



# LABOUR HIRE LICENSING COMPLIANCE AND ENFORCEMENT POLICY

AUGUST 2022

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The labour hire licence (LHL) scheme was established and implemented to regulate the labour hire industry in the ACT. The purpose of the scheme is to improve responsible practices in the labour hire industry to support better outcomes for Territory workers, particularly at risk workers.

The LHL scheme commenced under the [Labour Hire Licensing Act 2020](#) (the LHL Act) on 27 May 2021.

The governance of the LHL scheme is delivered via the LHL Commissioner and WorkSafe ACT inspectors, to support both the licensing function and compliance and enforcement activities.

The LHL scheme is subject to a three-year review of the establishing legislation. In addition, matters relating to the scheme are considered through the Labour Hire Licensing Advisory Committee (LHLAC) which has the role of providing advice to the responsible Minister on an ongoing basis.

The *Labour Hire Licensing Compliance and Enforcement Policy* (the Policy) outlines the operational compliance and enforcement posture of WorkSafe ACT in regulating the scheme under the LHL Act. The Policy also provides an overview of complaint management procedures to address issues with either licensed or unlicensed labour hire providers or with host employers.

To ensure compliance with the LHL Act (sections 53, 54, and 57) inspectors have the power to enter workplaces and other places including private residences (with consent or under warrant), search premises, interview people, seize items and require production of documents.

In consultation with the LHLAC, WorkSafe ACT will develop an annual Labour Hire Licensing Operations Plan to highlight strategic enforcement priorities. These priorities will align with WorkSafe ACT's [Strategic Plan 2020-2024](#) and the strategies sitting under that plan.

## **TIERED LICENCE APPLICATION AND COMPLAINT MANAGEMENT APPROACH**

The application of a tiered approach to complaint management aims to:

- ensure compliance with LHL and other workplace laws and standards
- enhance awareness of the obligations of labour hire providers
- enable complaints particularly against unlicensed providers
- remove from the labour hire market egregious operators who have neither the capacity nor willingness to comply, and
- protect the rights of those impacted by the LHL scheme.

## **TIER 1: DESKTOP ASSESSMENT OF LICENCE APPLICATIONS AND INITIAL TRIAGE OF COMPLAINTS**

### ***Applications***

Electronic applications are assessed by WorkSafe ACT. The application must meet specific criteria as specified in the LHL Act, including:

- meeting various form requirements detailed in s13 (3) of the Act
- the applicant is not excluded by s14 (i.e., person who was a holder of a licence that was cancelled within last two years)
- the applicant meeting criteria s28 1(a)(b)(c)(d)(e)(f) (i.e., suitable person to hold a licence), and
- the applicant meeting criteria s6 (2) of the Regulations (i.e., financial viability test).

An application for a licence must also include information about the applicant's financial capacity to meet their obligations under workplace laws and standards, in the payment of wages, allowances, superannuation contributions etc.

A licence will not be granted where an applicant has failed to meet the requirements of the application process or have been excluded from applying.

WorkSafe ACT may provide written notice to the applicant if further information is required to ascertain if the licence should be granted.

### ***Complaints***

Complaints about a labour hire licensee and/or a person/organisation engaging labour hire from an unlicensed labour hire provider can be submitted to the LHL Commissioner.

A complaint can be submitted to the LHL Commissioner by (but not restricted to) a worker, (see s.8 of the LHL Act for a definition), a person engaging labour hire ('host'), the Human Rights Commission, a third party, lawyer/solicitor, another labour hire provider, an employee of a licensee/host/unlicensed provider, a law enforcement agency (Police), an Australian Government Agency (such as the Australian Taxation Office or the Department of Home Affairs), an ACT Government Directorate and/or a family member or friend of the worker(s).

Complaints are assessed and triaged on receipt and will be handled according to the service standards included in the attached Service Charter and consistent with the Complaints Guideline issued by the Minister for Industrial Relations and Workplace Safety.

### ***Referral and escalation of matters***

Depending on the information in the application (including a renewal) or the nature of the complaint, matters may be escalated to a Tier 2: Targeted Inspector Compliance Audits. This will occur where the application or renewal is high-risk, and further information is required to verify the information provided by declaration.

## **TIER 2: TARGETED INSPECTOR COMPLIANCE AUDITS**

Monitoring of compliance with the LHL Act occurs through targeted inspector compliance audits. These audits are used to monitor compliance with the LHL Act, checking that all requirements of the licence continue to be met. This may include (but is not limited to):

- reassessment of information initially supplied to WorkSafe ACT during the application process – under s24 & s25
- verification of information provided by licensees in accordance with requirements of Part 5 Compliance Auditing, and
- ensuring compliance by licensees with conditions imposed under s29.

In line with the legislation, licensees will be given an opportunity to resolve any issues found, prior to any regulatory action being taken.

Should the licensee fail to do so in an appropriate timeframe, the outcomes of the inspector audit will be presented to the Case Management Panel (CMP) for consideration and potential escalation to Tier 3 – Formal Investigation.

## **TIER 3: REGULATORY ACTION, INQUIRY OR FORMAL INVESTIGATION**

Should a compliance issue be identified during a Tier 1 assessment and/or Tier 2 audit, and a decision for further inquiry is made, the compliance issue may be escalated to Tier 3 – regulatory action, inquiry or formal investigation.

Less complex inquiries are undertaken by inspectors, who will make enquiries, investigate complaints or potential issues of compliance regarding:

- unlicensed providers – s33
- entering into arrangements with unlicensed providers – s35
- failure to report updates – s32
- provision of false or misleading information- s40
- suitable person test – s40 (f) – s28
- financial viability and disclosure of interest - s12, and
- compliance with workplace laws and standards – s28.

If the inquiries reveal that regulatory action is required, a referral for the consideration of CMP will be developed. Regulatory action is described more fully below.

## **REGULATORY ACTION**

A decision to take compliance or enforcement action must be based on evidence, the law, and a *prima facie* case being established and be supported by the CMP.

After consideration of all the relevant criteria (see Enforcement below), an investigation may result in regulatory action against a licensee (section 42 of the LHL Act). This can result in WorkSafe ACT implementing any of the following actions:

- referral to Office of the ACT Director of Public Prosecutions (DPP) to consider commencement of a prosecution
- changes to licence conditions including:
  - imposing, or amending, a condition on the licence
  - suspending the licence for either a fixed period or until a particular event happens
  - disqualifying the licensee from applying for another licence for a fixed period or until a particular event happens, or
  - cancelling the licence
- decision to undertake no further action.

Under the Act, inspectors can recommend that legal proceedings are taken against:

- a provider (including unlicensed providers)
- people entering into arrangements with unlicensed providers
- people entering into avoidance arrangements, and
- other people where appropriate.

Powers under the LHL Act are delegated to inspectors to allow them to perform the following functions in relation to labour hire licences:

- grant of a licence
- refusal to consider a licence application
- application denial
- licence suspensions
- licence cancellations, and
- variations or revocations of conditions on a licence.

All regulatory actions are undertaken at the direction of the LHL Commissioner, using their powers as delegated under the Act and all decisions are reviewable (see Review of Decision).

The resources available to WorkSafe ACT to institute legal proceedings are finite and will therefore be spent on pursuing appropriate cases.

## SHOW CAUSE

Before the LHL Commissioner takes regulatory action against a licensee, they must give the licensee a written notice (a **show cause notice**) stating:

- a) the grounds on which, under section 40, the LHL Commissioner considers regulatory action may be taken
- b) details of the proposed regulatory action, and
- c) that the licensee may, not later than 14 days after the day the licensee is given the notice, give a written submission to the LHL Commissioner about the proposed regulatory action.

The LHL Commissioner must consider any written submission in response to the show cause notice when making a decision to undertake regulatory action against the licensee.

If a submission under section 41 (2) is received from a licensee, upon consideration, the LHL Commissioner may decide not to take regulatory action (section 43 of the Act). This decision is made where the LHL Commissioner is satisfied on reasonable grounds that regulatory action against the licensee:

- a) may not be taken; or
- b) may be taken, but it is not appropriate to take the action.

## **REVIEW OF DECISION**

Regulatory decisions are reviewable. The licensee, or another person whose interests are affected by the regulator's (WorkSafe ACT) decision, may apply for an internal review of the decision.

If not satisfied with the decision made by an internal (WorkSafe ACT) reviewer, an eligible person can apply to the ACT Civil and Administrative Tribunal (ACAT) for a review of the decision. ACAT is an independent body that hears and determines a range of cases in the ACT.

## **LEGAL PROCEEDINGS**

If a matter remains unresolved following processing through the tiers, CMP will consider a referral for potential prosecution action to the DPP.

This will only occur where there is sufficient evidence, it is in the public interest, and it is a proportionate response to the contravention.

Licensees and other affected parties will be given an opportunity to resolve and/or remediate any issues found (see **Show Cause**) and will be advised what regulatory action is proposed. This action may include potential referral to the DPP which may result in prosecution.

Other circumstances where prosecution action may be taken include:

- if an inspector alleges that a person has repeated the same offence on multiple, separate occasions
- if an inspector alleges that a person has been advised of a requirement of the legislation and they have repeatedly failed to comply, or
- offences are alleged relating to inspectors' powers (e.g. obstruction, failing to comply with requirements of inspectors, false or misleading information, etc.).

All decisions to refer prosecutions to the DPP are made by the LHL Commissioner.

## **OUTCOMES OF PROSECUTIONS**

Outcomes of successful prosecutions may be published to draw attention to the consequence of LHL violations, aiming to increase compliance rates in the Territory.

## **ENFORCEMENT POLICY**

Prosecution is a discretionary action, so not every breach of the law will automatically be prosecuted. The dominant factor in the decision to prosecute or not, is that it must always be in the public interest.

When commencing a prosecution, WorkSafe ACT aims to change the behaviour of the alleged perpetrator and deter future non-compliance. Prosecution in appropriate circumstances sends a message to the community that failures of legislative responsibilities will be enforced through the courts.

The decision to prosecute is made on the applicable law at the time, and public interest considerations. General public interest is the paramount concern in the decision to prosecute. The question of whether or not the public interest requires that a matter be considered by the CMP, the LHL Commissioner for decision, and ultimately the DPP to prosecute by determining:

- whether there is sufficient evidence (i.e. a *prima facie* case and reasonable prospects of a conviction), and
- whether the public interest requires a prosecution.

A *prima facie* case is necessary to consider any prosecution. A prosecution should not proceed if there is no reasonable prospect of a conviction. The DPP will provide advice if a brief of evidence as presented by WorkSafe ACT is to be referred to the ACT Magistrates Court.

This consideration requires an exercise of judgment which will depend in part upon an evaluation of the quality and persuasive strength of the evidence as it is likely to be at trial.



In considering the public interest, the main criteria for consideration will include:

1. the nature and circumstances of the alleged contravention
2. aggravated circumstances
3. impact of the alleged offence
4. effect of litigation
5. characteristics of the alleged aggrieved party
6. level of public concern
7. deterrence, and
8. administrative considerations.

Note that the applicability of and weight to be given to these and other factors will vary and depend on the circumstances of each case:

## **1. THE NATURE AND CIRCUMSTANCES OF THE ALLEGED CONTRAVENTION**

The level of seriousness or triviality of the alleged offence, or whether or not it is of a technical nature only. WorkSafe ACT considers the following to be serious offences:

- alleged offences regarding unlicensed providers
- entering into arrangements with unlicensed providers
- entering into avoidance arrangements
- failure to report, particularly where there is evidence that the person knowingly contravened their obligations or did not properly discharge their duty to ascertain their obligations, and
- alleged offences where special circumstances exist, e.g. vulnerable workers or where the person is a repeat offender (whether or not taken to court) or where there is evidence the person knowingly contravened their obligations (e.g. deliberate exploitative behaviour).

Where an alleged offence is considered to be of a less serious nature, WorkSafe ACT will consider appropriate enforcement mechanisms and alternatives to prosecution, such as recommendations to impose or vary conditions of licence or issue warning letters from the LHL Commissioner.

WorkSafe ACT will consider the following mitigating circumstances before allocating resources to an investigation and/or recommend prosecution:

- where the matter has come before WorkSafe ACT through a complaint or audit:
  - evidence of deliberate or reckless contravention of the Act that demonstrates a genuine misunderstanding (having made reasonable attempts to understand their legal obligations), and
  - suitable systems have been implemented to ensure that no contraventions will occur in the future

- where the person has sought advice, from WorkSafe ACT or a relevant professional:
  - systems have been implemented in line with that advice
- where the person has approached and worked with WorkSafe ACT to rectify a contravention:
  - suitable systems have been implemented to ensure that no contraventions will occur in the future.

Conversely, aggravating circumstances may include those where the person has refused, impeded, or delayed attempts at voluntary compliance, and any other relevant circumstances (see below).

## **2. AGGRAVATED CIRCUMSTANCES**

WorkSafe ACT will consider the following as aggravated circumstances by any alleged wrongdoer:

- the degree of culpability of the alleged wrongdoer in relation to the offence. This may include:
  - the degree or extent to which the alleged wrongdoer acted in accordance with any advice given by WorkSafe ACT or other Authority in relation to compliance with the relevant legislation
- the relevant compliance history of the alleged wrongdoer
- the attitude of the alleged wrongdoer, including any relevant proactive measures taken to comply with the relevant legislation
- the age, physical or mental health or special infirmity of the alleged wrongdoer or a necessary witness
- whether or not the alleged wrongdoer is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged wrongdoer has done so, and
- the degree of culpability of the alleged wrongdoer in connection with the alleged offence, for example the degree of management of senior management in the alleged offence.

## **3. IMPACT OF THE ALLEGED OFFENCE**

The attitude of the alleged wrongdoer and any other offences or impacts that have been identified to workers affected by the alleged offence.

## **4. EFFECT OF LITIGATION**

WorkSafe ACT will consider the:

- likely outcome in the event of a conviction considering the range of penalties available to the court, and
- availability and efficacy of any alternatives to prosecution.

## **5. CHARACTERISTICS OF THE ALLEGED AGGRIEVED PARTY**

The degree to which the alleged aggrieved party has the available resourcing to commence legal proceedings on their own behalf.

## **6. LEVEL OF PUBLIC CONCERN**

Whether or not the alleged offence is of minimal public concern.

## **7. DETERRENCE**

The prevalence of the alleged offence and the need for either specific or general deterrence.

## **8. ADMINISTRATIVE CONSIDERATIONS**

WorkSafe ACT will consider:

- the necessity to maintain public confidence in the ACT Government, WorkSafe ACT and the courts
- the likely length and expense of a court hearing
- whether or not the prosecution would be perceived as counterproductive to the interests of justice (e.g., by bringing the law into disrepute), and
- the length of time since the alleged offence.

## CLIENT SERVICE CHARTER

The Office of the Work Health and Safety Commissioner (WorkSafe ACT) is a statutory office established under the *Work Health and Safety Act 2011* (WHS Act). The Work Health and Safety (WHS) Commissioner is also the Labour Hire Licence (LHL) Commissioner. The LHL Commissioner is the regulator for the LHL scheme.

The objects of the *Labour Hire Licensing Act 2020* (the LHL Act) are to:

- protect workers from exploitation by providers of labour hire services; and
- ensure labour hire service providers meet their workplace obligations and responsibilities to the workers they supply; and
- promote the integrity of the labour hire services industry; and
- promote responsible practices in the labour hire services industry.

The objects are to be achieved by:

- establishing a licensing scheme to regulate the provision of labour hire services, and
- establishing a register of labour hire licensees.

## WHAT YOU CAN EXPECT FROM US

We will:

- communicate with you in a professional, courteous, and respectful manner
- act with honesty and integrity
- listen to you and be responsive
- provide guidance on compliance and deter non-compliance
- resolve or assist with certain work health and safety disputes
- respond to your enquiries, complaints and incidents accurately and thoroughly
- endeavour to respond to your complaint or request within 10 working days from receipt, which may include contacting you and/or the workplace
- make initial contact with the complainant regarding a serious allegation within 3 working days
- respect and protect the privacy of your information, and
- use feedback to continuously review and improve our services.

## WHAT WE EXPECT FROM YOU

You will:

- be courteous and respectful towards our staff
- understand our staff have processes they must follow
- work with us to solve problems
- provide us with feedback to help us improve our services, and
- treat staff in a way that is not threatening or abusive.

**We take abuse, threats, intimidation, or harassment of our staff seriously and do not view it as part of their job.**

If your behaviour is unacceptable, we:

- will provide you with a warning
- may set limits or conditions on your contact with us, and
- may cease all direct contact with you if your unacceptable behaviour continues or we have already investigated and responded to your issues.

## FEEDBACK AND COMPLAINTS

### General feedback

You can provide general feedback such as a compliment or suggestion by:

Email: [labourhirelicensing@worksafe.act.gov.au](mailto:labourhirelicensing@worksafe.act.gov.au)

Phone: **6207 3000**

International: **+61 2 6207 5111** (International call rates apply)

In writing:

**WorkSafe ACT**

**PO Box 158**

**CANBERRA ACT 2601**

### Accessibility and the National Relay Service

If you require a translator or interpreter, you can contact us through the Translating and Interpreter Service (TIS) 13 14 50.

If you are deaf, or have a hearing impairment or speech impairment, call 13 36 77 or visit [www.relayservice.gov.au](http://www.relayservice.gov.au) to make an internet relay or captioned relay call.

Speak and Listen users' phone 1300 555 727

Internet relay users connect to the NRS.

## Complaints

If you have a complaint about the professional conduct of a WorkSafe ACT staff member, please refer your concerns to us using the contact details listed above. Your complaint will be treated in confidence and investigated in accordance with this charter and ACT Public Service guidelines.

### Complaints about our decisions

If your complaint relates to a regulatory decision of WorkSafe ACT, you have the right to appeal. You, or another person whose interests are affected by our decision, may apply for an internal review of the decision.

If you are not satisfied with the decision made by an internal reviewer, an eligible person can apply to the [ACT Civil and Administrative Tribunal \(ACAT\)](#) for a review of the decision. ACAT is an independent body that hears and determines a range of cases in the ACT.

Contact details for the ACT Civil and Administrative Tribunal (ACAT):

#### **ACAT**

**GPO Box 370**

**CANBERRA ACT 2601**

**Phone: (02) 6207 1740**

You can also make a complaint to the [ACT Ombudsman](#). The ACT Ombudsman can investigate complaints about the decisions and administrative actions of ACT government agencies.

Contact details for the ACT Ombudsman:

#### **ACT Ombudsman**

**GPO Box 442**

**CANBERRA ACT 2601**

**Phone: 1300 362 072**

## Freedom of Information

The ACT *Freedom of Information Act 2016* (FOI Act) gives everyone the right to access copies of documents (except exempt documents) held by the Government and its agencies. For Freedom of Information (FOI) guidelines please [click here](#).

### **Privacy statement**

WorkSafe ACT may obtain personal information about you in connection with your complaint. The information may be collected and stored using the powers, and to carry out functions or activities of the LHL Act. Under s74 of the LHL Act, the LHL Commissioner may disclose any information that has been disclosed to, or obtained by, the Commissioner in the exercise of a function under this Act to a responsible entity if the Commissioner considers that:

- the information is relevant to the exercise of the functions of the responsible entity, and
- the disclosure of the information to the responsible entity is appropriate.

WorkSafe ACT is obliged to handle your information openly, transparently and in accordance with the Territory Privacy Principles set out in the *Information Privacy Act 2014*. For more information about how WorkSafe ACT will collect, use, share, and store your personal information and how you can access and correct the information, please see the [Privacy Statement](#).

### **COMPLAINTS AGAINST A LICENSED LABOUR HIRE PROVIDERS AND/OR UNLICENSED LABOUR HIRE PROVIDER**

Complaints submitted on the notification form may be actioned as part of a compliance audit under Part 5 of the LHL Act.

Upon receipt of a complaint, the LHL Commissioner may act upon the complaint and investigate it further or refer the complaint to the relevant authority responsible for administering that part of employment law. If the LHL Commissioner believes the complaint lacks substance, is not made in good faith, or has been dealt with in good faith, the decision may be made to take no action.

### **Who can make a complaint?**

There are no restrictions on who can make a complaint.