Draft Gangmasters (Exclusion) Regulations 2006 – response by the Association of Labour Providers on second Defra consultation

13 December 2005

Introduction

On 21 October 2005, Defra published a *Second Consultation on the Gangmasters (Exclusions) Regulations 2005* , accessible via this link to the **Defra website**. Comments are sought by 15 December 2005.

This response sets out the views of the Association of Labour Providers (ALP). The ALP was founded by 18 labour providers in January 2004. It now has 132 members and is generally recognised as the trade association for those labour providers that will be regulated under the Gangmasters (Licensing) Act. The draft regulations are therefore very relevant to all members of the ALP.

This response was prepared based on the views of members of the Association. The views expressed should therefore be taken to be the views not of a single organisation but the views of the 132 labour providers each of which will be directly affected by the final wording of the regulations. It may be possible that because of their own particular circumstances some individual members of the ALP might take a different view from the Association's view, but as yet the ALP is not aware that this is the case.

Executive summary

The Gangmasters (Licensing) Act 2004 is confined to the agriculture, horticulture, fishing and shellfish industries and products deriving from those industries.

There is no evidence that the malpractice which has led to the Act is any more prevalent in any particular part of the sectors covered by the Act or indeed in the sectors covered by the Act compared with other sectors of the economy.

Accordingly, it is sensible for the coverage of the licensing regime to be based on the structure of the industry and, subject to there being no costs which would fall on the public purse, to the views of labour providers and labour users.

Within the limits of the Act, there is only one option which can realistically be pursued, that is option four, with no exclusions for processing and packaging of food and agricultural products. Any other option would cause practical difficulties because the boundary between what was and was not regulated would be wholly artificial. Two of the options would also allow the intentions of the Act to be easily circumvented.

Legal background

The Act provides for a licensing scheme to cover the provision of labour to the agriculture, horticulture, fishing and shellfish industries and products deriving from those industries. The Act allows for "exclusion regulations" to exclude activities from the scope of the Act. It has always been the intention to use these provisions to limit the scope of the licensing scheme.

The first consultation

The ALP responded fully to the first consultation exercise on the exclusion regulations and the views expressed in that response remain valid. The response is accessible elsewhere on this site **via this link**. For ease of reference the Executive Summary is set out below –

"Executive summary

The scope of the legislation should reflect the way that the market is organised, that is the structure of labour providers and the structure of labour users. Dividing lines between what is included and what is excluded should, as far as possible, be obvious and natural rather than artificial and imposed. It is also necessary to recognise that controls in one area are likely to lead to the displacement of illegal activity to another area.

The distinction that the Regulations seek to draw between primary and secondary processing is entirely artificial. The plan to seek evidence on "gangmaster activity" is of questionable value as there is no reliable data on the extent of such activity in primary processing with which to compare such evidence.

Catering and retailing provide more logical exclusions in terms of market structure, but it is difficult to see any reason why they should be excluded.

There is an incorrect assumption that runs throughout the paper, that is that there are "illegal gangmasters" who might try to evade the law by calling themselves farmers or educational establishments or something else. This is not the position. There are unscrupulous people who will seek to make money by breaking the law and who will adopt any form of organisation and go into any business to do so.

With the exception of agricultural co-operatives, which seem to be labour providers by another name, proposed exclusions to deal with special circumstances in the farming sector seem reasonable and are supported."

Evidence of illegal working

The whole of the Act is based on somewhat shaky foundations in that there is no evidence of the malpractices that the provision of labour to the agriculture and food industries are any greater than in other sectors of the economy, or that malpractices on the part of labour providers are any worse than malpractices on the part of direct employers.

The evidence given on page 17 is suspect in this respect. It refers to 125 audits having been conducted under the Temporary Labour Working Group code of practice in which there were 800 non-compliances, the majority of which "involve illegal activity of some sort". Many of those non-compliances were actually health and safety problems on the premises of labour users over which labour providers have no control. It is significant in this respect that the non-compliances with legal obligations on the part of labour users are not thought worthy of any regulatory action. It is also submitted that if a similar audit was conducted of many other businesses in the economy then there would be a broadly similar level of non-compliances. There are many Acts of Parliament for which there is no effective monitoring or compliance mechanism. For example, the Better Regulation Task Force report on child workers noted that fewer than 10% of all children who were employed had the necessary consents. Also, such is the complexity of the laws to which employers are subject that is easy inadvertently for labour providers and other businesses to fall foul of a law, particularly in respect of documentation and record keeping.

It is relevant to note here that one of the intended effects of licensing is "to increase Exchequer revenues by promoting employment of legitimate workers". It would therefore be expected that evidence would show a high proportion of illegal workers in sectors covered by the Act. However, this is not supported by data from the Home Office which shows a breakdown of enforcement visits reported by the Immigration Service in the financial year 2004-5 by sector. (The data is

being used to help determine what sectors should be represented on the Illegal Working Stakeholder Group, ie they are an indication of the extent of illegal working.) 42% were in the hospitality sector, 15% in home visits, 8% in carwashes/garages, 6% in food production, 6% in retail, 5% in employment/cleaning agencies, 5% in factories and warehouses, 5% in the sex industry and 1% in each of the nursing/care home, construction, sports entertainment and horticultural/agricultural (farms and packhouses) sectors. Again, it is interesting to note that no action is being taken in respect of labour providers to the hospitality industry.

Paragraph 19 of the consultation document indicates that 87% of agency workers questioned rated their labour providers as very good or quite good. By any standards, this is an astonishingly high figure, probably well above that which many other employers could report. It is argued that information collected from labour providers on rates of pay showed that up to a quarter do not receive the correct statutory minimum wage because of deductions for transport and accommodation. This is highly misleading. What can legitimately be deducted for accommodation is a matter of great uncertainty such that the Secretary of State for Trade and Industry has asked the Low Pay Commission to study the issue and report on it. No labour provider has knowingly been providing accommodation in contravention of the minimum wage legislation. If they have been doing so it is because the legislation is very difficult, if not impossible, to interpret. This is spelled out in more detail in **the ALP's evidence to the Low Pay Commission** .

It is more correct to say that there has been evidence of illegal deductions for transport, but to a large extent this can be considered as a technicality and one which most local providers have remedied as soon as it has been pointed out. (A compulsory deduction for transport has to be deducted from pay in calculating whether the minimum wage is being met. Labour providers deal with this by making the provision of transport optional. The effect is the same for those workers who do not have other means of transport, as the only reason why labour providers provide transport in the first place is that there is no public transport.)

The consultation document conclusion on the research conducted for Defra was that it "tends to confirm that **serious** exploitation (as opposed to more minor forms of exploitation) by labour providers is neither endemic nor widespread in the second stage processing sector". Given that those labour providers that serve second stage processing also serve primary processing it is reasonable to infer a similar conclusion in respect of those labour providers in respect of primary processing. At first sight it is difficult to see how those labour providers that serve primary but not secondary stage processing would behave in a different way from those that serve both sub-sectors.

The options

Option one is to exclude second stage processing as proposed in the initial consultation. The response of all stakeholders was that this was not appropriate, largely on practical grounds. The first consultation document attempted to draw a distinction between primary processing (washing, grading, cutting etc) and second stage processing (tinning, baking etc). In practice, a dividing line cannot be drawn in this way. Where, for example, is the dividing line between a washed salad and a prawn salad? Using the Defra definitions, primary and second stage processing is frequently carried out in the same physical premises and a labour user may move workers from what would be primary to second stage processing in the normal course of their business. Labour providers do not have different divisions for primary and second stage processing. Large diversified labour providers typically would have an industrial division which would cover both. Smaller labour providers run a unified business. There are special health and safety requirements for the food industry as a whole with no distinction between first and second stage processing. Therefore it is logical for labour providers, if they are to have any specialist sectors, to have one for the whole of the food industry not for part of it.

Option one is therefore unworkable in practice. Moreover, as the RIA explains there would be no financial benefit from pursuing option one as only a handful of labour providers operate in second stage but not primary processing.

Option two is to exclude second stage processing "using a refined definition of initial/second stage processing linked to a review of the definition and its impact by the Gangmasters Licensing Authority". This manages to combine fudge and a cop out at the same time. It is proposed, one hopes not too seriously, that only the supply of labour to sites "exclusively involved in processing and packaging of fresh produce should be licensed". The suggestion therefore is that a plant concentrating on packing could remove itself and its labour providers from the scope of the Act by making two sandwiches which it sold to workers. The proposal would be rather like restricting the need to have a licence to serve alcohol only to those establishments that did nothing other than serve alcohol. A pub could therefore remove itself from the need to obtain a licence by making and selling a cheese roll.

This option is also linked to a possible review by the Gangmasters Licensing Authority. The Authority is being established as a regulator not as a body that specialises in analysing markets and the impact of policies. Its costs are already very high and which will have to be borne by labour providers. The cost of such a review is estimated at £150,000. If there is to be any review then it would be better if this was commissioned from an independent consultancy rather than by a body which has no particular expertise in conducting such reviews.

Option three is to exclude all off-farm facilities linked to a review of off-farm labour provider activity by the Gangmasters Licensing Authority. This at least has the merit of simplicity and perhaps an advantage to government in that the coverage of the Act would be co-terminus with the coverage of the Agricultural Wages Board and of Defra. However, the option is absurd. It would mean that some packing activity would be included and some would be excluded. It would be easy for a labour user and its labour providers to remove themselves from the scope of the Act by redefining the packing and processing activities as being off-farm rather than on-farm.

Option four is that there should be no exclusions in respect of food processing and packaging. Within the limitations of the Act itself, this is the only sensible option. It corresponds with the structure of the market and there would be little difficulty in drawing the line between what was and was not covered. The option would impose no additional costs (as recognised in the RIA) because with about 30 exceptions all the labour providers that serve secondary processing also serve primary processing, again indicating that there is no such proper distinction in the marketplace. It is difficult to see how it could be argued that this will result in regulatory resources being more thinly spread given that there will be only a modest increase in the number of regulated labour providers. Moreover, activity in food processing tends to be more concentrated among the large labour providers supplying large number of workers. Therefore the GLA will actually benefit through the inclusion of second stage processing by attracting substantial fee income, particularly if the banded scale as proposed in the GLA's consultation document is adopted.

The consultation document asks if there are other options. Within the scope of the Act the answer is no, although given the information now available the more sensible option would be to apply any regulation of labour providers across the whole economy rather than to a particular sector or subsector of that sector when there is no evidence to suggest that malpractices are any worse there than elsewhere.

No doubt some would argue that the Precision Prospecting research uncovered no evidence of abuse in second stage processing to justify extending the licensing regime to that part of the sector. This is true in itself. However, as the research also demonstrated that the same labour providers serve primary and second stage processing, by the same token there is no evidence of abuse in primary processing to justify the imposition of the licensing regime. It is not possible to argue that labour providers are guilty of abuse in primary processing but those same labour

providers are not guilty of abuse in second stage processing. There has so far been no evidence to justify the covering of the licensing regime in the long title of the Act. However, given that the licensing cannot go beyond the sector stipulated in the long title there is no evidence to justify differentiating different parts of the food supply chain.

The consultation document asks whether there would be any unintended consequences from adopting any of the options. For reasons that have already been explained, there would be. Options two and three would easily allow the effects of the Act to be circumvented by a modest restructuring. Option one would have the presumably unintended consequence of causing confusion and uncertainty as to whether or not, in a particular situation, labour providers and labour users were subject to the provisions of the Act.

The regulatory impact assessment

The regulatory impact assessment makes the startling claim that any restriction from the scope of the licensing regime would represent a reduction in regulatory burdens. This cannot be accepted. It was always envisaged that the licensing regime would be restricted from what is permitted on the face of the Act. To argue that what is now being proposed is somehow a reduction in regulatory burdens when no such burdens currently exist can presumably only be part of a campaign by a government department to indicate just how successful it is in meeting the government's deregulation agenda.

The regulatory burdens that will be imposed by the Act are considerable and well above those suggested in the RIA which accompanies the GLA consultation document on licence conditions. Where the RIA is correct is in saying that there would be no significant reduction in the regulatory burden if options one, two or three are selected compared with option four.

Voluntary licensing

The consultation document envisages that a labour provider whose activities would not bring them within the scope of the licensing regime could apply for voluntary regulation. This is an unusual concept although not completely unheard of. If it is the intention that voluntary registration with the GLA should be permitted even when a labour provider is not doing any activity which would come within the scope of the Act, then this needs to be spelled out in detail with an indication as to whether it is the wish of government that labour providers across the board should seek voluntary registration with the Gangmasters Licensing Authority.