Introduction

The Association of Professional Staffing Companies in Australia (APSCo Australia) is part of APSCo Global a recognised authority for staffing and recruitment organisations and their suppliers, in Australia, Europe and Asia, to provide Member companies with access to qualified advice and tools to ensure compliance obligations are met across all segments of their operations, including their workforce and their supply chains, responding to the changing needs of the modern workforce and the regulatory obligations this requires.

Globally, there are 1350 companies recognised as APSCo Members with Australian entities representing 20% of that Membership. 90% of major international organisations operating in the professional staffing and recruitment sector are Members of APSCo Global.

The Association has a tiered approach to ensuring that many of the discussion points identified in this Paper are consistently addressed with Members, that any behaviours that come under scrutiny are addressed and, most importantly that education and support is available to improve practice but also that unconscionable behaviour is addressed swiftly.

APSCo's brand globally is a recognised badge of quality and APSCo Australia is committed to ensuring there is no action in our Membership that diminishes that recognition.

The Tiered Approach

APSCo Members (including suppliers) must, before being accepted, complete a Business Verification Review (1) which is undertaken by a third party auditor to ensure key workforce management and business regulatory requirements are in place. If there is a gap identified in the compliance then APSCo undertakes an education and support program to ensure all regulatory and statutory requirements are in place.

Members and suppliers also agree, on joining and being accepted, to adhere to the Association's Australian and Global Codes of Conduct and Dispute Resolution Procedures (2,3,3.1,4) which include sanctions for behaviour that is unacceptable.

Member companies can also participate in quality based audits and reviews under the JAS-ANZ recognised Talent Engagement Standard (5) and, for the purpose of this submission, the most relevant is the iEngage (6) module which ensures Members have all processes in engaging workers correctly managed, regulatory requirements reported and that there are strict controls in place to ensure limited opportunity for anyone ( company or individual) in their workforce engagement supply chain to be non - compliant.

Member companies can also be accredited in the Talent Engagement Standard which addresses every element of workforce engagement.

APSCo has also developed a compliance driven knowledge platform to support compliance understanding at every level of a company because APSCo recognises that there are many elements to a staffing and recruitment business and our no -cost weekly webinar program of compliance updates as well as our no cost Recruitment Professional Certification program for consultants consistently addresses the following topics relevant to this Discussion Paper and they mirror the modules in the Talent Engagement Standard:

Employment and Contract Management including Modern Awards

Workplace Health & Safety Management

Modern Slavery

Equal Employment Opportunity & anti Discrimination

Regulation incl Licensing

The Black Economy and TPAR

This background informs our response to the Discussion Paper.

Part 1: Civil Penalties

APSCo has always maintained a position that penalties should be applied where there is evidence of clear and demonstrable remuneration underpayment, evidence of statutory payments not being paid ( superannuation in particular), and other evidence of wage theft that demonstrates systematic avoidance and/or complete disregard for the legislative requirements.

Most of the workforce our Membership represents do not represent vulnerability and are well positioned to challenge any concerns they may have but we have provided Members with guidelines through our Vulnerable Workers checklist and Modern Slavery webinars and templates (7,8,9) to ensure they maintain a monitoring process across the changing nature of their workforce, are aware of changing legislative and statutory requirements. Lack of due diligence can allow systemic errors to occur unchecked in organisations that have complex workforces.

The challenge for this sector is the complexity and diversity of the workforce that staffing and recruitment companies manage, the varied engagement structures that make up the modern workforce (often driven by the workers) and the overarching considerations that need to be managed in the supply chain.

APSCo believes education and recognition of quality practice is a far greater incentive for business to comply with legislation than continuously increasing civil penalties or criminal penalties - particularly in Australia where 80% of business is in the SME market - and the cost of compliance management is rapidly increasing.

Civil penalties do need to apply where there is proven deliberate and systematic breaches of the legislation but, before the penalties, the underpaid wages and superannuation should be always addressed as the priority.

Calculation of penalties should be commensurate with the breach and should reflect three contact points:

1. The amount of loss incurred by the workforce in wages (a calculation against interest in superannuation, cost of living etc)

2. The length of time the breach has been in place

3. The training & education that the principals must undertake to ensure the operations of the business are brought to a suitable standard and that this is monitored/audited for a set period, again commensurate with the breach.

Protecting Vulnerable Workers

APSCo introduced a Vulnerable Workers Checklist and Modern Slavery tools (7,8,9) and a number of other measures to assist Members to understand their obligations during the consultation phase for these Acts and, as our Members generally, do not have workers who fall under the vulnerable worker definition, there is little evidence we can submit but to state that we support the protections required by these workers and acknowledge that education and enforcement seem to be achieving results, if the cases that are in the public domain are examples of the outcomes to date.

Extending liability

The staffing and recruitment sector, their quality managers, employment law advisers, insurers and workers 'compensation advisers have worked to develop programs to educate Members, their clients and their supply chains to understand the notion of shared responsibility for onhire and contracted workforces and have developed an exemplar collaborative model, iSafe, (10) in work health & safety assessments which could be mirrored across workplace laws being considered in this Discussion Paper.

The iSafe program requires organisations to apply due diligence to their own operations and those in their supply chain, where there may be multiple intermediaries, to ensure work health and safety requirements are being met. If there are gaps these are highlighted and further reviews and due diligenec are scheduled accordingly along with policy and training support.

APSCo believes existing arrangements with regard to liability are sufficient in relation to employees in contracting supply chains but education and enforcement need strengthening.

To prove knowledge, and knowing involvement in a contravention of a workplace law, could be a subjective assessment at best when determining to extend liability to others in the supply chain. Insurers and legal advisers are continually reviewing policies and contractual arrangements to understand where the critical points are and, there is not, and never will be a one size fits all solution.

These issues need to be addressed on a case by case basis and the well established work health and safety system, when incidents occur and liability is identified, seems to be a model accepted by business generally even if there is not always agreement with the outcomes.

APSCo's position with its Members is that they have a responsibility to ensure the workplaces they are placing workers in have suitable policies, procedures and workplace management systems for the protection of those workers - whether they be contractors or on-hire employees.

There is also an expectation that APSCo Members will confirm, through a range of assessment tools, that any contractors they engage with have met the compliance requirements for their supply and for any workers they may subsequently engage. APSCo believes this should be a minimum due diligence standard across all companies.

APSCo supports the need for such oversight across the supply chain, as evidence of protecting all workers, no matter their classification, and in particular, raising the standards of compliance with all workplace legislation.

The workplace health and safety legislation is evidence that the benefits of extending responsibility far outweighs the risk but there needs to be a detailed consultation and education process, as there was with the Model Work Health & Safety Laws, before there can be any implementation or acceptance of such a process.

Sham contracting

APSCo Australia's predecessor (ITCRA) and other organisations in the sector worked collaboratively to inform Government during the development of the Independent Contractors Act. We have over the past few years advocated for this Act to be reviewed to address the issues highlighted in the Discussion Paper's sham contracting summary.

The contractor terminology is often used in the market by all parties, including Government, as a descriptor, without a real understanding that it is a name only - it is what sits behind the employment/contract agreement that defines the arrangement as to whether the worker is an employee or an independent contractor.

APSCo Australia has, over the past four years worked with the industry to review, not only the terms and contracts used, and their implications, but also to raise the ambiguities within the legislative frameworks.

The Association has developed matrices to inform and educate and we believe increased knowledge is the more productive way forward in removing sham contracting from the employment landscape. (11, 12)

APSCo has, in every Government submission, where sham contracting has been raised, including the labour hire licensing schemes driven by the States, recommended a clear separation between low skilled, low paid workers who are vulnerable to inappropriate sham contracting arrangements as opposed to highly-skilled professionals who wish to engage as independent contractors and have the capacity to ensure they are treated fairly.

The latter category represents most of our Members talent supply but we maintain this position to support those organisations who may have a mixed workforce.

APSCo would suggest that there are already thresholds in place that could identify highly paid workers and that these could be considered as a benchmark to create a simplification for all those engaging independent contractors:

1. QLD Licensing Scheme threshold for workers not captured under the license - $145,400 per annum

2. The high income threshold for unfair dismissal - $148,700 per annum

3. Corresponding rate of pay per hour av. $75 - $85

NOTE: APSCo produces an Index which analyses a number of metrics across contracting and on hire employee including remuneration. The September Index, puts the average hourly rate for contractors in our sector at $90.00 - this has been consistent for most of this year - so the benchmarks recommended reflect the current market trends for the true independent contractor. (13)

APSCo would also like to highlight the complexity and vagaries in the current Modern Award system. Individuals and employers struggle to match Awards to roles in emerging job titles and, in many instances this is compounded when there are multiple workers in one location who are engaged under different agreements and Awards - because the system is open to interpretation.

The past 12 months this Association has focussed its attention on addressing many of the matters raised in this Discussion Paper with our Members and there is always a strong desire to be compliant but the pathway for many companies, particularly small businesses without internal legal teams, is overwhelming.

The Discussion Paper asks if there should be a separate contravention for systemic and serious cases of sham contracting. APSCo believes that there is not a need for a separate contravention but rather that the same recommendations made under civil penalties ( above) should apply as this would provide consistency. In many cases sham contracting is synonomous with the exploitation of vulnerable workers so:

Calculation of penalties should be commensurate with the tenure of the sham contracting and should reflect two contact points:

1. The amount of loss incurred by the statutory authorities and the worker entitlements that are due and payable.

2. The length of time the sham contracting has been in place.

Part II: Criminal sanctions

APSCo Australia continues to be concerned that the focus on penalties diminishes the opportunity to consider increased education, accreditation and certification of organisations who are delivering exemplary workforce management, whether as direct employers or as staffing and recruitment companies supplying labour or as intermediaries involved in the supply chain.

Underpayment of wages can occur for many different reasons. If there has been a deliberate and criminal act then the courts already have the ability to take action but it is APSCo's view that before any fines, gaol term or other criminal punishments are applied the workers' salaries and statutory payments, affected by any such criminal act, receive the financial compensation owed.

A program developed by the Property Council of Australia, with regard to the Modern Slavery Act (14) and the supply chain monitoring and compliance is an example of how a sector can, through its own initiative, deliver an outcome that responds in a positive and corrective way to legislation and workforce management.

This delivers strong positive recognition of compliant providers and APSCo is exploring if this can be developed for any workforce management supply chain model with third party recognition and accreditation.

APSCo's approach to this Discussion Paper has been underpinned by the purpose of Fair Work Act which is to ensure the workers are treated fairly, that business is supported in that process and the broader statement made by the Attorney General, in releasing this Discussion Paper, should be the central tenet of any amendments or changes.

" Industrial relations can play an important role in contributing to the strength of the Australian economy. Potential reform to, or changes within, the Australian industrial relations system should be measured against three criteria:

1. driving jobs and wages growth,

2. boosting productivity, and strengthening the economy

3. ensuring protection of employees’ rights.

Importantly, an effective industrial relations system should strive to achieve the best overall balance, having regard to the needs of both employees and employers, including those engaged in small business."

APSCo also strongly supports the notion that deliberate and systemic unfair treatment of workers is unacceptable but that for this to be managed effectively, both the system and the incentives to maintain good practice should be reviewed to simplify and to consider the value of strong business compliance rather than a constant focus on criminal and civil penalties which, evidence has suggested, often drives the development of more innovative avoidance rather than successful compliance.

APSCo Australia thanks the Prime Minister and the Attorney General for the opportunity to respond to this important review and the Association looks forward to discussing the subjects raised in this Paper in more detail. We are also looking forward to more information on the National Registration Scheme for labour hire organisations, as it is made available.