Fair Work Bill 2008

Submission of
The Recruitment and Consulting Services Association

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To the

Senate Education, Employment and Workplace Relations Committee

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The Recruitment and Consulting Services Association

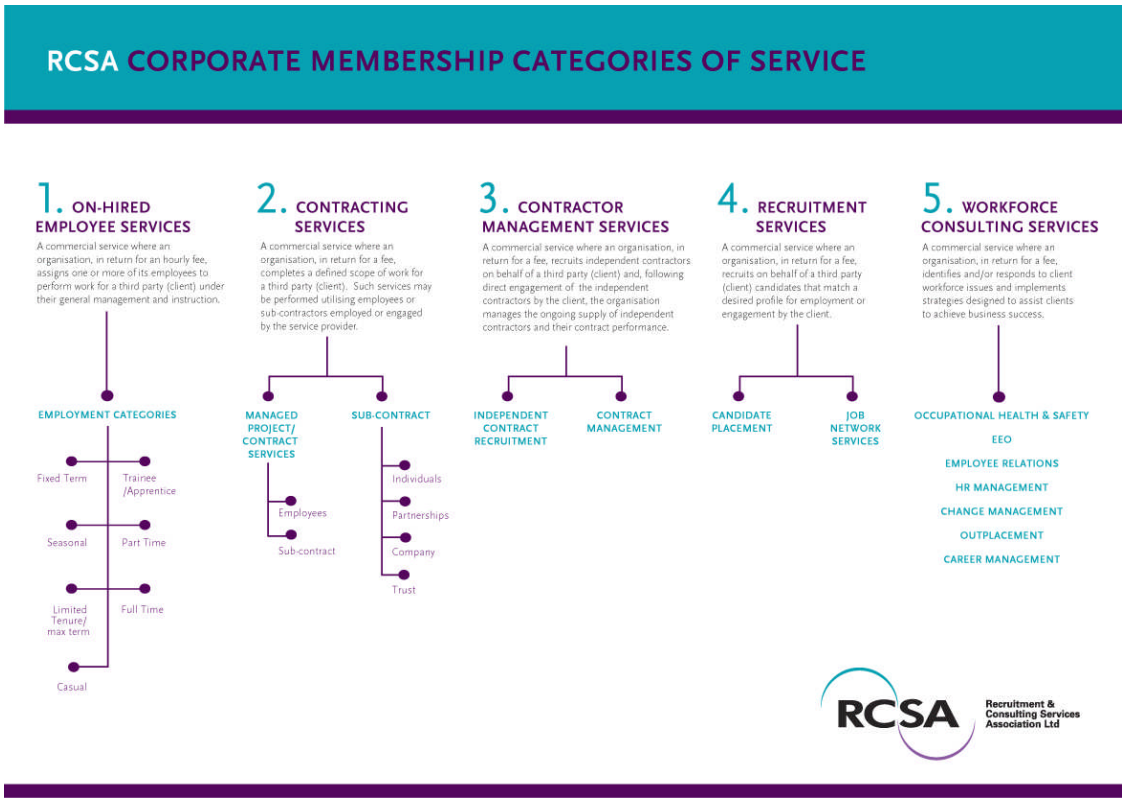
The RCSA is the peak body for the employment services industry throughout Australia and New Zealand. It is a not-for-profit Association that is managed by a Board of Directors.

The principal focus of the RCSA is "to represent and serve the interests of Members for the increased profile and professionalism of the industry". The RCSA has more than 3200 Members in Australia and New Zealand comprising multi-national companies, single consultancies, and individual practitioners operating within a recruitment consultancy.

The Association is instrumental in setting the professional standards, educating and developing Member skills, monitoring industry participant performance and working with legislators to formulate the future. Members are kept up-to-date on information regarding best practice techniques, resources and technological innovation, along with legislative changes impacting on employment.

The RCSA also acts as a lobbying voice, representing its Members on issues that impact upon the industry. It has a strong relationship with the public and private sector.

Members offer the following capabilities:



Key Information - On-hired Employment

The on-hired employment industry is a significant contributor to the Australian economy

Research completed by the Australian Bureau of Statistics in 2002 indicated that the on-hire services industry contributes $10 billion to the Australian economy, more than that of accounting services and more than that of legal services. The annual revenue of the industry is $16 billion, according to both Recruitment Super and RCSA Member Research.

Most on-hired employees employed by RCSA Members are either skilled or professional workers

RMIT University research[1] found the 61% of RCSA on-hired employees are skilled or professional workers with the remaining 39% being semi-skilled or unskilled.

Many on-hired employees are employed on a permanent basis

RMIT University research found that 16% of on-hired employees are now employed on a permanent basis.

Where on-hired employees are employed on a casual basis they have improved opportunities for ongoing work as they are supplied to alternative workplaces

RMIT University research found that half of all on-hired casual employees employed by RCSA Members are immediately placed in another assignment following the completion of their initial assignment that is, they enjoy 'back to back' assignments without having to search for new work like those engaged in direct hire casual employment.

An overwhelming majority of people *choose* to work as an on-hired employee and the reasons for this choice are not what you may expect

RMIT University research found that 67% of on-hired employees chose to work as an on-hired employee and 34% prefer this form of work over permanent employment.

The most important reasons for choosing on-hired employment are diversity of work, to screen potential employers, recognition of contribution and the payment of overtime worked.

[1] Brennan, L. Valos, M. and Hindle, K. (2003*) On-hired Workers in Australia: Motivations and Outcomes* RMIT Occasional Research Report. School of Applied Communication, RMIT University, Design and Social Context Portfolio Melbourne Australia

Business uses on-hired employees to help with recruitment and urgent labour requirements, not to reduce cost or pay.

RMIT University research found that the main reason that organisations use on-hired employee services is to resource extra staff (30%), cover in-house employee absences (17%), reduce the administrative burden of employment (17%) and overcome skills shortage issues (9%). Only 2% of organisations surveyed indicated that the primary reason for using on-hired employees was related to pay.

Business is more productive and competitive because of the use of on-hired workers

RMIT University research found that 76% of organisations using on-hired workers were more productive and competitive as a result.

On-hired employment creates jobs and doesn't necessarily replace direct hire employment opportunities

RMIT University research found that 51% of organisations using on-hired employees would not necessarily employ an equivalent number of employees directly if they were unable to use on-hired employees. In fact 19% of organisations said they would rarely do so.

Furthermore, 19% of RCSA Member on-hired employees eventually become permanent employees of the host organisation they are assigned to work for, according to RMIT University research.

A significant majority of on-hired employees employed by RCSA Members are receiving the same pay rates as employees employed by the host organisation (client).

RMIT University research found that 68.49% of RCSA Member white collar on-hired employees were receiving pay rates that were the equivalent of the host organisation's pay rates.

RMIT University research found that 66.34% of RCSA Member blue collar on-hired employees were receiving pay rates that were the equivalent of the host organisation's pay rates.

A majority of on-hired employees employed by RCSA Members are receiving above award rates of pay

RMIT University research found that 68.45% of RCSA Member white collar on-hired employees were receiving pay rates that were above minimum award pay rates.

RMIT University research found that 49.22% of RCSA Member blue collar on-hired employees were receiving pay rates that were above minimum award pay rates.

An RCSA quarterly Business Managers Survey conducted in March, 2007 found that 97% of Members employing on-hired employees paid above minimum pay rates because that is what the market required and 59% of Members paid above minimum pay rates so as to reflect client pay rates.

Introduction

The Recruitment and Consulting Services Association (RCSA) supports the existence of a workplace relations system that maintains a fair and sustainable safety net of terms and conditions of employment whilst also being responsive and flexible enough to cater for modern working relationships and the constantly changing needs of business and government.

RCSA respects the Government's consultative approach in relation to the drafting of the Fair Work Bill. Such an approach provides a very important sense of inclusion within business at a time of change within the economy and workplace conditions. RCSA looks forward to working further with the Committee to assist in the finalisation of a workplace relations system that will stand the test of time, fairness and the needs of contemporary business.

However, RCSA is concerned that there are certain elements of the Fair Work Bill that will have a challenging impact upon our Membership, especially those Members who engage on-hired employees, a workforce which now makes up approximately 4% of Australia's total employed workforce.

RCSA provides the following submission in a constructive spirit and is more than willing to provide further detail or assistance if required before the public hearings of the Committee.

RCSA submits that whilst our Member's workplace relations needs and challenges are relatively unique, our Member's services are vital to a vibrant and responsive economy and play a special role in the provision of learning, earning and lifestyle needs of thousands of Australian workers across all sectors and occupation types.

RCSA makes the following comments on the most relevant aspects of the Fair Work Bill as it relates to recruitment and on-hired employment services.

Workplace Agreements

RCSA is concerned that collective agreements in their current and proposed legislative form are not particularly well suited to forms of employment and workforces that are characterised by short term engagement across multiple awards and variable site conditions.

On-hired employees, whilst being as diverse as they are numerous, are commonly employed on a casual basis, for relatively short periods of time, at multiple client sites and pursuant to a broad spectrum of awards. Quite often one on-hired worker will be employed under several different awards depending on the client they are assigned to work for, and in accordance with variable patterns of work hours. It is these characteristics that present the challenges for the making of collective workplace agreements, especially in a simple and efficient manner.

RCSA is not saying that collective agreements are not able to be made within on-hired employment however, we are concerned that the current structure of the Fair Work Bill is such that they are not an attractive instrument. Collective agreements in on-hired employment have typically been made for specified client sites where there is a limited number of awards applying and the supply of on-hired workers is ongoing rather than sporadic or short term. Collective agreements do require a considerable investment of time and resources and as a result are not designed for the resolution of short term workforce needs which commonly arise in the on-hire context.

Of particular concern to the RCSA is the requirement under section 181(1) of the Fair Work Bill that in order to have a vote on the proposed Agreement, the employer may request that the *employees employed at the time* who are covered by the Agreement approve the Agreement by voting on it. This concern goes back to the preliminary comments at the start of these submissions regarding the high percentage of casuals engaged and the large number of on-hired employees. In reality, some casuals or on-hired employees may not be specifically *employed at the time* the vote is taken but may have a level of expectation of being re-engaged in the near future. It would be preferable if the question of *employees employed at the time* could be clarified in the legislation and the on-hired situation specifically dealt with.

In addition, section 193(1) of the Fair Work Bill specifies when collective agreements pass the Better Off Overall Test ('BOOT'). The test must be passed in relation to *each award covered employee and each prospective award covered employee.* This requirement implies that the test will be an individual test (*each employee*) and if there were several employees out of several hundred where the BOOT test did not pass then the enterprise agreement could not be approved. This is imposing an individual test on a collective arrangement and defeats the purpose of a collective agreement and

the concept of collective consent. If this is not the intention of the Fair Work Bill, then this should be made clear.

Modern Awards

RCSA supports the modernisation of Awards and the process for such within the Fair Work Bill.

RCSA does not support the application of awards to employees that are currently award free or the extension of entitlements to employees where such entitlements do not currently exist within an applicable award. This should be made clear in the Fair Work Bill.

In addition, the Fair Work Bill specifies that modern Awards will not apply to employees earning in excess of $100,000. The Fair Work Bill states that this needs to be accompanied by a guarantee of annual earnings. RCSA submits that it would be beneficial if this guarantee would be able to take into account commission and bonus structures that are a traditional feature of direct hire employees within the recruitment and on-hire sectors.

Fair Work Australia

RCSA understands the desire to combine the roles of the six statutory bodies (AIRC, IRC, AFPC, WA, WO and ABCC) and recongises that the new model will be fundamental in shaping workplace relations moving forward. However, RCSA would like to ensure that any determinations or decisions made by Fair Work Australia are made publically available so, as legislation and law is developed, our Members can be aware and up-to date. This is particularly relevant to the FWA Unfair Dismissal determinations so as to provide employers with some guidance as to how to interpret the unfair dismissal provisions.

National Employment Standards

Flexible Working Time Arrangements

The RCSA submits the following:

- The NES must, in the establishment of 'reasonable business grounds' for the refusal of a request for *flexible work arrangements*, recognise that employers of on-hired employees are often limited in their capacity to provide flexible working arrangements by the clients such on-hired employees are assigned to. The Fair Work Bill provides guiding information as to what may constitute *reasonable business grounds.* It would be useful if *control* and *beyond the control of the employer* could be specified as an important factor in determining whether flexible working arrangements are a reasonable business ground for refusing flexible work arrangements.

- All casuals, including long-term casuals, should be exempt from the entitlement to flexible working time arrangements on the basis that such employees knowingly enter in to flexible work arrangements and that casual employment caters for personal needs through breaks in employment.

- There should be capacity for an employer and employee to amend award conditions to accommodate flexible working arrangements. For example, an employee requesting an earlier start time to allow for early departure to collect children from school should be allowed to forgo morning shift allowances so that the employer is not burdened as a result of the accommodation without having to pass a BOOT.

Parental Leave and Related Entitlements

RCSA submits that the capacity of employers of on-hired employees to return an employee to a position comparable in status where a suitable assignment is no longer available with a client is difficult.

In addition, RCSA submits that the definition of *continuous employment* as contemplated within this paragraph does not take in to account absences of a casual employee. This definition will need to clarify the definition of *continuous employment* for casual employees.

Annual Leave

RCSA submits that reliance upon Modern Awards for the determination of ordinary hours is problematic for on-hired employment given that on-hired employees commonly work across multiple Awards. An increasing number of on-hired employees are employed on a permanent basis and accrue annual leave. RCSA submits that it would be preferable for ordinary hours to be specified within the NES, where employees are employed across multiple awards, in order to overcome this problem.

Personal/Carer's Leave and Compassionate Leave Entitlement

RCSA submits that the NES should provide an employer with the right to request information from an employee's treating medical practitioner to assist an employer to determine the possible length of a period of personal leave. Such rights will also facilitate an employer's capacity to determine the ability of an employee to perform the inherent requirements of the position for equal opportunity purposes and assist in compliance with Occupational Health and Safety legislation.

Community Service Leave Entitlement

RCSA submits that small employers should be exempt from jury duty make up pay obligations beyond the first 3 days and that any make up pay beyond that period should be payable by Government.

Public Holiday Entitlement

RCSA submits that the paid public holiday entitlement should not apply to casual employees. The Fair Work Bill proposes that casual employees will be entitled to payment whilst taking such holidays where ordinary hours would have been worked. The payment of a casual loading is suitable compensation for the non-payment of ordinary time during public holidays.

Notice of Termination Entitlement

RCSA submits that redundancy pay should remain an Award based entitlement and should not be part of the NES. Alternatively, employees earning more than $100,000 should be excluded from the entitlement to redundancy pay under the NES. The entitlement should not apply to employers with less than 15 full time employees. A casual employee should not be included in the determination of a small employer for the purposes of redundancy pay entitlements. Any other approach would place unreasonable burden on the on-hire sector and its unique employment arrangements.

Fair Work Information Statement

The requirement to provide a this statement to employees at the commencement of employment needs to specifically address the issue of casual employment and the frequent breaks in employment experienced by the on-hire sector, including information on when a casual employee's employment commences for this purpose, especially following a break in employment.

Good Faith Bargaining

Obligations under the Fair Work Bill for good faith bargaining will not require concessions to be made or require agreement to be reached, however, FWA will be able to assist bargaining if requested by a bargaining representative. The Fair Work Bill should be specific on the question of whether FWA has jurisdiction to arbitrate that a Collective Agreement be made.

Industrial Action

FWA will play a central role in regulation of industrial action, included protected action. Employer industrial action will only be protected where an employer responds to employee industrial action (employer response action). This requirement places employers in an unfavourable position when it comes to bargaining.

Unfair Dismissal

To access the unfair dismissal rights employees must first serve a qualifying period of 12 months if employed by a business of fewer than 15 employees and 6 months for other employees. The count of employees is taken at the time of termination and includes casual employees employed for 12 months or

more on a regular and systematic basis. The difficulty for on-hire firms is that many small on-hire firms will employ more than 15 on-hired casual employees for a regular and systematic basis whilst only having one or two permanent operations employees. As a result most small business recruiters and on-hire firms will not be deemed small despite their real size. RCSA therefore submits that casual employees should be removed from the definition of employee for the purposes of determining what a small business is. Alternatively we submit that an exemption of 12 months should apply to casual employees, as has been enjoyed for many years now without problem.

RCSA is also concerned that the *genuine redundancy exemption* from the unfair dismissal laws is more limited in scope than the current *genuine operational requirement*. Of interest is that there will not be a genuine redundancy if it would have been reasonable in all the circumstances for the employee to be redeployed within the employer's enterprise. This places a hard burden on the on-hire sector given that almost all on-hired employees would be redeployed on to other assignments in lieu of being retrenched in most cases.

Unlawful Termination

The Fair Work Bill prohibits employers from taking *adverse action* against not just employees but prospective employees on a range of discriminatory grounds. Extending the prohibition to action towards prospective employees is effectively doubling up with the existing State and Federal discrimination legislation. The Fair Work Bill needs to specify that action can only be commenced in one jurisdiction.

Transmission of Business

Transmission of business will be referred to as *transfer of business*. This means that any transaction between an associated entity of the old employer, or a transfer of work or assets will be likely to constitute a transmission of business under the Act. This is a change form the current position where a transfer of work only (ie: people not assets) is not generally a transmission of business. This could pose specific issues for the on-hire sector where employees are regularly employed by a client of an on-hire firm. Such practice may be discouraged if obligation transfer across with the employee. This may, in turn, impact growth and job prospects for many employees in this sector.

RCSA submits that the current transmission of business provisions be retained given that they require more than labour to transfer. RCSA submits that the transfer of labour only in an outsource situation is not a transfer of 'business' in the strict sense.

Right of Entry

The Fair Work Bill will require *occupiers* to allow permit holders to inspect and make copies of records kept on or accessible from a computer kept on the

premises. RCSA submits that the definition of *occupier* requires clarification to specify that it does not include clients of on-hire firms.

Under the Fair Work Bill, the union's access to "non-member records" will no longer be subject to application to the AIRC. This may lead to abuse and greater disruption to workplaces and would breach privacy rights of non-union members a potentially breach some of the freedom of association provisions.