and make an offer to creditors to legitimately avoid liquidation. Consumer and Business Services regularly monitor liquidation appointments to identify licence holders and will seek to cancel both company and personal licences soon after winding up.

Labour hire is a feature of many industries such as cleaning, horticulture and viticulture and in recent years Clifton Hall has been appointed to liquidate a number labour hire operators. Despite the differing industries in which they operate, the common feature is that all of the matters have significant state or federal taxation debts and usually high levels of accrued entitlements and superannuation.

Where these appointments are made (involuntarily) by the Court, we often have difficulty even locating the company's director and records, impeding our ability to carry out investigations and make recoveries to benefit creditors.

In the long run the new laws may help to reduce the number of liquidations of companies designed to flout existing laws by operating for a finite period to avoid paying employee entitlements, taxation and other statutory obligations.

The new law

The *Labour Hire Licensing Act 2017 (SA)* ('the Act') commenced in South Australia on 1 March 2018 and requires labour hire providers to be licensed with Consumer and Business Services. All labour hire providers operating in South Australia were required to lodge their application by 31 August 2019 to be licensed by 1 November 2019.

The Act applies to persons (including businesses) who are involved in the 'provision of labour hire services' – where the provider supplies to another person a worker to do work in, and as part of a business or commercial undertaking of the other person.

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While there was criticism that the definition of labour hire was very broad, exemptions have been provided for situations where:

- providing labour hire services is not a core function of the business;
- workers are provided within the same group of companies;
- workers are provided within the same franchise;
- workers are provided to another business operating using the same banner, branding or trading name.

Not only will be it a requirement to hold a license in order to provide labour hire services, **it will also be illegal to accept labour hire services from an unlicensed provider**. Licence numbers will be required to be displayed in any advertisements for labour hire services.

It is worth noting however that a labour hire licence is not required if you:

- hold a current building, plumbing, gas fitting or electrical contractor licence
- hold a current security or investigation agent's licence that is not restricted to being an employee only
- operate as a company with:
 1. no more than two directors; and
 2. the worker provided is a director and participates in the management of the company or shares in its profits.

Registration

Aside from nominating a responsible person, completing the required paperwork and (of course) paying the prescribed fee, the Act includes a number of other key obligations, including:

- an application must include a letter from a member of CAANZ, CPA Australia or IPA confirming that the applicant is solvent
- prerequisite knowledge requirements, with applicants required to complete two units of study on managing a business - unless they already hold a qualification in business or HR, hold an equivalent interstate licence or where the applicant is an ASX listed company.

The impact of liquidations on registering

Similar to other state based licencing, the Act states that a person who is or has been a director of a company in liquidation is deemed not to be a 'fit and proper' person to hold such a licence or to be the director of a licence holder.

The Act looks at liquidations that have occurred in the previous 5 years – and whether the person was a director of the company at the time of winding up or in the six months prior to liquidation.

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This 'fit and proper' person tests affects both current licences and limits the ability to apply for a new licence, with a 2 year waiting period where a licence is cancelled due to liquidation.

It will be interesting to see the extent to which end users of labour hire insist on only dealing with registered providers. In larger supply chains, an end user may insist on such warranties to be provided, however in the absence of any certification (as might occur in building or electrical works), the labour hire system may still be open to exploitation.

Only time will tell if the new laws can be effective and achieve the desired outcome.