

*National Competition Policy
Review of the
Employment Agents
Act 1996
Final Report*



DEPARTMENT OF **FAIR TRADING**
NSW Consumer Protection Agency

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1 Executive Summary and recommendations

Background to the review

The review has been undertaken as part of the NSW Government's commitment under National Competition Policy to review all of its legislation which restricts competition. The National Competition Principles Agreement requires that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of the restriction and that the objectives of the legislation can only be achieved by restricting competition. This report is the finding of the review of the Employment Agents Act 1996, undertaken by the Department of Fair Trading.

The employment agency industry

Employment agents typically offer a range of services including recruitment, labour hire and other adjunct services such as assistance with resume preparation. It is only the recruitment activities which are regulated by the Employment Agents Act 1996. Labour hire services fall within the scope of the Industrial Relations Act 1996. The Department of Industrial Relations is currently undertaking an inquiry into the labour hire industry and the findings of that inquiry may also have an impact on agents licensed under the Employment Agents Act.

The Act provides for a licensing system with entry criteria based upon the applicant being of suitable character and having reasonably suitable premises. There is a prohibition on the charging of fees to jobseekers and requirements for basic record keeping in relation to applicants and available positions. There are 2255 current employment agent licences in New South Wales held by 1809 licensees.

Queensland, South Australia and Western Australia operate licensing regimes for employment agents which are broadly similar to that in New South Wales. These have all been the subject of recent NCP reviews with the reports not published to date. The Australian Capital Territory is in the implementation phase of new legislation, based on the NSW Employment Agents Act. Victoria, Tasmania and the Northern Territory do not regulate employment agents.

The industry is also experiencing a number of significant changes in the way in which it conducts its business including:

- the contracting out of the Commonwealth Employment Service resulting in a significant number of new agents entering the market and a change in the overall composition of the industry;
- E-commerce being increasingly utilised by agents and providing the potential for agents to operate in New South Wales through use of the Internet, but base themselves in another jurisdiction to avoid the New South Wales regulatory regime; and
- a greater reliance on contract labour by industry generally and a subsequent growth in the employment agency industry, particularly the labour hire industry.

Economic justification for government intervention

The Council of Australian Government [COAG] has agreed that government intervention should be limited to situations of market failure. The review team found that there was a market failure in the employment agency industry based on information asymmetries between an employment agent and a jobseeker.

In addition to market failure governments may intervene in markets in order to:

- facilitate universal access to essential goods and services;
- allocate limited public resources; and
- protect consumers, employees and the environment.

The review team found that, in relation to consumer protection, Government intervention may be warranted and appropriate in order to ensure:

- that jobseekers are not charged fees by employment agents;
- that discriminatory recruitment practices are eliminated; and
- that job seekers have access to information regarding their rights and methods of redress.

Whether the Employment Agents Act is the most appropriate mechanism to achieve this was subsequently examined by the review.

Effects of the licensing regime on competition

The licensing regime was found to impact on competition in the following ways:

<i>Type of restriction</i>	<i>Impact on competition</i>
Control on entry	<ul style="list-style-type: none"> ▪ agent must be licensed ▪ separate licence required for each premises ▪ premises must be reasonably suitable
Control on price or production	<ul style="list-style-type: none"> ▪ price for job seekers is set at zero with actual cost being transferred to employer
Control on quality	<ul style="list-style-type: none"> ▪ location is limited by the requirement for each premises to be licensed
Control on advertising	<ul style="list-style-type: none"> ▪ misleading advertising is prohibited [duplicates similar provisions of Fair Trading Act]
Control on type of Inputs used	<ul style="list-style-type: none"> ▪ requirement for a person in charge at each licensed premises restricts the administrative flexibility and staffing structure utilised by the agent
Imposition of significant costs	<ul style="list-style-type: none"> ▪ some compliance costs are imposed by the licensing regime eg licence fees and advertising of intention to apply for a licence.

In practice the impact on competition is not seen to be significant either by the review team or the industry itself. Australian Business, in its submission to the review, stated that “the Act operates as a barrier which, while not overly onerous, is unnecessary and irksome.”

Assessment of Alternative Licensing Arrangements

It was identified that the need for government intervention in relation to employment agents was based upon addressing the following consumer protection issues:

- charging of fees to jobseekers;
- discriminatory recruitment practices by employment agents; and
- provision of information to jobseekers regarding their rights and avenues for redress.

These issues were taken into account when considering each of the options. Each option, other than deregulation, was developed on the premise that the prohibition on the charging of fees to jobseekers would be retained in some legislated form.

The review team concluded that it is not the role of employment agent legislation to address issues of discrimination which are addressed in specific legislation and monitored through the Anti-Discrimination Board

and the Human Rights and Equal Opportunity Commission. On this basis, mechanisms for specifically addressing discriminatory practices were not included in the options considered.

The review team concluded that:

- The *current licensing regime* incurs relatively low costs for all parties involved and has a very low impact on competition in the industry. However, the retention of the scheme is very hard to justify on the basis of the low level of the risks arising from the use of an employment agent. Additionally, it does not include an adequate mechanism to ensure that jobseekers are provided with information relating to their right not to be charged a fee and access to mechanisms for redress if they are illegally charged the fee;
- *Negative licensing* provides some slight cost savings to government and perhaps some slight increase in employment growth. This increase is considered to be minimal given that the barriers to entry are so low that there would be very little, if any increase in new entrants to the market. Again, government intervention at this level remains hard to justify on the basis of the low risks involved, as discussed above. This option also does not provide mechanisms for the provision of appropriate information, although it would be possible to incorporate a similar information standard to that proposed in the enhanced enforcement model;
- Under a *co-regulation* model, it is apparent from submissions received that barriers to entry are likely to be increased by education and experience requirements and competition impeded in a manner that also cannot be justified by the identified risks.
- *Co-regulation with a compulsory Code of Conduct* was not seen as providing any additional benefits over a co-regulation model.
- *Deregulation* is likely to result in lower costs for agents and the government and would have a beneficial impact on competition within the industry. This could however be outweighed by the cost of increased exploitation of jobseekers by unscrupulous agents.
- A *comprehensive licensing* scheme would include an information standard. The review team found that such a scheme may be justified in order to address the identified risks associated with the labour hire industry. However, there is concern that this very comprehensive regime would also be imposed on employment placement agents whose activities have been assessed as imposing very low risk for jobseekers and not warranting such a high level of intervention.

- On the balance of evidence the greatest net public benefit arises from an *enhanced enforcement model*. There is no consistent reason for continuing to licence employment agents that justifies the albeit limited competitive restrictions imposed by licensing. The option involves the repeal of the Employment Agents Act, resulting in the removal of the current licensing regime. It provides mechanisms to ensure that fees to jobseekers continue to be banned and that information is provided to jobseekers regarding their rights and available mechanisms for redress. This would all be achieved through the Fair Trading Act in a manner which is simpler, more efficient and effective than a licensing regime to administer.

Recommendations

1. *It is recommended that the Employment Agents Act 1996 should be repealed and the following amendments be made to the Fair Trading Act 1987:*
 - *a definition of an "employment placement service";*
 - *a provision banning the charging a fee to jobseekers by an employment agent for an employment placement service;*
 - *a regulation making power for the establishment of information standards for services, similar to that in the Queensland Fair Trading Act; and*
 - *creation of an offence for the breach of an information standard, with a penalty notice provision attached.*
2. *It is recommended that a specific information standard be developed for employment agents under the recommended regulation making power.*

The following actions have also been recommended to improve the administrative efficiency of the current licensing scheme should the current regime remain in place for any extended period of time:

3. *It is recommended that the requirement for advertising of intent to apply for a licence be removed from the licensing scheme.*
4. *It is recommended that the requirement for "reasonably suitable premises" be removed from the Act.*
5. *It is recommended that the cancellation of a licence under section 11 of the Act be exempted from the operation of section 15 of the Act, in a similar way to cancellation at the person's own request.*
6. *It is recommended that one licence be issued for each licensee with all "registered" premises listed on the licence.*

7. *It is recommended that the reference to prescribed formats for records and registers be removed from the Act.*
8. *It is recommended that the Act be amended to reflect the introduction of the Job Network.*