

Draft Gangmasters (Exclusion) Regulations 2005 - Comments by the Association of Labour Providers

3 May 2005

Introduction

The Gangmasters (Licensing) Act 2004 provides for a system of licensing of labour providers to come into effect in 2006. The Act is widely drawn, covering all providers of labour to the agriculture and food industries and the direct provision of labour for shellfish picking. It has always been the intention to limit the scope of the Act by secondary legislation. On 28 February 2005, Defra published a consultation document on the scope of the legislation, incorporating Draft Gangmasters (Exclusion) Regulations. The document can be accessed at the following address: <http://www.defra.gov.uk/corporate/consult/gangmaster-exclreg/index.htm>. Comments are sought by 27 May 2005.

This response is by the Association of Labour Providers. The Association was established by 18 labour providers at the beginning of 2004. It has grown rapidly and now has 99 members. It is recognised as the trade association for labour providers whose activities will be covered by the Act and has been invited to nominate two members of the Gangmasters Licensing Authority. The consultation document is very relevant to ALP members, all of which serve sectors to be included within the legislation and many of which serve sectors that will be or may be excluded.

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.

Initial and second stage processing – an artificial distinction

This response concentrates on the main issue, that is whether the “second stage processing” of agricultural products should be included within the scope of the legislation.

The Draft Regulations seek to draw a distinction between initial processing and second stage processing. These are defined in paragraph 5 of the Schedule to the Regulations –

“Initial processing” means –

(a) the application of any initial process, such as washing, dressing, cleaning, grading, cutting, trimming, dividing or filleting, unless such process is a minor part of second stage processing; and

(b) any processing carried out on a farm.

“Second stage processing” means the application of any process applied to shellfish, fish and produce derived from agricultural work, shellfish or fish after initial processing has been completed.”

This distinction, and any variation on it, is unsustainable in theory and unworkable in practice. An initial point is that the clarity of legislation is not helped when the meaning of initial processing is different if it is carried out on a farm compared with anywhere else. At the very least it would be more sensible to cover all activity carried out on a farm and label it as such rather than to attempt to call it initial processing.

Some examples can show just how unworkable the distinction is. A processing plant dealing with salads is likely to produce washed salads, bagged salads, salads with the addition of other vegetables, salads with the additions of croutons and sachets of vinaigrette and salads with, say, ham or chicken. All of the salads may go through the same initial processing but some stop at that stage. To apply the legislation only to that part of the activity that end with primary processing would be unworkable.

Apples provide a similar example. Cleaning and packing raw apples is clearly covered but what about sliced apples and apples as part of a fruit salad (all desserts are described as being excluded)?

The point here is that, within many processing plants, in some cases initial processing is the end of the activity in the plants where in other cases it is the prelude to second stage processing.

Labour users themselves do not draw a distinction in the structure of their business between initial and second stage processing, although many draw a distinction between agriculture and packing/processing, which in the case of larger labour providers is generally described as “industrial”. This point is illustrated by the websites of the large diversified labour providers–

- Staffline Recruitment has an industrial division “which specialises in supplying staff to the food, warehouse, distribution, packing and production industries”. The website goes on to say that where a customer has specific requirements “such as health training in the case of food operations, we make sure all workers have it before we supply them to you”.
- Primetime Recruitment also serves the “food industry” through its industrial division. It comments that “the food industry is undoubtedly one of the most specialised sectors with which we deal”..... “Primetime have put together a team to deal exclusively with the food sector and we have strict guidelines and procedures to which we insist they adhere.”
- Manpower has divisions which cover production and assembly and warehousing and distribution with nothing specific for the food industry.
- Blue Arrow has a division dealing with industrial which will cover the food industry.

The websites of ALP members show a similar position –

- Agripro says it is able to “bridge the void of a lack of personnel in the agricultural/horticultural, food production and processing industries”.
- CIP Recruitment has sectors for catering, industrial, commercial, events and retail. The industrial division covers the food industry.
- CY Labour Services provides temporary labour for “general factory production lines, cold stores, warehouses and production factories”.
- Interecruit says it specialises in “office, management, health care and industrial employment sectors”, the industrial sector covering the food industry.
- One Call Recruitment’s website comments “initially supplying packers into the fresh produce industry where the company has strong roots, it has diversified into many different categories of staff in many other industrial environments”.

While labour providers may well reorganise their activities to take account of the Act, it is unreasonable to expect food processing companies to do this. Paragraph 26 of the consultation document states that all processing undertaken on a farm is deemed to be initial processing: “This is necessary to ensure that there is no confusion as to whether a licence is needed for work done on farms.” By the same token, it is important that there is not confusion as to whether a licence is needed for work done in processing plants. It is instructive to look at the Geest website and attempt to ascertain from that where there is a clear division between initial and second stage processing.

It is significant that the Food Standards Agency, the regulatory body for the industry, says on its website that “The Agency is concerned with the whole food industry from farming and food production, packaging and distribution, to retail and catering – and addresses safety issues at every stage of the chain.”

It is also necessary to consider the displacement issue here. The provision of labour lends itself to illegal activity partly because of the significant fluctuations in the demand for labour but also because the enforcement authorities seem unable to deal with informal economy issues. The problem is accentuated where illegal labour is used, as by definition this cannot be part of the formal economy. Crooks will make money where there is money to be made. If it becomes less easy to make money by providing labour to sectors regulated under the gangmaster legislation then crooks will simply shift their business elsewhere. It is obviously far easier to shift it within an established industrial sector where they are already operating, that is the food industry, rather than to shift it to a different sector with different companies and different working practices, such as construction or catering.

The Association can see no theoretical or practical grounds for excluding the artificially defined second stage processing from the scope of the legislation. This was also the view of the non-government members in the Consultative Committee established by Defra to advise on the implementation of the Act. It is clear that the proposed initial exclusion of second stage processing stems from differences within government and reflects far more the structure of government than it does the structure of the food industry.

The exercise to gather evidence

Defra has commissioned research which will attempt to “assess the extent of exploitation or illegal activity by labour providers in second stage processing” and argues that “at present evidence of exploitation and/or illegal activity is largely anecdotal or hearsay as no formal survey has been undertaken to establish the extent to which exploitation and illegal activity is taking place in these areas”. There is no such survey in respect of initial processing either. The consultation paper subsequently makes the point that “With regards to initial processing work, the evidence of

significant levels of exploitation and other forms of illegal activity by labour providers is well documented and uncontested". Far from being well documented the evidence is sparse and piecemeal. There is certainly no formal survey and it is difficult to see what value a survey of the artificially defined second stage processing can be if there is nothing to compare it with.

To aid transparency in this matter, it would be helpful if the terms of reference for the study could be published and if it could be widened to cover initial processing so as to give the appropriate benchmark.

Retailing

It is accepted that there is a dividing line between the production of food and retailing, whereas there is no such dividing line between initial and second stage processing. However, all dividing lines are never clear in a modern economy. It is noted that it is proposed to exclude the distribution centres of the supermarkets which certainly make substantial use of contract labour. However, similar distribution centres used by smaller retailers would presumably be included.

Wholesale markets must certainly be included within the scope of the legislation.

This seems to give a rather artificial distinction between the supermarkets' supply chains, much of which will be excluded from the legislation, and the supply chains serving the rest of the economy, most of which will be included.

Having said that it is easier to draw a dividing line at retailing, the arguments for excluding retailing are difficult to establish. The consultation document refers to the fact that retailers make comparatively little use of temporary labour but the Act is not about temporary labour; it is about contract labour. It is unusual for legislation to draw a distinction on the grounds of whether a practice is common or minor. It is rather like saying that in areas where there is only a modest amount of speeding there is no need to enforce the speed limits.

Catering

Catering is similar to retailing in respect of the Exclusion Regulations. Again, the dividing line between catering and the food industry is reasonably clear cut although inevitably with some blurring at the edges. The catering industry makes substantial use of contract labour, particularly where demand for labour is highly seasonal. There is also evidence of illegal working in catering. The small scale of many units in the industry lends itself to this.

From a government point of view, there would seem strong arguments for including both catering and retailing within the legislation, although the point is not of significant concern to the Association.

Agricultural exemptions

The Draft Regulations propose excluding a number of practices in the agricultural industry, such as farmer to farmer loans and agricultural contracting. The Association accepts the logic for all of these with one exception. It is proposed to exclude the supply of workers within the same agricultural co-operative. An agricultural co-operative is defined in the Draft Regulations as a business comprising farmers, controlled by its members for the purpose of increasing their profitability and achieving its purpose through various means including the collective use and/or sharing of labour. This would seem to make an agricultural co-operative a labour provider. There is already a significant risk with the legislation that illegality will shift from labour providers to farmers. This provision would seem to be formalising this by allowing an exemption for an organisation which looks and acts like a labour provider. Simply because it is mutually owned is no reason why there should be an exclusion. Accordingly, the Association wishes to see this exclusion removed.

Detailed answers to questions

The consultation document sets out a number of individual questions. For the convenience of those assessing the responses this section gives specific answers to those questions.

Q1. Are the general powers of review provided by the Act, as modified in these Regulations, sufficient to allow the Authority to adequately monitor the activity of labour providers in circumstances where a licence is not required? If not, what else is required?

No, and the question is misleading in this respect, reflecting the lack of joined-up government.

Paragraph 2 of the Regulation is specifically concerned with activity which comes within the scope of the Act and therefore the only review that is required is in respect of the food industry. While this is logical to the extent that any subsequent Exclusion Regulations can only be within the food industry, it is helpful to be at least aware of what is happening in other sectors, particularly the displacement effect.

The Association proposes adding a new subsection in the following terms:

“The Authority shall at such times as it sees fit or as directed by the Secretary of State draw the attention of the Secretary of State to gangmaster activity in sectors not covered by the Act, in particular to the effects on the labour market in other sectors of the operation of the Act.”

Q2. Do you think that initial processing should come within the licensing arrangements as proposed?

Yes.

Q3. Do you think that catering and retail outlets should be excluded as proposed?

The case for exclusion is not well made and the Association would prefer catering and retail outlets to be covered but recognises that this is not going to happen.

Q4. With regard to second stage processing, which option do you support? Why?

The Association regards the distinction between initial and second stage processing to be artificial and arbitrary, unsustainable in theory and unworkable in practice. Second stage processing should not be excluded. Option 1 is the only realistic way forward.

Q5. Should initial processing which is undertaken as a minor part of off-farm second stage processing be excluded from the proposed licensing arrangements? If not, why?

No, for the reasons given in the body of this response. Within a single plant the treatment of some products may stop at initial processing as defined in the Regulations, while in other cases initial processing is a prelude to second stage processing on or off the plant.

Q6. Is the boundary between licensed and unlicensed processing work clear? Are there ways in which we might make the boundary clearer?

The boundary is not clear nor can the boundary be made clear because there is no such boundary within the industry. The only solution is to include all food processing within the scope of the legislation.

Q7. Should the definition of “initial processing” at Paragraph 4 of the Schedule incorporate all processing done on a farm? If not, why? How would you delineate the boundary between initial processing and second stage processing undertaken on a farm?

It is accepted that all activity carried out on a farm should be covered by the legislation. The Association would prefer that the English language was not abused in seeking to achieve this.

Q8. Do you agree that farmer to farmer loans should be excluded from the licensing requirements?

Yes.

Q9. Are the terms of the exclusion relating to the supply of workers under a share farming agreement sufficiently secure to prevent abuse by unscrupulous labour providers?

The Association is not qualified to comment on this.

Q10. Is the restriction of 20% of monthly contracted hours sufficient to accommodate most farmer to farmer loans while deterring potential abuse by unscrupulous gangmasters?

At first sight, yes, but the real problem might be abuse by unscrupulous farmers.

Q11. Should the stipulation relating to percentage of contracted hours be higher or lower?

It should certainly be no higher.

Q12. Should the loan by one farmer to another of gang workers be restricted to exceptional circumstances?

To avoid abuse, yes.

Q13. Do you agree that machinery rings and agricultural co-operatives should be excluded from the licensing requirements?

The Association has no problem with machinery rings provided that the “principal purpose” provision is rigorously enforced. However, agricultural co-operatives are labour providers by another name and should not be excluded.

Q14. Is the definition of agricultural co-operative used in the Schedule acceptable, too prescriptive or too loose? Please give an alternative definition if you wish.

As defined in the Schedule, an agricultural co-operative could clearly be a labour provider run by farmers. If there is scope for abuse by labour providers run by people other than farmers there would equally be seen to be scope for abuse the farmers.

Q15. Are there agricultural co-operatives which do not meet the criteria used to define a co-operative? If so, how might the criteria be recast?

The question seems to imply that Defra is having difficulty defining agricultural co-operatives. The case for exclusion is not made.

Q16. Are the criteria used to define a co-operative sufficient to prevent the exploitation of this provision by illegal labour providers?

Clearly not, bearing in mind that the people running the co-operative could be illegal labour providers themselves.

Q17. Do you agree that agricultural contractors should be excluded from the licensing requirements?

Given the definition in the Schedule, yes.

Q18. Do you think that the terms of this exclusion are open to abuse? If so, how can the terms be redrafted to minimise abuse?

The terms currently provide for the exclusion to apply only where the labour is provided to use machinery owned or hired by the contractor. This seems reasonable.

Q19. Are there types of agricultural contracting that fall outside the terms of this exclusion?

The Association is not qualified to comment on this.

Q20. Do you agree that these sub-contracting arrangements should be excluded from the licensing requirements?

At first sight, yes, although paragraph 37 of the consultation document is very difficult to follow.

Q21. Are the tests contained in paragraphs 9(a)-(c) adequate to identify bona fide sub-contracting arrangements where the risk of exploitation is low?

No comment.

Q22. Paragraph 9(1) stipulates that the service provided by the sub-contractor must be made to a person who owns or operates a food and drink processing business. Are there sub-contracting relationships which will not be covered by this exclusion as they involve the processing of produce to which the Act applies other than food and drink? Should the exclusion be extended to cover these? If so, why?

The Association is not in a position to comment on this.

Q23. Do you agree that the supply of workers in this way [where a farmer has sold his farm but retains ownership of the crop] should be excluded from the licensing requirements?

Yes.

Q24. Do you agree that educational institutions and establishments should be excluded from the requirement to obtain a licence? If not, why not?

Q25. Are the terms of this exclusion sufficiently prescriptive in order to prevent its exploitation by an unscrupulous labour provider setting up a bogus educational establishment to avoid licensing requirements?

These two questions rather miss the point. Unscrupulous labour providers will not set up educational establishments. The bigger risk is that those purporting to run educational establishments in practice operate as labour providers. As drafted, the exclusion is far too wide as there is no definition of educational establishment and almost any agricultural work can be described as “training”.

Q26. Do you agree that the supply of specialist workers by specialist agencies should be excluded from the licensing requirements?

Yes.

Q27. Are the terms of the exclusion too restrictive?

No.

Q28 – Q32

These questions are on the shellfish industry on which the Association is not qualified to comment.

Partial regulatory impact assessment

The partial RIA is useful and helpfully contributes to the quality of debate. The Association has a small number of comments on the RIA.

Paragraph 1.1

This states that the Regulations are made under sections 1(2)(f) and 6(2) of the Act whereas in the Regulations themselves it is stated that they are made under sections 6(2) and 25(1) of the Act. It would seem necessary to include reference to 1(2)(f) in the Regulations themselves otherwise the point about reviewing the scope may not be adequately covered.

Paragraph 1.4

It would be helpful for the terms of reference of the study of second stage processing to be publicly available.

Paragraph 3.7

It is stated that evidence of illegal activities by labour providers in initial processing is “well documented and uncontested”. The evidence is certainly not well documented but rather is a mixture of anecdote, hearsay and some case studies and court cases. Defra should publish what it sees as being the “well documented evidence”.

Paragraph 3.10

There is an additional risk that the Exclusion Regulations will create substantial uncertainty as to what is or is not covered.

Paragraph 3.13

The second sentence has a double negative the effect of which is that it means the opposite of what is intended. The more serious point is not the time taken to check that a labour provider is licensed but rather whether the labour provider and the labour user know that a licence is required and the time taken to discover how to that there is a licence. [A useful exercise might be to phone the Defra switchboard and ask for details of how to obtain a gangmaster licence.]

Paragraph 4.1

It is stated that the drafting of the Regulations has been influenced by contact with stakeholder organisations. This may be true but the government has ignored the almost unanimous view of the non-government members of its Consultative Committee that second stage processing should be included.

Paragraph 5.2

This has a non sequitur in arguing that the wider the scheme the more the finite level of compliance resources would be diluted. Compliance resources are not finite and indeed in many sectors they seem to be infinite. The wider the coverage of the scheme the more licensing fees will

be obtained and therefore the more compliance resources should be available. Also, it is assumed that compliance activity will be risk based. The argument for limiting the scope of the Act on the grounds that compliance resources is limited is unacceptable. And if it is to be used for this reason the exclusions must be risk based.

Paragraph 5.4

It is stated that labour providers who serve the supermarkets are thought to be at the respectable end of the labour providers' spectrum. It would be helpful to have evidence on this.

All employment businesses must meet the requirements of the Employment Agencies Act 1973. There is no logic in bringing in this point simply with respect with catering. It applies also to initial and second stage processing.

Paragraph 5.5

The benefits are overstated. If the labour providers who serve the retail and catering sectors are large diversified labour providers then almost certainly they will have a licence under the Act because they will serve the food industry as well.

Paragraph 5.7

In the third bullet point it is wise to include the qualification "in theory at least". If the Act covered farmer to farmer loans then it would simply not be complied with.

Paragraph 5.9

This seems to assume that processing plants engage in either initial processing only, after which the goods leave the plant, or they engage in second stage processing of which initial processing is a part. In practice, many food processing plants will do both. As is stated at the end of the paragraph "It would be extremely difficult to monitor and enforce a scheme where the requirements imposed on labour providers and labour users might vary from day to day". This is precisely what is being proposed if second stage processing is excluded.

Paragraph 5.10

The suggestion that there will be a saving to labour providers of between £1.2 million and £2.4 million if second stage processing is included is invalid. Labour providers who serve second stage processing also serve initial processing. The final sentence of this paragraph half recognises this point by saying that the level of benefit stemming from this option will depend in part on the extent to which labour providers operating in this sector are also active in agriculture and thus require to be licensed anyway. Of course the Act does not cover just agriculture, but also first stage processing as defined in the Act.

Paragraph 6.1

The argument that including second stage processing would impose a "substantial regulatory burden on both users and suppliers of workers throughout the food chain" is unsustainable. First of all, the burden of having a licence and verifying that there is one is fairly modest. Secondly, the government seems to have no qualms in imposing what it is now defining as a substantial regulatory burden on a large part of the food chain.

This paragraph makes the point that this option is undesirable because it would retain within the scope of the scheme "a wide range of circumstances which, while defined by the Act as acting as a gangmaster, cannot by common perception be construed as such". This is a problem with the whole of the Act not just in this area. The fact is that the Act does not apply to gangmasters, it

applies to employment businesses. Not one single member of the Association of Labour Providers has the term “gangmaster” in its title and none use this as a definition of what they do. The government should rightly be concerned with twisting the English language in this way, but the remedy is to untwist it rather than to seek to limit the application.

Paragraph 7.3

The burden will be knowing what is excluded rather than checking whether there is a licence.

Paragraph 11.1

It would seem appropriate that the Better Regulation Task Force and the Food Standards Agency should also be consulted.