

Private Employment Agents Bill 2005

Explanatory Notes

Objectives of the Legislation

The objective of the Bill is to provide the authority and other supporting legislative provisions for the making of a mandatory Code of Conduct in a Regulation to regulate private employment agents after the expiry of current legislation.

Reasons for the Legislation

As a result of an independent legislative review in 2000, the *Private Employment Agents Act 1983* (the Act) is due to expire on 26 April 2005.

Section 31 of the Act requires the Employment Agents Advisory Committee (EAAC) to formulate a draft code of conduct to regulate agents after the expiry of the Act in relation to the following matters:

- the type of work arrangements and commercial operations covered by the code;
- standards of competence and training for private employment agents;
- disciplining private employment agents who contravene the code; and
- the records that private employment agents must keep.

A Public Benefits Test (PBT) minor review of the future regulation of employment agents under National Competition Policy (NCP) principles was conducted by the Department of Industrial Relations during 2004.

Taking into account submissions to the Review from stakeholders, identified problems in the industry and matters to be regulated in any Code as prescribed by the Act, the Review recommended that industry regulation by a statutory Code of Conduct with licensing abolished would deliver the greatest net benefit to the community in the regulation of agents after the expiry of the Act. This leads to a legislative structure where the required Code of Conduct is established in a statutory Regulation made under the authority of the Private Employment Agents Bill 2005. Compliance with the provisions of the Code is therefore mandatory and enforceable in the courts.

The Bill and proposed Regulation/Code of Conduct strengthen consumer protection in the industry by specifying what basic services are/are not appropriate and providing for sanctions against those agents who do not provide services to the acceptable industry standard as a means of encouraging compliance. Given the direction established by Section 31 of the current Act, it is appropriate that the operations of Private Employment Agents will be governed primarily by provisions that will be contained in the proposed Regulation/Code of Conduct.

The proposed Regulation/Code of Conduct will be made immediately after assent is given for the Bill so that the both the Bill and Regulation may commence on the same date (i.e. 27 April 2005 or the date of assent for this Bill, whichever is later).

Costs for Government Implementation

Under current legislation the Government collects approximately \$280,000 per year in revenue from licences and expends an estimated \$100,000 per year on administration of the Act. Under the provisions of section 24 of the current Act, due to the expiry date of the Act, no annual licence renewal fees have been payable since the year ending 30 June 2002.

The Bill and proposed Regulation/Code of Conduct abolish licensing thus forgoing the revenue. At the same time abolishment of licences would reduce the amount spent on administration.

Fundamental Legislative Principles

Clauses 45 (Responsibility for acts or omissions of representatives) and 46 (Executive officers must ensure corporation complies with Act) 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 to ensure compliance or if the person was not in a position to influence the conduct of the relevant person.

The proposed clauses continue the effect of provisions contained in the current Act and are considered justifiable and necessary for the effective enforcement of the legislation and to prevent unscrupulous private employment agents sheltering behind their employees or their status as corporations.

In Part 6 (Injunctions) of the Bill, clauses 36 (Purpose of pt 6) and 39 (Grounds for injunction) provide that private employment agents may be restrained from engaging in disreputable conduct or even from acting as a private employment agent. The grounds for such injunction include engaging in conduct that contravenes specified legislative provisions by, or the existence of convictions for specified serious offences against a private employment agent, an executive officer of a corporation that is a private employment agent or an employee of a private employment agent.

The District Court may only grant the injunction if satisfied it should be granted given the nature of the conduct complained of and the circumstances of any serious offence. Where an employee has been convicted of one of the specified serious offences, grounds for the injunction are limited to where they have knowingly been employed by the private employment agent in inappropriate activities.

The private employment agents industry is an industry where work seekers need to be able to trust in the character and abilities – financial and otherwise - of their personal representatives. The proposed clauses are considered justifiable and necessary for the effective enforcement of the legislation and to prevent unscrupulous private employment agents sheltering behind the status of a corporation or using persons of disreputable character to deliver their services.

Consultation

The PBT minor review of the future regulation of private employment agents included a newspaper advertisement inviting submissions from stakeholders and the public. All licence holders were also invited by letter to make submissions.

Extensive consultation has taken place with key stakeholders through the EAAC in the drafting and preparation of the Bill. They have expressed support for the Bill.

Notes on Provisions

Part 1 Preliminary

Short Title

Clause 1 sets out the short title of the Act as the *Private Employment Agents Act 2005*.

Commencement

Clause 2 provides that the Act will commence on the later of 27 April 2005 (i.e. the day after the current Act expires) or the date of assent.

Dictionary

Clause 3 provides for particular terms in the Act to be defined in a Dictionary in the Schedule to the Act.

Meaning of *private employment agent*

Clause 4 provides the meaning of private employment agent by confirming the circumstances in which a person is deemed to be a private employment agent.

Nominated activities are excluded for purposes of the meaning of private employment agent. These exclusions are the publishing of advertisements about employment opportunities and the placement of workers in 'labour hire/on hire' arrangements whether under a contract of service or a contract for service.

Part 2 Code of Conduct

Purpose of pt 2

Clause 5 provides that the purpose of pt 2 is to provide for a code of conduct as the main way of regulating private employment agents.

Code of Conduct

Clause 6 provides for a regulation to include a Code of Conduct for private employment agents and specifies those matters that may be contained in the code.

Part 3 Employment Agents Advisory Committee

Division 1 Establishment and functions

Establishment of committee

Clause 7 establishes the Employment Agents Advisory Committee.

Functions of committee

Clause 8 specifies the functions of the committee and provides that these include advising the chief executive on matters relating to the content and operation of the code and, if asked by the chief executive, advising on matters in the *Industrial Relations Act 1999* relating to fees charged by private employment agents. The committee is provided with the necessary powers to perform the functions.

At the commencement of the Act the chief executive mentioned in any of the provisions is the Director General of the Department of Industrial Relations.

Membership of committee

Clause 9 prescribes the members of the committee and how they are to be appointed. The membership of the committee is to comprise

- 1 member representing private employment agents who seek work for models and performers
- 1 member representing private employment agents who seek work for workers other than models and performers
- 1 member representing employee organisations that represent models and performers

- 1 member representing employee organisations that represent workers other than models and performers
- 1 independent person, and
- 1 officer of the department.

All members are to be appointed by the Minister except for the officer of the department who is appointed by the chief executive.

The membership has been specified to provide for representation from both the general industry and entertainment sectors of the private employment agents' industry.

At the commencement of the Act the Minister mentioned in any of the provisions is the Minister for Employment, Training and Industrial Relations.

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Chairperson

Clause 10 provides that the independent member is the chairperson.

Term of office

Clause 11 provide that committee members are appointed for up to 3 years and may be reappointed for a further term of up to 3 years.

Vacation of office

Clause 12 sets out the conditions under which a committee member's position becomes vacant.

Division 3 Meetings of committee

Presiding at meetings

Clause 13 provides for the chairperson to preside at meetings and that in the chairperson's absence, members present at the meeting must choose a member to preside.

Quorum

Clause 14 provides that a meeting quorum exists if 4 members are present.

Conduct of meetings

Clause 15 provides for the committee to meet regularly on being called at a specified time decided by the chairperson. Business at meetings is to be conducted in a manner considered appropriate by the committee.

Division 4 Other provisions about committee**Conflict of interest**

Clause 16 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.

Entitlements of committee members

Clause 17 provides that payments made to members of the committee, other than the member who is an officer of the department, are to be decided by the Minister.

Chief executive to help committee

Clause 18 provides that the chief executive is to give the committee reasonable help to perform its functions.

Part 4 Inspectors**Appointment and qualifications**

Clause 19 provides that the chief executive may appoint persons who are departmental officers or a person prescribed under a regulation as an inspector but only if satisfied that the person is qualified because of their expertise or experience or because the person has satisfactorily finished approved training.

Appointment conditions and limit on powers

Clause 20 provides that inspector's powers may be limited by conditions stated in an instrument of appointment, a regulation or a notice signed by the chief executive.

Issue of identity card

Clause 21 provides that an inspector must be issued with an identity card containing specified information by the chief executive. A single identity card may be issued to an inspector exercising powers under more than one Act. For example, if an inspector is also an inspector under the *Industrial Relations Act 1999* then a single card covering the purposes of both Acts could be issued.

Production or display of identity card

Clause 22 provides that in exercising a power in relation to a person an inspector must produce their identity card for inspection before exercising the power or have the card clearly visible to the person. If this is not practicable the card must be produced at the first reasonable opportunity. Specified circumstances when an inspector enters a place are excluded from the requirement to initially produce or display the card.

When inspector ceases to hold office

Clause 23 specifies when an inspector ceases to hold office including upon resignation or in accordance with any other conditions placed on holding the office of inspector.

Resignation

Clause 24 provides that an inspector may resign by signed notice to the chief executive.

Return of identity card

Clause 25 provides that a person who ceases to be an inspector must return their identity card within 21 days of the cessation. A penalty is prescribed in respect of non-compliance with the provision.

Part 5 Enforcement

Power to enter place

Clause 26 provides power to inspectors to enter workplaces and public places without the occupiers consent subject to certain conditions. Workplace is defined as including a place in or on which an inspector reasonably believes the business of a private employment agent is, has been, or is about to be carried out. An inspector's power to enter domestic premises, and the limitations on that power, is also set out in this clause.

General powers after entering workplace

Clause 27 provides for powers of inspectors to monitor or enforce compliance in a workplace. These powers allow inspectors to

- inspect, photograph or film any part of the workplace or anything in it
- copy documents
- take into the workplace persons, equipment or materials reasonably required to exercise a power
- require a person at the workplace to give reasonable help to the inspector to exercise their powers.

A person required to give reasonable help must be warned it is an offence not to comply with the requirement without a reasonable excuse. A penalty is prescribed in respect of any person who fails to comply without a reasonable excuse.

Power to require documents to be produced

Clause 28 provides for the power of an inspector to require documents to be produced at a reasonable time and place nominated by the inspector. Documents may be kept for copying. A person may be asked to certify a copy of a document as a true copy. Documents must be returned after copying. Penalties are prescribed for persons who fail to comply with requirements without a reasonable excuse. It is a reasonable excuse not to comply with the requirement if doing so might tend to incriminate the person.

Power to require information

Clause 29 provides for the power of an inspector to question private employment agents and other persons found in a workplace about matters under this Act and require them to give information to ascertain compliance with the Act. Warnings are to be given that it is an offence not to comply with the requirement without a reasonable excuse. A penalty is prescribed for failure to comply without a reasonable excuse. It is a reasonable excuse not to comply with the requirement if doing so might tend to incriminate the person. Power to question persons includes the power to question the person outside of anyone else's hearing.

Power to seize evidence

Clause 30 provides for the circumstances under which an inspector may seize a thing at a workplace. These circumstances are where the inspector reasonably believes that

- the thing is evidence of an offence against this Act and its seizure is necessary to prevent it being hidden, lost or destroyed or used to continue or repeat an offence.
- the thing has just been used in committing an offence against this Act.

Powers supporting seizure

Clause 31 provides for the power of an inspector to move a seized thing from a place or restrict access to it at the place of seizure. A penalty is prescribed for tampering or attempting to tamper with a thing to which access has been restricted without an inspector's approval.

Receipt for seized thing

Clause 32 requires an inspector to give a receipt for a seized thing to the person from whom it was seized or for a receipt for a seized thing to be left in a conspicuous position. The receipt must generally describe the thing and its condition. The requirement to give a receipt is waived where if it is impracticable or unreasonable to do so because of a thing's nature, condition and value.

Forfeiture for a seized thing

Clause 33 provide that a seized thing is forfeited to the State if its owner can't reasonably be found or the thing can't reasonably be returned or if

there is a reasonable belief that it is necessary to keep the thing to prevent it being used to commit further offences.

The owner of the thing must by written notice be told of any decision to keep the thing because there is a reasonable belief that it is necessary to keep the thing to prevent it being used to commit further offences. This requirement is waived where considering the thing's nature condition and value, the owner can't reasonably be found or it is impracticable or unreasonable to give the notice.

Return of seized thing

Clause 34 requires that a seized thing that has not been forfeited must be returned to its owner at the end of 6 months or if a proceeding for an offence involving it is commenced within 6 months, at the end of proceedings and appeal from the proceedings. The thing unless it is forfeited must be returned to its owner immediately its continued retention as evidence ceases to be necessary.

Access to sized thing

Clause 35 provides that unless it is impracticable or unreasonable to do so and unless the thing is forfeited, the owner of a thing must be allowed to inspect it and, if it is a document, copy it.

Part 6 Injunctions

Purpose of pt 6

Clause 36 describes the purpose of the part. The part provides for the ability to obtain an injunction to ensure that private employment agents may be restrained from engaging in any particular disreputable conduct or may be restrained altogether from acting as an agent. The conduct taken into account includes conduct for a private employment agent by an employee or by an executive officer (e.g. a director) of a private employment agent that is a corporation.

Injunctions

Clause 37 provides that injunctions may be granted by the District Court against private employment agents and sets out the activities that the injunction may restrain.

Who may apply for injunction

Clause 38 prescribes the range of persons who may apply to the court for an injunction.

Grounds for injunction

Clause 39 sets out the grounds on which the court may grant an injunction. The grounds include contraventions of declared provisions of the Bill or proposed Regulation/Code of Conduct (or a corresponding interstate law), contraventions of specified provisions of the *Industrial Relations Act 1999* regarding limitations on fee charging (or a corresponding interstate law), failure to comply with specified orders under the *Industrial Relations Act 1999* regarding limitations on fee charging (or a corresponding interstate law) and having been found guilty of a serious offence as defined (e.g. sexual or violent offences, drug trafficking, fraud etc whether in Queensland or interstate punishable by more than three years imprisonment). Provision has also been made to grant injunctions based on the conduct or record of serious offences pertaining to an executive officer of a corporation which is an agent or to an employee of an agent.

In relation to ‘declared provisions’ these will be listed in the proposed Regulation/Code of Conduct. Not all contraventions will be grounds for the court to grant an injunction. The contraventions which qualify as grounds will be limited to those seen as serious offences and offences against the fundamental issues of the Act or the proposed Regulation/Code of Conduct.

Grounds for an injunction relating to ‘serious offences’ are based on a definition of that term which includes, for example, sexual or violent offences, drug trafficking, fraud etc punishable by more than three years imprisonment. Offences of a sexual nature are listed by reference to specified sections of the Criminal Code.

The District Court may only grant the injunction if satisfied it should be granted given the nature of the conduct complained of and the circumstances of any serious offence.

Appeals from a decision of the District Court are made to the Court of Appeal Division of the Supreme Court.

Court's powers for injunctions

Clause 40 provides for the conditions under which the court may grant injunctions restraining conduct or requiring a person to do an act or thing.

Terms of injunction

Clause 41 provides for injunctions to be granted in terms the court considers appropriate. Injunctions restraining a person from carrying on business as a private employment agent may be for a stated period and may state other terms and conditions. Injunctions may also require a person to take actions such as disclosing information or publishing advertisements to remedy any adverse consequences of their actions.

Undertakings as to costs

Clause 42 provides that if the chief executive applies for an injunction, no undertaking as to damages or costs may be required or made.

Part 7 Miscellaneous

Criminal history checks

Clause 43 permits the chief executive to ask the commissioner of the police service for a report on the criminal history of a private employment agent, an executive officer of a corporation that is a private employment agent or an employee of a private employment agent to enable a decision to be made about whether grounds exist to apply for an injunction. The clause limits the information to be supplied and provides for the later destruction of the report.

Responsibility for acts or omissions of representatives

Clause 44 clarifies the responsibility for acts or omissions of representatives. It provides that in an offence proceeding, an act done or omitted to be done by a person's representative is also taken to have been done or omitted to be done by the person. A defence is provided where the person proves that they could not have prevented the action or omission by the exercise of reasonable diligence.

Executive officers must ensure corporation complies with Act

Clause 45 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. A defence for an executive officer is provided if it can be proved they took reasonable steps to ensure compliance by the corporation or if the person was not in a position to influence the conduct of the corporation in relation to the offence.

Proceedings for offences

Clause 46 provides for prosecution of offences under this Act to be taken before an industrial magistrate in accordance with the rules under the *Industrial Relations Act 1999*. Time limits for the commencement of a prosecution are prescribed. No limitation is placed on who may commence proceedings.

Appeal

Clause 47 provides that appeals against a decision of the Industrial Magistrates Court may be made to the Industrial Court.

Evidentiary provisions

Clause 48 provides that in proceedings under this Act certain appointments, copies of requests or notices and authority are accepted in evidence or presumed until the contrary is proven.

Protection from liability

Clause 49 provides an indemnity for nominated persons against civil liability for actions done or omissions made honestly and without negligence under the Act.

Regulation-making power

Clause 50 provides authority for regulations to be made under this Act.

Declaration about use of information obtained under expired Act

Clause 51 provides that information obtained under the provisions of the *Private Employment Agents Act 1983* may be used in proceedings to obtain an injunction under this Act.

Part 8 Amendment of Industrial Relations Act 1999

Act amended in part 8

Clause 52 provides that this part amends the *Industrial Relations Act 1999*. These are consequential amendments arising from amendments to defined terms used in both this Act and the *Industrial Relations Act 1999*.

Amendment of s 408A (Definitions for ch 11A)

Clause 53 amends the definition of performer to clarify that it includes persons whose work is competing in sport. This reflects the definition of the same term in the Dictionary of this Bill

Amendment of s 408B (Meaning of *Private employment agent*)

Clause 54 amends the definition of a person's activities that are not part of the definition of private employment agent. This reflects clause 4(3) of this Bill.

Schedule

Dictionary

The dictionary provides the meaning of various terms used in this Act.