

# **PRIVATE EMPLOYMENT AGENCIES AND OTHER ACTS AMENDMENT BILL 2001**

## **EXPLANATORY NOTES**

### **Objectives of the Legislation**

The objective of this Amendment Bill is to implement the recommendations resulting from a review of the *Private Employment Agencies Act 1983* (the Act). The Act provides for the licensing and related operational requirements of private employment agents. Protections are also provided against employees being charged inappropriate fees by agents for the procurement of employment.

In implementing the review recommendations, the Bill amends both the Act and the *Industrial Relations Act 1999*.

An unrelated amendment of a technical nature to the *Trading (Allowable Hours) Act 1990* is also introduced by way of the Bill.

### **Reasons for the Legislation**

The Act has been reviewed to address National Competition Policy (NCP) issues and issues to do with the operation of the legislation in contemporary times.

The review was conducted by an independent reviewer and involved comprehensive consultation with industry and government stakeholders. A formal Public Benefits Test in accordance with NCP guidelines was also undertaken as part of the review process. The primary recommendations resulting from the review included:

- the expiry of the Act over a period of two (2) years;
- the introduction of a simplified licensing process for private employment agents, to apply until the expiry of the Act;
- the establishment of an Employment Agents Advisory Committee to oversee the expiry process and to formulate a draft code of conduct for the future regulation of agents; and

- the immediate transfer of provisions protecting workers from being charged inappropriate fees by agents for the procurement of work to the *Industrial Relations Act 1999*.

The Queensland Government, following consideration of the final report of the reviewer, approved the preparation of legislation to give effect to the recommendations of the review.

The amendment to the *Trading (Allowable Hours) Act 1990* is made at the request of the Queensland Office of Gaming Regulation, Queensland Treasury to reflect changes in respect of race wagering and the TAB Queensland brought about by the *Wagering Act 1998* and the *TAB Queensland Limited Privatisation Act 1999*.

### **Cost for Government Implementation**

Implementation of the proposed amendments will result in reduced compliance and administration costs for government.

### **Fundamental Legislative Principles**

Proposed sections 36 (Responsibility for acts or omissions of representatives) and 37 (Executive officers must ensure corporation complies with Act) of clause 20 of the Bill relate to the responsibility of persons, including corporations, for acts or omissions of representatives and the obligations on executive officers of corporations to ensure compliance by the corporation.

Defences exist if the person took reasonable steps to prevent the offending act or omission or ensure compliance or if the person was not in a position to influence the conduct of the relevant person. These defences effectively reverse the onus of proof.

The proposed sections are considered justifiable and necessary to prevent unscrupulous private employment agents sheltering behind employees or corporations and for the effective enforcement of the legislation.

### **Consultation**

Extensive consultation has been conducted with all key stakeholders regarding the preparation and finalisation of this Bill. All stakeholders have expressed support for the Bill.

## **NOTES ON CLAUSES**

### **PART 1—PRELIMINARY**

#### **Short title**

*Clause 1* sets out the short title of the Bill.

#### **Commencement**

*Clause 2* provides for the commencement of Part 4 of the Bill on assent and the commencement of the remaining provisions of the Bill on a day to be fixed by proclamation.

### **PART 2—AMENDMENT OF PRIVATE EMPLOYMENT AGENCIES ACT 1983**

#### **Act amended in pt 2 and sch**

*Clause 3* provides that this part of the Bill and the schedule to the Bill amend the *Private Employment Agencies Act 1983*.

#### **Amendment of title**

*Clause 4* replaces the word “agencies” with the word “agents” in the title of the Act.

#### **Amendment of s 1 (Short title)**

*Clause 5* replaces the word “agencies” with the word “agents” in the short title of the Act.

#### **Replacement of s 5 (Interpretation)**

*Clause 6* omits section 5 and inserts new sections 5 and 5A.

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New section 5 clarifies that the dictionary in the schedule defines particular words used in Act.

New section 5A provides the meaning of private employment agent by confirming the circumstances in which a person is deemed to be a private employment agent. This includes offering to find work for a model or performer or providing other stipulated services for a model or performer.

Nominated activities are excluded for purposes of the meaning of private employment agent.

### **Replacement of ss 6 to 8**

*Clause 7* omits sections 6 to 8 and inserts new sections 6 to 8.

New section 6 establishes there is to be a licensing officer and provides for the licensing officer's appointment.

New section 7 provides a power of delegation for the licensing officer. This section replaces the provisions at existing section 7A (Delegation of powers and functions of licensing officer).

New section 8 outlines the actions an inspector must take for purposes of identification of the inspector and evidence of the inspector's authority in exercising a power under the Act. This section replaces the provisions at existing section 8 (Evidence of authority).

Existing sections 6 (Administration) and 7 (Licensing officer and inspectors) are omitted, as these provisions are no longer relevant in view of new provisions proposed in the Bill relating to the licensing officer and inspectors.

### **Amendment of s 11 (Offences relating to inspectors etc.)**

*Clause 8* confirms that non-compliance with section 11 is an offence and provides a penalty accordingly.

### **Omission of ss 12 and 13**

*Clause 9* omits sections 12 and 13.

Existing section 12 (Answers and information given under compulsion) is omitted to accord with currently accepted legislative principles.

Existing section 13 (Annual report) is omitted as its effect can be achieved administratively.

### **Amendment of pt 3 hdg (Licences and licensees)**

*Clause 10* omits irrelevant words from the heading to Part 3.

### **Omission of ss 14 to 16**

*Clause 11* omits sections 14 to 16.

Existing sections 14 (Private employment agents and agencies), 15 (Types of licences) and 16 (Conditions for issue of licence) are omitted in view of new provisions relating to these issues proposed in the Bill.

### **Amendment of s 17 (Business to be carried on subject to licence)**

*Clause 12* confirms that non-compliance with certain provisions is an offence and converts the maximum penalty for contraventions of the section into the appropriate number of penalty units.

The section is further amended to accord with the new licensing arrangements for private employment agents introduced in the Bill.

### **Replacement of ss 18 to 26**

*Clause 13* omits sections 18 to 26 and inserts new sections 18 to 26.

Existing sections 18 (Application for licence) to 26 (Duration of renewed licence) are omitted in view of new provisions proposed in the Bill relating to the application for, and granting of, licences for private employment agents. The clause deals also with the process to be followed regarding complaints made against licence holders.

New section 18 clarifies that an individual, a partnership or a corporation may apply for a licence and the manner of such application.

New section 19 stipulates that the licensing officer must grant an application for a licence except in specified circumstances where an application must be referred to the Employment Agents Advisory Committee for its advice on whether the licence should be granted.

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New section 20 requires the licensing officer, when referring an application for a licence to the committee, to supply to the committee any documents or information relevant to the applicant or the application.

New section 21 stipulates that the licensing officer must grant an application for a licence if the committee advises accordingly.

New section 22 provides that, where the committee advises the licensing officer to refuse to grant an application for a licence, the licensing officer must consider the advice and may grant or refuse the application.

Where an application is refused, the applicant must be advised of the reasons for the decision and that a right of appeal exists against the decision.

New section 23 outlines the particulars that must be stated in a licence.

New section 24 provides that licences granted or renewed under the new arrangements will remain valid until the Act expires.

New section 25 allows for the voluntary surrender of a licence by a holder.

New section 26 states that the licensing officer may refer a complaint about a private employment agent to the committee for the informal resolution of the complaint by the committee or, if a resolution is not achieved, for a recommendation as to what action may be taken. This action may include cancellation of the licence if sufficient grounds exist.

The licensing officer may refer any other matter arising under the Act to the committee for its help or advice. The licensing officer also may refer a matter arising under the fee charging provisions relating to agents in the *Industrial Relations Act 1999* to the committee for its help or advice.

### **Amendment of s 26A (Published list of licence holders)**

*Clause 14* amends section 26A, without change in meaning. This section requires the licensing officer to publish a list of persons who hold licences as at the 1 June each year.

### **Replacement of ss 27 to 30**

*Clause 15* omits sections 27 to 30 and inserts new sections 27 to 29.

New section 27 outlines the grounds for cancelling a private employment agent's licence. Such grounds include where an agent has not complied

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with provisions of the Act or the fee charging provisions relating to agents in the *Industrial Relations Act 1999*.

New section 28 prescribes the procedure that the licensing officer must follow when cancelling a private employment agent's licence. An invitation must be given for the holder to show cause and, if the licence is subsequently cancelled, the holder must be advised of the right of appeal.

New section 29 provides that the licensing officer may give a person a notice requiring the return of a cancelled licence. The notice must be complied with unless there is a reasonable excuse.

Existing section 30 (Industrial magistrate's decision final) is omitted in view of changes proposed in the Bill relating to proceedings and appeals.

### **Insertion of new pts 3A and 3B**

*Clause 16* inserts new Parts 3A and 3B into the Act.

Part 3A (Divisions 1 to 4) establishes the Private Employment Agents Advisory Committee and provides for related issues.

Division 1 (sections 30 and 31) provides for the establishment and functions of the committee, such functions to include the formulation of a draft code of conduct for regulating private employment agents after the expiry of the Act and assisting the licensing officer with issues to do with agents.

The committee is conferred with necessary powers to perform the functions.

Division 2 (sections 31A to 31D) prescribes the members of the committee and how they are to be appointed. The membership of the committee is to comprise 2 representatives of the private employment agents industry, 2 representatives of employee organisations, 1 independent chairperson and 1 officer of the Department of Industrial Relations.

Division 3 (sections 31E to 31G) provides that the chairperson is to preside at committee meetings unless that person is absent, in which case the members present must choose a member to preside.

There must be at least 4 members present to form a quorum.

Meetings of the committee are to be held on a regular basis to ensure that the committee's functions are performed. Frequency of meetings is to be determined by the chairperson.

Division 4 (sections 31H to 31J) prohibits a member of the committee from taking part in a discussion, or voting on, an issue in which the member has a direct or indirect interest. The circumstances that constitute an interest in an issue are clarified.

Payments made to members of the committee are to be decided by the Minister.

The chief executive of the Department of Industrial Relations is to give the committee reasonable help to perform its functions.

Part 3B (sections 31K to 31P) establishes the rights of appeal and related procedures and processes that apply in respect of certain decisions made under the legislation.

Section 31K provides that an applicant for a new licence may appeal to an Industrial Magistrate where the licensing officer refuses to grant the application. The holder of an existing licence may appeal to an Industrial Magistrate where the licensing officer refuses to renew the licence or cancels the licence.

Section 31L requires that a written notice stating the grounds of the appeal must be filed with the registrar of the Magistrates Court within 28 days. A copy must be served on the licensing officer. The Court may, at any time, extend the period for filing the appeal.

Section 31M states that the Court may stay the decision of the licensing officer until it decides the appeal. The stay may be given on conditions the Court considers appropriate, operates for the period fixed by the Court and may be revoked or amended by the Court.

Section 31N states that, in deciding an appeal, the matter is to be reheard and the Court is not bound by rules of evidence and must observe natural justice.

Section 31O outlines the powers the Court has in deciding an appeal including the setting aside or variation of the decision appealed against.

Section 31P provides for an appeal to be made to the Industrial Court against the decision of an Industrial Magistrate, but only on a question of law.

## **Replacement of ss 32 and 32A**

*Clause 17 omits sections 32 and 32A and inserts new section 32.*



New section 32 outlines requirements that must be met before a private employment agent is entitled to recover a fee from a person who asks the agent to find a worker for the person. These requirements reflect the existing provisions in section 32 (Recovery of fees and charges) relating to recovery of fees by an agent from applicant employers.

The existing provisions in section 32 (Recovery of fees and charges) relating to fees demanded or received by an agent from applicant employees and the existing provisions in section 32A (Order for repayment of amounts unlawfully received) are omitted in view of new provisions proposed in the Bill relating to fees payable to an agent and the recovery of inappropriate fees charged by an agent.

### **Amendment of s 33 (Records to be kept and retained)**

*Clause 18* requires that agents must keep registers of “workers”, “employers” and “placements” and prescribes the particulars that must be kept in the registers. Penalties are prescribed in respect of non-compliance with these provisions.

These requirements reflect the existing provisions in section 33 and in the *Private Employment Agencies Regulation 1989* relating to records to be kept by agents in a redrafted and simplified format.

### **Amendment of s 34 (False information not to be published)**

*Clause 19* amends section 34 to confirm that agents must not publish false information in the course of their business or make false statements to workers on the nature or availability of work. A penalty is prescribed in respect of non-compliance with these provisions.

### **Replacement of ss 35 to 38**

*Clause 20* omits sections 35 to 38 and inserts new sections 35 to 37.

New section 35 requires that, in any publication, an agent must include specified details for purposes of identification. A penalty is prescribed in respect of non-compliance with this section. These provisions reflect the existing provisions at sections 35 (Identification of agency in publications).

New section 36 clarifies the responsibility for acts or omissions of representatives. It declares persons, including corporations, to be guilty of offences committed by their representatives.

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New section 37 places an obligation on executive officers of corporations to ensure the corporation complies with the Act. If the corporation commits an offence, each executive officer also commits an offence.

These provisions replace existing provisions at section 38 (Responsibility for employees) and accord with current drafting practice.

Existing section 36 (Premises to conform to standard) is omitted as it refers to repealed legislation and, in any case, a requirement would exist for business premises to comply with the *Workplace Health and Safety Act 1995*.

Existing section 37 (General penalty) is omitted to accord with current drafting practice in that penalties are now prescribed within each individual offence provision.

### **Amendment of s 39 (Proceedings for offences)**

*Clause 21* amends section 39 to provide that any person may commence proceedings for offences and to clarify the time periods in which proceedings are to be commenced. This accords with accepted legislative principles.

### **Replacement of ss 40 to 42**

*Clause 22* omits sections 40 to 42 and inserts new section 40.

New section 40 provides that the processes under the *Industrial Relations Act 1999* and the *Industrial Relations (Tribunals) Rules 2000* apply in respect of a prosecution for an offence or an appeal to the Industrial Court taken under the Act. This reflects existing provisions at section 41.

Existing section 40 is omitted to align with changes introduced by this Bill in respect of appeals.

Existing section 42 is omitted as its effect can be achieved administratively, if required.

### **Replacement of ss 43A to 45**

*Clause 23* omits sections 43A to 45 and inserts new sections 44 to 47 and new Parts 5 and 6.

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New section 44 provides an indemnity for nominated persons against civil liability when undertaking actions under the Act.

New section 45 provides for the making of regulations under the Act.

These provisions reflect the existing provisions at sections 43B (Protection of things done under Act) and 45 (Regulations) respectively.

New section 46 provides that the chief executive of the Department of Industrial Relations may approve forms for purposes of the Act. Such forms would include an application for a licence or renewal of a licence.

New section 47 provides for the renumbering of the Act in the next reprint of the Act.

Existing section 43A (Representation of parties at hearings) is omitted in view of changes proposed in the Bill relating to the various proceedings that may be undertaken and to accord with accepted legislative principles.

Existing section 44 (Service of documents) is omitted as provisions relating to the service of documents are contained in Part 10 of the *Acts Interpretation Act 1954*.

Part 5 (new sections 48 to 54) provides for the transitional arrangements that will apply on commencement of the legislative changes proposed in the Bill.

Section 48 provides that an application for a general licence made under the Act prior to commencement and which has not been finally decided, is taken to be an application made under the new provisions. All processes underway at the time of commencement in relation to the application are to stop. An objection lodged against the application will be considered by the licensing officer in the officer's determination of the application under the new provisions.

Section 49 clarifies that existing licences are deemed as held by the partnership or corporation where a nominated person is the holder on behalf of a partnership or corporation.

Section 50 confirms that licences in existence at the time of commencement will continue in force until 31 May 2002, which is the renewal date for all current general licence holders under the Act.

Section 51 gives an option for holders of licences in existence at the time of commencement to renew the licence prior to the 31 May 2002. Any licence so renewed will remain valid until the Act expires.

Section 52 clarifies that certain nominated provisions relating to the granting of a licence apply also to the renewal of a licence. This includes

provision that the renewal may be forwarded to the Employment Agents Advisory Committee by the licensing officer for advice.

Section 53 provides that the procedure to be followed by the licensing officer in cancelling a licence is to apply where a decision is made to not renew a licence. This includes the requirement that a show cause notice be issued.

Section 54 provides for the continuation of any temporary licences in force at the time of commencement.

Part 6 (new section 55) provides that the Act will expire 2 years after the commencement of the amendments to the Act contained in part 2 of the Bill. On recommendation of the Employment Agents Advisory Committee, the Minister for Industrial Relations may postpone the expiry of the Act by not more than 1 year.

### **Insertion of schedule**

*Clause 24* inserts the dictionary, which provides the meaning of various terms used in the Act.

## **PART 3—AMENDMENT OF INDUSTRIAL RELATIONS ACT 1999**

### **Act amended in pt 3**

*Clause 25* provides that this part of the Bill amends the *Industrial Relations Act 1999*.

### **Amendment of s 273 (Commission's functions)**

*Clause 26* amends section 273 to ensure that the functions of the Queensland Industrial Relations Commission reflect new provisions proposed in the Bill whereby an application may be made to the Commission for an order for the repayment of a fee received by a private employment agent.

### **Amendment of s 292 (Magistrate's jurisdiction)**

*Clause 27* amends section 292 to ensure that the jurisdiction of an Industrial Magistrate reflects new provisions proposed in the Bill whereby an application may be made to an Industrial Magistrate for an order for the repayment of a fee received by a private employment agent.

### **Amendment of s 293 (Magistrates' jurisdiction is exclusive)**

*Clause 28* amends section 293 to clarify that the jurisdiction conferred on an Industrial Magistrate is not exclusive of another court's jurisdiction in respect of a claim for the repayment of a fee received by a private employment agent.

### **Amendment of s 319 (Representation of parties)**

*Clause 29* amends section 319 to specify that legal representation will not be permitted, even with the parties' consent, in the Queensland Industrial Relations Commission in proceedings relating to a claim for the repayment of a fee received by a private employment agent. This will apply also where the Commission remits the matter to an Industrial Magistrate for hearing.

### **Amendment of s 320 (Basis of decisions of the commission and magistrates)**

*Clause 30* amends section 320 to specify that the Queensland Industrial Relations Commission is not bound by technicalities, legal forms or rules of evidence and may inform itself on a matter it considers appropriate in proceedings relating to a claim for the repayment of a fee received by a private employment agent. The Commission also is to be governed by equity, good conscience and the substantial merits of the case having regard to the interests of the persons concerned and the community.

This will apply also to an Industrial Magistrate where the Commission remits the matter to the Magistrate for hearing.

### **Amendment of s 336 (Recovery of amounts under orders)**

Existing section 336 provides that, where the Queensland Industrial Relations Commission orders an amount to be paid, the registrar may issue a certificate for purposes of recovering the amount as for a debt. This would

apply to orders made on a claim for the repayment of a fee received by a private employment agent.

*Clause 31* amends section 336 to clarify that the registrar of the Magistrates Court may issue a certificate in the same manner where the Commission remits the matter to the Industrial Magistrate for hearing.

### **Insertion of new ch 11A**

*Clause 32* inserts a new Chapter 11A (sections 408A to 408H) into the *Industrial Relations Act 1999*. The Chapter contains provisions relating to fees charged by private employment agents against persons looking for work.

Section 408A defines various terms used in Chapter 11A.

Section 408B provides the meaning of private employment agent by confirming the circumstances in which a person is deemed to be a private employment agent. This includes offering to find work for a model or performer or providing other stipulated services for a model or performer.

Nominated activities are excluded for purposes of the meaning of private employment agent.

Section 408C provides the circumstances under which a private employment agent may also be a manager of a model or performer. To be a manager, the agent must provide a minimum number of specified additional services for the model or performer under a written agreement with the model or performer. An agent may be a manager whether or not any agreement between the agent and the model or performer states that the agent is the sole provider of management services.

Section 408D prescribes that a private employment agent must not, in any way, demand or receive from a person seeking work a fee for finding, or attempting to find, the person work. Exceptions are provided for an agent who finds work for a model or performer and for an agent who is a manager of a model or performer.

An agent may demand or receive a fee from a model or performer for finding the person work only where the agent provides prescribed particulars in writing, the fee is not more than that prescribed and the amount payable to the model or performer, after payment of any fee, is at least the amount payable under an applicable industrial instrument.

An agent who is also a manager of a model or performer may demand or receive a fee only in accordance with a written agreement with the model

or performer. Any fee so received is in lieu of the prescribed fee that may be charged as an agent.

Section 408E provides that an Industrial Magistrate who hears and decides a complaint for an offence regarding fees must order any defendant found guilty to repay any fee found, on the balance of probabilities, to have been received in contravention of the legislation. The Magistrate may, if the defendant is found not guilty, order the defendant to repay any fee found, on the balance of probabilities, to have been received from a person seeking work. These provisions are based on existing provisions relating to the hearing by an Industrial Magistrate of a fee charging offence against a private employment agent.

Section 408F provides for an application to be made to the Queensland Industrial Relations Commission for an order for the repayment of a fee received by a private employment agent in contravention of the fee charging restrictions at section 408D.

The Commission may remit the application to an Industrial Magistrate for hearing under certain circumstances.

An application may be made by the person who was charged the fee, an employee organisation on behalf of a member who was charged the fee, another person authorised to act on behalf of the person charged the fee, or an inspector under the *Industrial Relations Act 1999*.

The application must be made within 6 years after the fee was received by the private employment agent.

Section 408G provides for an application to be made to an Industrial Magistrate for an order for the repayment of a fee received by a private employment agent in contravention of the fee charging provisions at section 408D. This provision is based on the existing provision whereby an application may be made by an employee to an Industrial Magistrate for the recovery of fees from a private employment agent.

Provisions relating to who may make an application and the time period in which an application must be made are the same as for an application to the Queensland Industrial Relations Commission under section 408F.

Section 408H provides avenues for the enforcement of an order made by an Industrial Magistrate on a private employment agent for the repayment of fees received in contravention of section 408D or for certain costs.

### **Amendment of s 669 (Offence to offer or accept premiums)**

Section 669 prohibits a person from offering, demanding, asking, accepting or agreeing to accept a consideration, gift, allowance or forbearance for the employment of a person.

*Clause 33* amends section 669 to clarify that certain fees may be charged by private employment agents.

### **Amendment of sch 5 (Dictionary)**

*Clause 34* amends Schedule 5 of the *Industrial Relations Act 1999* to provide references for purposes of the meaning of various terms used in new Chapter 11A.

## **PART 4—AMENDMENT OF TRADING (ALLOWABLE HOURS) ACT 1990**

### **Act amended in pt 4**

*Clause 35* provides that this part of the Bill amends the *Trading (Allowable Hours) Act 1990*.

### **Amendment of s 33 (Anzac Day a holiday for all employees)**

*Clause 36* amends section 33(2)(c) to maintain the current situation where TAB offices and agencies can open on Anzac Day for purposes of race betting.



## **SCHEDULE**

### **OTHER CONSEQUENTIAL AMENDMENTS OF PRIVATE EMPLOYMENT AGENCIES ACT 1983**

The schedule to the Bill provides for amendments of a minor nature to replace various terms used in existing provisions of the Act to accord with changes introduced in the Bill and current legislative drafting practice.