Ai GROUP SUBMISSION

Government of South Australia

Reforming Employment Agents Legislation

30 AUGUST 2024

INTRODUCTION

1. The Australian Industry Group (**Ai Group**) appreciates the opportunity to review and respond to:

   a. The 'Reforming Employment Agents Legislation' Discussion Paper (**Discussion Paper**).

   b. The Draft Employment Agents Bill 2024 (**the Bill**).

   c. The Draft Employment Agents Regulations 2024 (**the Regulations**), which include the proposed **Code of Conduct.**

2. Ai Group supports compliant, transparent, best practice operations by employment agents. It is in the interests of both employers and job seekers that employment agent services operate professionally, and to appropriate standards.

3. Reviewing the Discussion Paper, it is welcome that:

   a. The Bill would eliminate requirements for employment agents to hold a licence (and presumably the accompanying fee obligations), and to maintain and operate solely from a registered premises in South Australia or be under the supervision of a manager who is a resident of the State of South Australia.

   b. Changes in this area are to proceed from a recognition of the red tape and regulatory burden on businesses, and the need to create efficiencies through more modern, and easier to understand laws.

4. However, we also note that the Discussion Paper states that:

   > "*The draft legislation mirrors the approach Queensland (**Qld**) has adopted in the Private Employment Agents Act 2005 (Qld) (**Qld Act**), which establishes the Private Employment Agents (Code of Conduct) Regulation 2015 (**Qld Regs**).*
   >
   > *The benefit of the Queensland approach, and the reason it is considered the best model to reform the employment agent industry, is that it establishes a framework that promotes ethical conduct and the provision of high-quality placement and recruitment services from employment agents, whilst also providing for regulatory monitoring and enforcement for breaches of the code of conduct*".[1]

[1] Discussion Paper, p.5

5. Despite this clear intention, there are several aspects of the proposed framework that are not consistent with / do not mirror the Qld framework. A number of these inconsistencies would impose inappropriate and unjustified additional burdens on agents, or be impractical or ambiguous. We address these concerns below.

6. We also suggest that it may also have been appropriate to engage with the wider question of whether South Australia should continue to regulate the work of employment agents at all, and whether there is any contemporary policy rationale for such regulation in the 2020s. Given various other states and territories do not impose such regulation, it may have been useful to examine whether South Australia should join them.

THE BILL

7. As set out above, the Bill and Regulations are intended to mirror Queensland framework as set out in the Qld Act and Qld Regs. However, several key aspects of the Bill and Regulations do not mirror the Queensland framework and should be amended as follows:

8. **Inconsistent / excessive penalty amounts**: The Bill provides for significant maximum civil remedy pecuniary amounts of $10,000 (ss.10(3) and (4), 11(4) and 13). These maximum amounts are excessive compared to the prescribed penalties of 14 penalty units in the Qld framework (currently $161.30 for a penalty unit as of 1 July 2024 - $2,258.20) for comparable contraventions in Qld Act. We recommend that these penalty amounts be revised downwards accordingly.

9. **A lack of specificity around time of entry**: Section 10(a) provides that an inspector may … "*at any reasonable time enter and inspect premises*" "*for a purpose connected with the administration or enforcement of the*" Bill. Section 10(a) of the Bill should be revised to accurately / properly mirror section 26 of the Qld Act. This will provide for an practical / balanced limitation regarding time of entry and the exercise of powers. Section 26 of the Qld Act limits time of entry as follows:

> ***Section 26 Power to enter place***[2]
>
> *(1) An inspector may, without an occupier's consent, enter a place if -*
>
> *(a) it is a public place and the entry is made when it is open to the public;*

[2] Private Employment Agents Act 2005 (Qld), emphasis added

or

(b) it is a workplace and the entry is made when—

*(i) the workplace is **open for carrying on business**; or*

*(ii) the workplace is **otherwise open for entry**.*

(2) If the workplace is in, on or near domestic premises, an inspector may, without the occupier's consent—

*(a) enter the land around the premises **to an extent that is reasonable to contact the occupier**; or*

*(b) enter part of the place the inspector reasonably considers members of **the public are ordinarily allowed to enter when they wish to contact the occupier**.*

*(3) **Power to enter a place under this section does not include power to enter a place, or any part of a place, that is used for residential purposes without the consent of the occupier**.*

(4) In this section—

domestic premises means premises usually occupied as a private dwelling house.

workplace means a place in or on which the inspector reasonably believes the business of a private employment agent is, has been, or is about to be carried out.

10. **There is no requirement for an inspector to provide a penalty warning**: Sections 10, 11 and 13 of the Bill do not contain a requirement on the inspector to warn the person in charge of the offences that apply – by contrast to the Qld Act (see section 27(3) of the Qld Act for example). Providing a warning to the person is vital, including for educative and preventative purposes, and this omission should be rectified.

11. **Persons assisting an inspector**: Section 10(2) of the Bill states that *"(2) In the exercise of powers under this section an inspector may be assisted by such persons as may be reasonable in the circumstances*". There is no clear guidance on who this person might be or the extent they may be limited in exercising the inspector's powers. This sub-section should be removed from the Bill.

12. If it is retained, no person should be able to exercise the powers of an inspector unless the person in charge of the premises expressly agrees and is given the opportunity to be also supported by, for example, an employer association or other representative. The person assisting should also be a "*fit and proper*" person and have been appropriately trained in and understand the proper exercise of what are very extensive powers under the Bill.

13. **Liability of agents for acts or omissions of employees etc**: Section 15 of the Bill is excessively broad and should be revised for the following reasons:

    a. The requirement to prove that "*that the person was not acting in the course of employment*" is conceptually difficult in cases where the agent's staff member is not in fact an employee (as is contemplated by this section). A contractor, for example, will not be providing services "*in the course of employment*" – but instead provides their services through a contract for service.

    b. On this basis, it would be more appropriate to adopt the wording used under the Qld Act which has reference to the person's "*actual or apparent authority.*"

    c. This section also unreasonably broadens "responsibility" well beyond that provided for in the Qld Act, by requiring the employment agent to prove that the person was not acting in the 'course of employment" to avoid liability. The wording of the Qld Act should be accurately applied, which requires the employment agent to only prove that they could not, "*by the exercise of reasonable diligence*", have prevented the act or omission.

    d. Recommended amendments addressing the above are as follows:

> ***15—Liability of agents for acts or omissions of employees etc***
>
> *For the purposes of this Act, an act or omission of a person employed by an employment agent (whether under a contract of service or otherwise) will be taken to be an act or omission of the employment agent within the scope of the person's actual or apparent authority, unless the employment agent proves they could not, by the exercise of reasonable diligence, have prevented the act or omission ~~that the person was not acting in the course of the employment~~.*

14. **Commencement of prosecutions should have a more practical and proportionate end date, consistent with the approach in the Queensland legislation**: Section 14 of the Bill provides an extended period during which prosecutions can be commenced which is of longer duration than that provided under the Qld Act.

15. We recommend that the approach taken in section 46 (2) of the Qld Act be applied in section 14 of the Bill, and that section 14 of the Bill be amended to properly mirror the following:

> ***Section 46 Proceedings for Offences***[3]
>
> *(2) A prosecution for an offence against this Act must be commenced within the later of the following—*
>
> *(a) 1 year after the offence is committed;*
>
> *(b) 6 months after the commission of the offence comes to the complainant's knowledge, but within 2 years after the commission of the offence.*

16. **Protection from liability**: Section 16 of the Bill provides that no "*civil liability will attach to a person for an act or omission in good faith*". This should be revised as follows:

a. Section 49 of the Qld Act by contrast indemnifies the Minister, member of the committee, the chief executive or an inspector and does not more generally apply this to "persons" as is the case in section 16 of the Bill. The Bill should limit the indemnification in the same way as section 49 of the Qld Act. Specifically, section 16 should not extend this indemnification to *persons assisting the inspector* as currently envisaged under section 10(2) of the Bill.

b. Section 49 of the Qld Act requires the indemnified act or omission to have been done "honestly" (i.e., similar to the concept of "good faith in section 16 of the Bill), **but it also requires that the act or omission be done** *"without negligence under this Act"*. It is essential that the Bill be amended to similarly require that the act or omission be done both in "*good faith*" and "*without negligence*".

c. An appropriate amendment reflecting the above should be as follows:

> ***Section 16 – Protection from liability***
>
> *(1) No civil liability will attach to an inspector ~~a person~~ for an act or omission made in good faith and without negligence under this Act —*
>
> *(a) in the exercise or discharge, or purported exercise or discharge, of a power or function under this Act; or*

[3] Private Employment Agents Act 2005 (Qld), s.46(2)

(b) in the carrying out, or purported carrying out, of any direction or requirement given or imposed, or purportedly given or imposed, in accordance with this Act

THE CODE OF CONDUCT

17. The Code of Conduct addresses matters of conduct, skills, due diligence etc that would be expected in such a Code. However, there are areas in which the Code should be reviewed and improved, as follows – noting also the stated intention to mirror the Qld Regs (and Code of Conduct):

18. **Consistency in penalties**: The Qld Regs provide for a maximum penalty of 14 penalty units (currently $161.30 for a penalty unit as at 1 July 2024 - $2,258.20). Where the Regs provide for proposed maximum penalties greater than this amount, they should be revised downwards so that the penalties are mirrored between the two jurisdictions.

19. **Regulation 7(2)(b) 'Ensuring employees comply with Act and code of conduct'**: It would be appropriate to express this as "*must promote so far as is reasonably practicable*" as the nature and extent of such an obligation should have regard to particular circumstances, knowledge and capacities.

20. **Regulation 12(c) 'Keeping work seeker informed'**: The only documentation which should be relevant to a job seeker is the advertisement for a position (if any), a position description when provided, and the written offer of employment in due course. It will not be appropriate that an employee have access to "any documents about the position in the agent's possession at the relevant time" where such documentation is not relevant to the employees ongoing work and/or is confidential in nature. On this basis, Regulation 12 should be amended as follows:

> ***Regulation 12-Keeping a work seeker informed***
>
> *An employment agent must, on written request by a work seeker, give the work seeker whichever of the following is relevant within 7 days of the request:*
>
> *(a) if the work seeker is not referred as a candidate for a particular vacancy—genuine reasons the work seeker was not referred by the employment agent as a candidate for the vacancy;*
>
> *(b) advice on the work seeker's application for a vacancy*
>
> *(c) if the work seeker is placed in a position—a copy of any documents about the*

position in the agent's possession at the ~~relevant~~ time the work seeker was referred (or not referred) by the employment agent,

except if the employment agent determines that any such reasons, advice or documents are confidential to the employment agent or any other party.

21. **Regulation 16 'Dealing with work seekers from overseas'**: It is important for both work seekers and employers that those who are referred for work have legal entitlements to do such work. However, immigration law is complex and there is considerable scope for error and misunderstanding. This should more practically and usefully be recast along the lines of the following:

Regulation 16—Dealing with work seekers from overseas

An employment agent must not refer a work seeker to a person in Australia who is looking for workers if they are aware the work seeker is not legally entitled to work in Australia, or there is a basis which is known to the employment agent at the time of referral for concerns regarding the person's entitlement to work in Australia.

22. **Regulation 17 'Dealing with overseas placements'**: A similar but even stronger concern arises where employment agents refer job seekers to opportunities in other countries. Australia's immigration laws are difficult to interpret and apply to particular circumstances (See Regulation 16). When looking at the application of other legal systems it is even more likely that errors or misunderstandings will emerge. Regulation 17 should be recast based on what it is reasonable for the employment agent to know of the requirements to work in other countries, and of information that the agent is or can be aware of. Some countries provide extensive supporting information in English, others in languages other than English, and others still with considerable variations in the quality of information available. Countries also operate with various levels of transparency and communication in relation to work rights. This creates a situation in which what is reasonable in relation to Regulation 17 needs to be pragmatic and contextual.

Regulation 17 - Dealings with overseas placements

An employment agent must not refer a work seeker to a person in another country who is looking for workers if the employment agent knows the work seeker - …"

23. **Regulation 18 'Display at Business Premises'**: It is not sufficiently clear how this will apply where the agent does not have premises in South Australia or is operating remotely. The regulation should be amended to address this with specificity / clarity

noting that a penalty may be imposed if the regulation is contravened.

24. Requirements to display information physically also seem to insufficiently reflect contemporary practices. Regulation 18 should be amended to give agents the alternative option of displaying such information on their websites. If it is the case that the scale of fees needs to be displayed, it should be possible to comply with such an obligation using a website if that is what an agency wishes to do.

25. **Regulation 21 'Responsibilities to employers':** This Regulation provides for responsibilities to employers additional to those provided for under the Qld Regs and is not justified given the stated intention that the regulations be 'mirrored'. If, despite this, it is retained, we suggest the following amendments:

a. As noted above in relation to Regulation 18, there needs to be clarification regarding the display of the scale of fees through means other than the 'physical premises'.

b. Given that Regulation 20 already proposes the non-recovery of fees for failures to comply, it is not appropriate to also impose pecuniary penalty amounts. The additional penalties in Regulation 21 should be removed.

c. Noting that Regulation 18 acknowledges that the scale of fees is based on the time that is chargeable, we suggest the following amendments:

Regulation 21 – Responsibilities to employers

(1) An employment agent is not entitled to recover from a person who uses the services of the agent a fee for finding workers for the person, unless, before providing the service,

the agent—

(a) notifies the person of the agent's fee for the service for the time being chargeable by the agent in respect of the agent's business; and

(b) gives the person a written notice confirming the amount of the agent's fee for the time being chargeable by the agent for the service.

~~*Maximum penalty: $5 000.*~~

~~*Expiation fee: $315.*~~

(2) An employment agent must not charge a person who uses the services of the

agent for finding workers for the person a fee which exceeds the rate of payment set out in the scale of fees for the time being chargeable by the agent in respect of the agent's business which is displayed at the agent's ~~place of business~~ premises and is applicable to the particular case.

~~*Maximum penalty: $5 000.*~~

~~*Expiation fee: $315.*~~

(3) Subject to this clause, an employment agent must not demand or receive any fee from a person for the time being chargeable by the agent in respect of the agent's business in respect of seeking or obtaining another to work for the person unless—

(a) the worker (or prospective worker) has made contact with the person about that employment; or

(b) the fee is payable pursuant to a ~~written~~ agreement between the person and the employment agent.

~~*Maximum penalty: $5 000.*~~

~~*Expiation fee: $315.*~~

(4) Subclause (3) does not prevent an employment agent requiring a person to pay a deposit before the employment agent begins the search for a worker but, if such a deposit is paid, the deposit must be held by the employment agent until—

(a) a fee becomes chargeable under subclause (3); or

(b) the person ceases to be listed with the employment agent as a person who is seeking a worker—in which case the deposit must be applied towards any fee payable by the person to the employment agent for the time being chargeable by the agent in respect of the agent's business, or otherwise paid in accordance with an ~~written~~ agreement between the person and the employment agent; or

(c) the employment agent and the person agree on the repayment of the deposit

26. **Regulation 22 'Worker register to be kept'**: Under anti-discrimination laws a person may not need to provide their age or gender to the employer agent, each of which are protected attributes under anti-discrimination legislation.

27. Reg 22(3) also requires clarification around "*the person knows to be false*". Regulation 22 should be amended as follows:

> *(2) The worker register must include the following particulars for each person who looks for work through the employment agent—*
>
> *(a) the person's name, address, ~~age, gender~~ and occupation;*
>
> *(b) the type of work the person is looking for;*
>
> *(c) the date the particulars mentioned in the ~~a~~preceding sub-paragraphs are entered in the register.*
>
> *(3) The employment agent must not make or cause to be made in the worker register an entry that the ~~person~~ employment agent knows to be false at the time of entry.*

28. **Regulations 22-24 'Registers'**: There should be an express clarification that the only persons to whom an agency must provide register information are inspectors. An additional paragraph or subparagraph might usefully be added to Regulations 22, 23, and 24 to this effect. We note also our comments above on section 10(2) of the Bill.

29. **Regulation 23 'Employer Register'**: Regulation 23(2)(a) refers to "place of business". We recall our submissions above in relation to "premises" and situations in which businesses operate outside South Australia or remotely.

30. **Regulation 28 'Availability of code of conduct'**: Regulation 28(a) should be amended to provide that the copy of the code of conduct can also be made available on an organisation website. Again, in the mid-2020's, physical display copies should not be the only option in a heavily online environment. This is also relevant given the overall recognition in the amending legislation that businesses based in other states will provide employment agency services into South Australia. These will be heavily on-line businesses, and it would be appropriate to allow them to meet their Code obligations using their websites. We repeat our submissions above in relation to "premises" and recommended amendments to Regulation 18.

IMPACT ON THOSE SEEKING EMPLOYMENT

31. The suggestion that those seeking employment would not be impacted by the proposed approach[4] should be revisited.

[4] Discussion Paper, p.6.

32. An injunctive approach in which an employment agent could be precluded from providing services with little or no notice would impact on those who signed up for such services (i.e. job seekers), and those who rely on labour supply through such an agent (employers).

33. Employers and job seekers will also need to become aware that the agent they have asked to work on their behalf will no longer be able to do so, and will need to restart a job search process with other providers.

34. Job seekers may also have invested time and resources into their engagement with a particular provider that may be precluded from providing the agreed services to them.

NATIONAL LABOUR HIRE LICENSING

35. This Review is proceeding in parallel with significant work towards a National Labour Hire Licencing scheme. As the specifics of such a scheme, including its breadth and application become clearer it will be appropriate to review any potentially overlapping approaches in individual states and territories, including any overlap with new approaches for employment agents in South Australia through/following this Review.

HOW TO PROCEED

36. We note the 'preliminary intention' that a Bill be introduced into parliament during 2024, to come to operation from 1 January 2025.[5] Ai Group broadly supports this intended approach, subject to:

    a. This submission and recommendations for amendments outlined above.

    b. Reviewing the final form of the legislation to be introduced and providing further input if required.

    c. An opportunity for peak business representatives in South Australia, including Ai Group to be further consulted on any updated draft Regulations, including the Code of Conduct, prior to the regulations being made.

    d. A reasonable period of notice between the passage of amending legislation and commencement, and in particular an opportunity for all those who are covered by the existing registration process to understand the new approaches and be able to comply with them.

[5] Discussion Paper, p.8

If the Bill does not pass until the final sitting days of 2024 for example, commencement on 1 January 2025 may be impractical. This would however also need to be balanced against not triggering the payment of further fees in 2025 under the existing scheme, only to see that scheme abolished a matter of weeks or months later.

e. Convening discussions with peak employer and union representatives as detail of the proposed national labour licencing scheme becomes clearer, with a view to considering any changes needed to the proposed new Act, Regulations and Code of Practice for employment agents in South Australia.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years. Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

OFFICE ADDRESSES

NEW SOUTH WALES

Sydney
51 Walker Street
North Sydney NSW 2060

Western Sydney
Level 2, 100 George Street
Parramatta NSW 2150

Albury Wodonga
560 David Street
Albury NSW 2640

Hunter
Suite 1, "Nautilos"
265 Wharf Road
Newcastle NSW 2300

VICTORIA

Melbourne
Level 2 / 441 St Kilda Road
Melbourne VIC 3004

Bendigo
87 Wil Street
Bendigo VIC 3550

QUEENSLAND

Brisbane
202 Boundary Street Spring Hill
QLD 4000

ACT

Canberra
Ground Floor,
42 Macquarie Street
Barton ACT 2600

SOUTH AUSTRALIA

Adelaide
Level 1 / 45 Greenhill Road
Wayville SA 5034

WESTERN AUSTRALIA

South Perth
Suite 6, Level 3 South Shore Centre 85
South Perth Esplanade
South Perth WA 6151

www.aigroup.com.au