



**Standing Committee Inquiry into Independent  
Contracting and Labour Hire**

**Supplementary Submission (Compliance)**

**of**

**The Recruitment and Consulting Services Association**

**April 2005**

## **COMPLIANCE AND LEGISLATION**

### **Industrial Relations and Occupational Health and Safety**

#### **Applying legislation to on-hired employee services**

The application of legislation to on-hired employee services should not be complex however the existence of an influential third party by virtue of the client that maintains influence over the on-hired employee on assignment and the provider by way of commercial influence does lead to natural complexities.

Industrial relations, occupational health and safety and workers compensation are the areas of law that have a significant influence on on-hired employee service providers, on-hired employees and even clients in select circumstances. Each piece of legislation shall be considered in turn.

Contracting services are given select consideration only.

#### ***Industrial relations legislation***

On-hired employee service providers in Australia apply industrial relations legislation in a manner that is consistent with traditional employment.

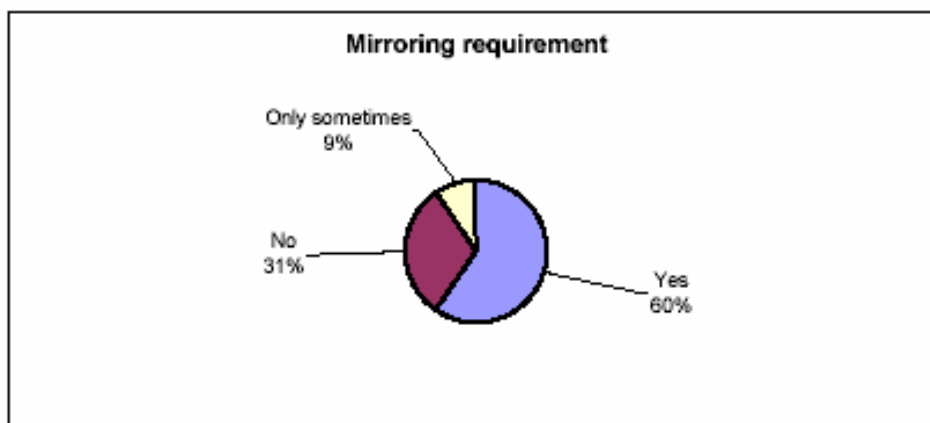
Many RCSA members are bound by Federal Awards through named respondentcy or by virtue of their full membership of industrial organisations registered in accordance with the Workplace Relations Act 1996. More recently providers in Victoria have become bound through the introduction of common rule federal awards. RCSA members utilise certified agreements and Australian Workplace Agreements to the benefit of them and their employees. Those members that are not bound by Federal Awards apply entitlements in accordance with Schedule 1A of the Workplace Relations Act and minimum entitlements fall under the Property and Business Services Industry Sector created in accordance with that Schedule. Likewise, unfair dismissal matters are processed in accordance with the Federal system.

Whilst there may be circumstances where an on-hired employee service provider is not bound by a Federal Award or Agreement this does not mean that they do not abide by Federal Awards in all such circumstances. In many circumstances RCSA members will respect the principal provisions of an award or certified agreement that applies to client employees despite not being obliged to do so. Many members still incorrectly believe that they are in fact bound by the Award of a client despite not being a party.

It is not feasible to apply all certified agreement provisions to on-hired employees in all circumstances given it may not be the desire of the client. However, in a large number of certified agreements, especially in the manufacturing construction industries, clients are required to ensure that on-hired employees are afforded the same entitlements as direct employees covered by such agreement.

**Despite client enterprise agreements containing clauses requiring on-hired employee services providers to pay the same entitlements to their own employees, this is not always sustainable given an on-hired employees conditions could actually be better than the clients.**

The RMIT University study into on-hired employee services identified that 60% of clients require on-hired employee service providers to 'mirror' or match the entitlements that apply to their own direct employees performing similar or the same work.



RMIT University 2003

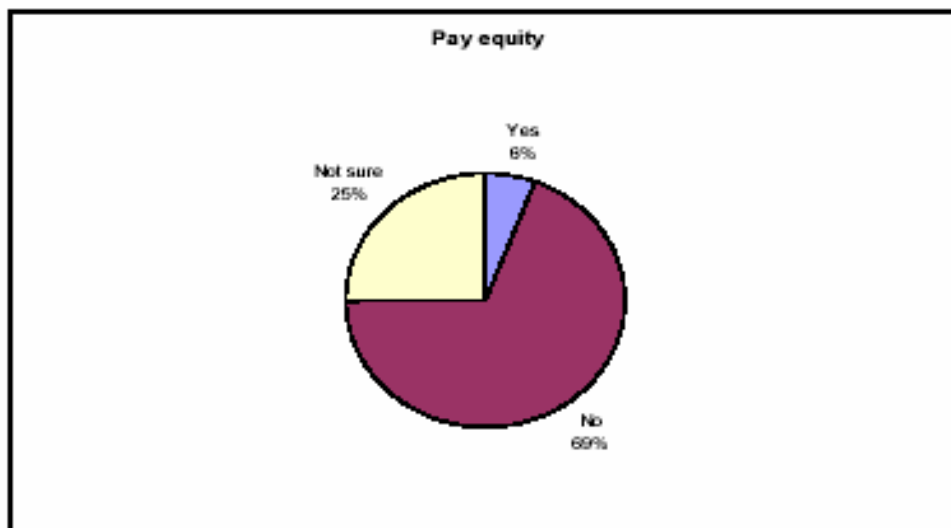
When contrasted against the experiences of RCSA members the results appear to be quite consistent. In 66.34% of blue collar assignments, RCSA members match at least the pay rates applicable to client employees. In white collar the level of 'mirroring' is 68.49%.

**The extent of client pay rate 'mirroring' by on-hired employee service providers that are not members of the RCSA is significantly lower at 49% for white collar and 43% for blue collar.**

## Compliance

The level of compliance with industrial instruments in Australia is extremely good given the relative simplicity of the existing system. However, if the push for industry specific awards is successful like that being pursued by the Australian Manufacturing Workers Union then compliance will become more difficult. Any multi-tiered industrial instrument system is only likely to lead to greater non-compliance given the greater degree of complexity and inconsistency with client employee entitlements.

Only 6% of on-hired employees responding to the RMIT survey felt that they had been paid less than the minimum award rate of pay. It would be arguable that many of these 6% also failed to understand that they are not legally entitled to the minimum rates applicable to client employees. The diagram below provides the breakdown of perceived underpayment of wages amongst on-hired employees.



RMIT University 2003

### **There is little evidence of systematic non-compliance in the industrial relations jurisdiction.**

It remains important to understand that it is the responsibility of the employer in the provider of on-hired employee services to maintain compliance with legislative and industrial instrument obligations, not the role of the client.

It was also determined in the RMIT survey that 65% of RCSA member blue collar on-hired employees are covered by an Award or 'enterprise bargaining agreement' (not including that of the client). In white collar assignments the coverage rate is 57%.

**When you consider the degree of mirroring and that approximately 65% of on-hired employees are covered by an Award or EBA, it is hard to justify any argument that there is a need to introduce industry specific awards**

The existing arrangements where on-hired employee service providers are generally covered by industry awards and company specific certified agreements are suitable. Any attempt to legislate for the requirement to match client terms and conditions would appear to be simply an attempt to legislate a function of the union movement who find it difficult to attract membership in a contemporary workforce.

#### Unfair dismissal and discrimination

The RCSA does however recognise the need for improved understanding of the critical role to be played by on-hired employee service providers in the field of unfair dismissal avoidance as well as the prevention of discrimination and sexual harassment.

Whilst the RCSA has seen no evidence of significant non-compliance in this jurisdiction, it does acknowledge some of the ambiguity that arises from clients maintaining an ongoing supervisory role whilst on-hired employees are on assignment. It becomes critical for RCSA members to play a proactive function to ensure prevention of breaches of legislation and to also ensure the implementation of effective and fair processes. To that end RCSA has developed a training program to ensure member compliance in an area that has been complex and ambiguous given the non-traditional supervisory and instruction arrangements where third parties are involved.

The RCSA acknowledge the potential for ambiguity when there are multiple parties seeking to manage an on-hired employee but advocate training as a solution rather than legislative amendment.

**On-hired employee service providers actually educate clients in the fair and equitable application of work laws and there is a clear opportunity for government to seize this opportunity in the interests of all employers.**

The RCSA has worked closely with the Equal Opportunity Commission of Victoria to assist with its enquiry into the recruitment industry. The EOCV have been very proactive in listening to many of the suggestions RCSA has put forward in relation to opportunities to educate clients of recruitment and on-hired employee service providers.

A best practice guide to equal employment opportunity in employment has been drafted and has just been promoted across the nation.

Occupational health and safety legislation is one jurisdiction that requires further attention to ensure the ongoing safety of on-hired employees. This opinion derives from the recognition by the RCSA that the capacity to control risk is a fundamental element of effective occupational health and safety management in the industry. It must be recognised that risk control should not blindly sit with common law employers in all circumstances given the changing work arrangements we are all now aware of.

### OHS performance

The RCSA has been particularly concerned by an ongoing reliance upon the report of Elsa Underhill into occupational health and safety trends in the labour hire industry<sup>1</sup>. In the absence of alternative data the Underhill report has suggested trends of high injury rates amongst on-hired employees when considered against claims histories of direct employers, that claims are of greater severity and that younger workers are disproportionately represented.

A report recently prepared by ACIL Tasman outlines that the report has some fundamental flaws and questions the capacity of the researcher to draw some of the conclusions she has. A copy of this report can be made available to the Standing Committee upon request.

Some of the ACIL Tasman findings into the Underhill report are provided below:

- While Underhill uses multiple sources of information and undertakes her own analysis, there is insufficient evidence to support many of her strong conclusions.
- Comparisons are made against direct hire employees where the predominant category of employment is permanent employment whilst that of on-hired employees is casual employment. It should be clear that there needs to be a common basis for comparison – the only difference should be about the nature of the employment relationship. This means that we need to compare similar employees, similar jobs and similar organisations, or alternatively take account of those differences in the analysis.
- If one is to draw policy conclusions about the merits of labour hire firms in terms of their approach to OHS, a more complete version of the question should be: For any given job, are the OHS outcomes different for a particular person to be employed by a labour hire firm and contracted out to an organisation compared to that being employed by that organisation?
- Some of the sample sizes are too small given the number of variables involved.

- Underhill notes, there are several factors likely to lead to more compensation claims: These include the intensity of tasks in unfamiliar settings; insufficient experience etc. Despite this realisation, Underhill fails to look at these in an integrated way, instead cutting the data in a number of ways. This identifies correlations rather than causation. This only works if all variables are unrelated (independent), which is clearly not the case here (labour hire workers are younger, in riskier jobs, etc). Underhill should instead have done regression analysis. The dependent variable (workers compensation) should have been regressed against the independent variables (age, occupation, labour hire, etc). If the proper sampling had been followed, this would have either been a logit model (for compensation or not) or a tobit model (for length of time injured and other items that are not binary).
- Much of the analysis undertaken is proportional, however it is proportional in terms of the injuries. This does not answer whether labour hire has different outcomes to direct hire – this just provides compositional insights. Underhill should have looked at absolute differences.

The RCSA applaud any attempts to obtain a greater insight into a relatively unknown industry, however it is essential that such research is thorough and accurate. It is unfortunate that the analysis done by Underhill throws little light (and certainly no great insights) in this area and the conclusions reached are not supported by the data or the analysis on that data

### Accurate Statistics

RCSA submit it is inappropriate to rely upon currently available workers compensation data to accurately assess the health and safety performance of on-hired employee services in Australia.

The data would be available within the data bases of the regulators however it is not available to RCSA in the detail required to conduct a proper analysis of performance.

Currently data is generally made available in an aggregated format which does not allow for precision and often includes third party employment services but are not true on-hired employee services. For example much of the data contains statistics for group training schemes and in-house labour pools e.g. those that arise in the construction industry.

RCSA has sought detailed analysis that contains statistics including:

- Nature of injury
- The causal factor
- Location of injury on body
- Type of injury
- The age of the worker
- The occupation of the worker
- Type of employment

This level of detail would allow for analysis that would be meaningful.

Approximately two years ago RCSA in Victoria obtained authority from 150 of its members, representing 50% of on-hired employee services in Victoria, to aggregate their data and provide a detailed analysis of these data. This data provided much of the information outlined above.

Following analysis this improved data showed that the performance of on-hired employee services was an equal or better performer than the rest of the scheme.

In an attempt to obtain comparable data across Australia for on-hired employee services RCSA wrote to the head of each of the Workers Compensation regulators asking for such data to be made available. Each of the regulators except for one indicated that such data would not or could not be made available to RCSA.

A further problem faced by RCSA in relation to data analysis in this area is attempts to compare the performance of on-hired employee services with that of direct hire employment. Such cross-comparisons are fundamentally flawed because such analysis is a comparison of predominantly short-term assignment based employment with direct hire employment that is long term.

RCSA commissioned ACIL Tasman to review the Underhill Report undertaken on behalf of the Victorian WorkCover Authority. ACIL Tasman found that the methodology utilized was not statistically sound and therefore the conclusions reached could not be substantiated. Underhill also failed to do cross-comparison on an industry by industry basis or on the basis of employment type e.g. casual against casual and permanent against permanent.

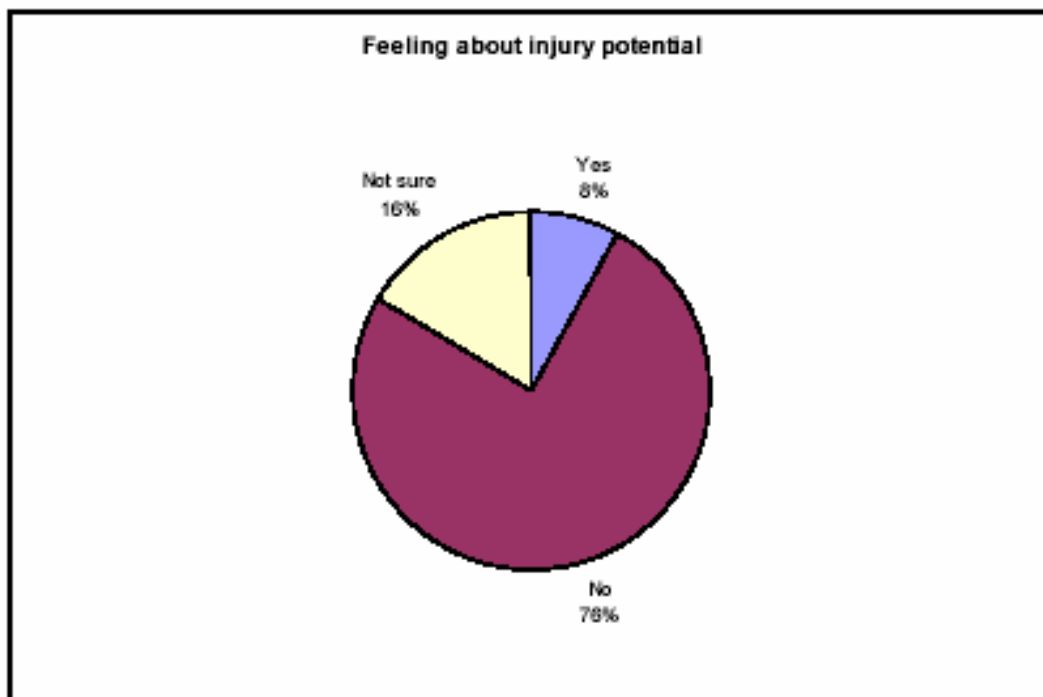
A premium review by the VWA in 2004 determined that the inclusion of claims for group training scheme employers distorted the financial performance of on-hired employee services statistics and resulted in the removal of such claims costs. This contributed to a decrease of 55% in the workers compensation rates in the two employment services categories. A revised premium structure in Victoria, scheduled to come into effect from 1 January 2006 will allow for employment services sector performance to be compared with the performance of direct hire employers by WorkCover industry group. This is likely to allow for the first valid



cross comparison of on-hired employee services performance against that of its direct hire counterparts. It will be the first opportunity to conduct a proper and valid analysis of the performance of on-hired employee services in Australia against direct hire.

### OHS compliance

There is no evidence to support allegations that on-hired employees feel less safe than when working as a direct employee. 76% of respondents to the RMIT University survey into the attitudes of on-hired workers denied that they felt more likely to be injured as an on-hired employee.



RMIT University 2003

Whilst there has historically been very little reliable data on on-hired employee providers and OH&S, the RMIT survey obtained the following findings which are of particular interest:

**55% of RCSA members have identified hazards in client workplaces during OHS assessments, which indicates that there has been significant value to direct client employees as a result of the utilisation of on-hired employees.**

61% of RCSA members conducted OH&S assessments on client OHS systems before or shortly after assigning on-hired employees to the client workplaces. This result would be significantly greater when one considers that the question did not seek to discriminate between on-hired employee services and contracting services.

The level of comprehensiveness of OHS assessments of client systems is high when one considers the 'practicability' of conducting assessments on all client systems and workplaces. To that end 34% of non-RCSA members indicated it took an average of 10 hours to complete a pre-placement assessment of clients OHS systems and workplaces.

OHS assessments were predominantly carried out by employees of the provider at 66% of RCSA members. One in ten RCSA members indicated that they utilised a mix of external providers and internal staff to conduct such assessments.

The RMIT report also identified a degree of difficulty in carrying out pre-placement OHS assessments.

**62% of RCSA members and 63% of non-members reported that clients had made it difficult for them to carry out assessments of their workplaces or obtain information to ensure compliance**

These findings become critical when 36% of clients believe that on-hired employee service providers should rarely or never have the right to instruct clients in how to manage workplace safety for the protection of their own employees (RMIT).

It is important to understand that despite the difficulties often faced by on-hired employee service providers seeking to comply with their obligations under the Act, most members reported that they had refused to supply on-hired employees in circumstances where OHS compliance of the client was not satisfactory.

**49% of RCSA members have refused to supply on-hired employees to clients for OHS reasons in all industries**

What was also of interest were the attitudes of clients to the responsibility for controlling risks in their workplaces in which on-hired employees worked. The RMIT report clearly indicated that a majority of clients believed they should be responsible for the following:

- Controlling safety
- Supervision of on-hired employees
- Provision of Safety equipment
- Job specific training
- Maintaining the OHS management system
- Inducting employees into the workplace

However, clients believed the on-hired employee service providers should be responsible for the following:

- Assessing the suitability of the on-hired employee for the job
- Checking qualifications of the on-hired employee

**These results clearly support the position that it would be suitable to assign responsibility under legislation in accordance with control**

This is a position strongly supported by the RCSA.

In 2003 WorkSafe Victoria commenced a Compliance and Enforcement Project for On-Hire Employee Services industry.

The Victorian WorkCover Authority's (VWA) interim report as at 17 June 2003 the WorkSafe inspectorate reported:

- at least 654 workplaces inspections incorporating over 146 on-hired employee service providers
- the average number of visits to each on-hired employee service provider was 2.5
- inspections had occurred across the State of Victoria
- Approximately 57% of the inspectorate project visits have been to on-hire companies whilst the remainder have been to hosts of those on-hired employee service providers

The Victorian WorkCover Authority inspectorate findings as reported at 17 June 2003 reveal:

- 78 notices had been written by inspectors addressing a range of risks with all but one being improvement notices.

- Over half the notices have been served on clients and just less than half to the on-hire companies

On the basis of the VWA's own data on-hired employee service providers are demonstrating a high level of compliance pursuant to their obligations under the legislation when compared to workplaces in general.

An Australian Capital Territory Inspection Program report released last month stated the following:

*The overall findings of the programmed inspection indicate that the labour hire industry is on the way to achieving best practice in the management of certain aspects of occupational health and safety. The majority of labour hire companies show a commitment to occupational health and safety with a good knowledge and awareness of their responsibilities.*

Furthermore, the following compliance levels were observed:

- 94% of labour hire companies have an Occupational Health and Safety Policy and procedures manual.
- 100% of labour hire companies have Occupational Health and Safety management representatives
- 100% of on-hired workers are consulted about OHS issues
- 100% of labour hire companies ensure that on-hired workers are competent to do tasks asked of them at host workplaces
- 100% of on-hired workers are given specific induction training before commencing work and are given instruction in the use of equipment at the host's workplace.
- 83% of labour hire companies evaluate or monitor the host employers OHS System.
- 94% of labour hire companies keep in regular contact with on-hired workers.
- 88% of labour hire companies ensure there are mechanisms in place for the local health and safety representative or host employer to communicate with the on-hired worker on site.
- 94% of on-hired workers are supplied with a Job Safety Analysis specific to the task undertaken.

- 88% of labour hire companies regularly inspect the host's workplace

The RMIT report outlined that only 15% of clients were not aware of on-hired employee service providers having conducted safety inductions for their employees prior to the commencement of work.

An alternative insight into the performance of on-hired employee service providers and occupational health and safety management is provided by compliance analysis conducted by the South Australian WorkCover Corporation.

**A South Australian report on the initial findings<sup>2</sup> reported on-hired employment occupational health and safety management systems “approaching excellence” citing “a willingness to achieve continuous improvement in management of OHS&W” and results that are most encouraging.**

We again find an opportunity here for the utilisation of the unique relationship between on-hired employee service providers and their clients to facilitate the provision of safety system assessment and education of parties in client workplaces. Where the parties conducting assessments of client OHS systems and risks are adequately trained there is no reason they can not assist regulatory authorities in the provision of information and the identification of hazardous work practices requiring risk control.

#### OHS legislation – The argument for change

The existence of current joint obligations of both provider and client under all State OHS Acts is understood by the RCSA, however we believe variations to the legislation would provide for significant improvement in compliance.

The imprecision of the Occupational Health and Safety Act 1985 combined with the inefficient assignment of certain liability to parties without effective control of particular workplace risks thwarts the ability of on-hired employee service providers (OES Providers) to confidently and effectively comply with their obligations under the Act and consequently inhibits their ability to protect the health and safety of their workforce and those that work in conjunction with them.

One of the greatest difficulties in addressing OHS issues in this sector is that the existing legislation and regulations were drafted with the traditional employment patterns of some years ago in mind. In today's environment, however, organisations now choose to regularly supplement existing workforces with the use of on-hired employee services in virtually all industries and the effect of outdated legislation compounds on a daily basis.

It is therefore imperative that State Occupational Health and Safety legislation be reviewed and amended in order to enable the legislation and its objects to more accurately reflect the current labour market arrangements.

**Western Australia's revised OHS legislation specifically caters for the limited capacity to control risk in relation to on-hired employee services.**

This legislative amendment is greatly welcomed and demonstrates a far more progressive approach to the regulation of on-hired employee services in Australia.

Despite specific recommendations of Chris Maxwell QC in the recent Victorian OHS Act review the Victorian State Government failed to adopt a similar approach despite the call to do so from many unions.

RCSA submits that the well-being and welfare of the worker will be greatly enhanced, afford greater protection and reduce the incidence of accidents and injuries in the workplace.

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<sup>1</sup> Underhill, E, Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Worker's Compensation Claims, October 2002

<sup>2</sup> Labour Hire Targeted Intervention Strategy – Interim Report on Phase 1: Labour Hire / On Hire Agency Audits, Workplace Services, Department of Administrative Information Services