Submission to the Senate Employment, Workplace Relations, and Education Legislation Committee

Regarding Workplace Relations Amendment (Casuals and Fair Termination) Bill 2002

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INTRODUCTION

The Recruitment and Consulting Services Association (RCSA) welcomes the opportunity to provide a submission the Senate Employment, Workplace Relations, and Education Legislation Committee. This document provides the RCSA's view on Workplace Relations Amendment (Casuals and Fair Termination) Bill 2002.

As the leading industry body representing over 3200 members, and in an industry that has more than a $7.8 billion turnover we believe that we represent a strong voice of Australian business people.

With almost 65 % of our members' business based on the placement of casual workers, this Fair Termination Bill has particular resonance with our membership.

The RCSA supports the position that casuals should be exempt from fair termination laws if they have been employed for up to12 months and not 6 months as others have proposed.

It is a market reality that an on-going casual or flexible workforce satisfies the employment requirements of a large number of businesses, who would struggle if not for the flexibility, and likewise satisfies the work/life balance of many Australians.

The continued growth of flexible work in Australia, and the rest of the world, is a direct reflection of market forces and changing social dynamics. The introduction of any legislation or regulation that may curb or diminish these market forces will inevitably have a strong negative impact on the economy and employment of Australians.
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THE RECRUITMENT CONSULTING SERVICES ASSOCIATION

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

The central focus of the RCSA is 'To represent and serve the interests of members for the increased profile and professionalism of the industry'.

The RCSA's 3200 members in Australia and New Zealand include multi-national companies, single consultancies, and individual practitioners operating within a recruitment consultancy.

The RCSA 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, as well as with the media.

There are three main types of member organisations in the RCSA – Labour Hire, Consulting Services and Recruitment Services. This paper relates to Labour Hire, which the RCSA defines as the on-hire of the services of employees of a recruitment firm to a third party.

Key Statistics

- Research conducted by the RCSA in 1999 suggest that the labour hire industry contribute $10 billion to the Australian economy, with $7.5 billion of this figure in worker's wages.
- RCSA research has also found that the average length of placement of someone through a labour hire agency is six weeks.
- The majority of the labour hire industry's workforce is casual employees (probably in excess of 95%).
- 65% RCSA members have a labour hire component in their business.

THE ROLE OF CASUAL LABOUR IN TODAY'S ECONOMY

The growing relationship between employers, recruitment agencies and the casual workforce has become an important part of modern market efficiencies and is helping Australia to become internationally competitive. The casual workforce in Australia is around 27%[1] of the total workforce and growing rapidly.

For employers, casual hire offers flexibility and the opportunity to engage a range of specialist and professional skills on an as-needs basis. It helps them meet changing market demands and employers are willing to meet the additional costs invariably associated with casual hire.

Many employers prefer to work through recruitment agencies as the hiring process is itself a specialised skill particularly where casual workers are needed on a continuous basis. There are efficiency and effectiveness advantages that strongly support the outsourcing of labour hire by large and small firms.

Casual workers – often highly paid and specialised professionals – prefer casual arrangements which offer them flexibility, diversity and higher pay rates. While some traditional employment benefits are foregone, for many casuals it is a lifestyle choice. Very few casuals are interested in changing over to full time employment – an opportunity which is often made available.

Where legislative or regulatory structures oblige employers to increase the entitlements of casuals, it correspondingly decreases the ability of employers to offer higher financial or other incentives.

[1] ABS, catalogue no 6203.0, Special Article – Casual Employment, July 1999

BACKGROUND TO THE ISSUE

A recent Federal Court ruling – *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589 determined that a Regulation found in the *Workplace Relations Regulations 1996* was invalid, thereby allowing casual employees with less than 12 month's service, to bring a claim for unfair dismissal.

The Court found that the regulation was invalid because it exceeded the scope of the legislative provision under the Act for which the Regulations support.

In response, in December 2001, the Minister for Employment and Workplace Relations, Mr Tony Abbott, introduced a further Regulation, excluding casual employees with less than 12 month's service from accessing the unfair dismissal jurisdiction. The new Regulation differs slightly from the earlier, invalid Regulation. The Bill is intended to validate the provisions that were considered invalid by the Hamzy decision, and if passed will operate from the time of the time the original Regulations were made.

The issue was discussed by the Lower House in February and March and was referred to the Senate Committee as the end of the summer session of Parliament and is now subject of a Senate Committee inquiry.

Currently the Opposition has floated the idea of limiting Fair termination to six, not 12, months.

DEFINITION

One of the key points of discussion within the Fair Termination debate has been the definition of a 'casual worker'.

The Australian Bureau of Statistics defines them as an employee without paid, sick or holiday leave, and receives an income loading to compensate.

The RCSA defines a casual worker as a person whose contract of employment is by the hour and receives a rate of pay, which incorporates a loading. This loading compensates for entitlements afforded to permanent employees which are commonly specified in the relevant awards/agreement.

For RCSA members, casuals are known as on-hired workers. They are hired by the RCSA member and placed with a host employer. The RCSA member pays for the on-hired worker's salary and therefore is their employer.

The RCSA supports flexible employment as an efficient way of meeting the changing needs of Australian businesses and providing opportunities for a diverse and balance lifestyle for employees.

Australia is following a global trend where each industry is served by a core workforce and supported by flexible workforce. This employment environment is both beneficial for the business community, but also for Australians who want to have the choice between full time work and flexible hours

THE RCSA'S POSITION

The RCSA believes the standing 12 month exclusion period should be protected as it has worked well both for the industry, and for the business community at large for several years. RCSA supports the legislation that prevents a casual employee from making a fair termination claim until they have completed 12 months service.

Why 12 months and not six months

Economic cycles

The RCSA's membership serves all sectors of the business community from hospitality to retail, healthcare and manufacturing. As an integral component to providing the employment infrastructure for these industries the RCSA has an insight into the economic cycles and seasonality of various industries. Economic cycles rather than length of service drive the RCSA's members' businesses, and to use an arbitrary six months would be disadvantageous.

Reducing Fair Termination laws for casual workers to six months restricts the flexibility and productivity of the large percentage of businesses who rely on casual labour, whilst reducing the opportunities available for the increasing number of Australians who seek the benefits of casual work.

If the six-month ruling is introduced then it increases business risk. To counter this risk, business can choose from two alternatives:

1. stop employing casuals, or
2. Reduce what casuals are paid

In either option it is reduced to an economic trade off to ensure business survival.

Large industry sectors work on a seasonal calender use casual for more than six months, but less than 12 months. There are several examples of such industries:

Pharmaceutical Industry

- Many pharmaceutical temporary placements involve exposure to, and handling of, highly toxic substances and carcinogens. These roles involve lengthy and expensive induction and training. These costs must be amortised over more than six months to be economical.
- Contract manufacturing projects (i.e. Flu Vaccine) are seasonal and aligned to international market needs, and demand continuity of staff due to intensive training requirements. Typically these runs are longer than six months but less than 12.
- Product development cycles are invariably longer than six months, but usually shorter than 12, and rely on predictable continuity of staff for the duration.

Hospitality and Entertainment Sector

- The hospitality and entertainment industry is a highly seasonal business. Many of these industries have a season that lasts more for six months, such as the catering for the AFL football season. Both hospitality and entertainment are renowned for their

small margins, and heavily rely on contractors to support often skeleton staff arrangements.

Food Manufacturing

- The product development cycles in launching new lines are the same as the pharmaceutical industry and require a flexible workforce to support the peak launch phase.
- Quality assurance testing in many food manufacturing enterprises requires qualified staff. Casual placements of more than six months is the only viable way to resource these roles with staff of the necessary standard.

Accounting

- Many small professional accounting (Public and Chartered) practices rely on taxation work as their main income source. The tax season runs over a nine months period during which casual employees are utilised. The period is not fixed, but varies due to client needs, but is longer than six months.

It is important to note that in the examples above, the casual placements cited range from pharmacists to marketing strategists, chefs, accountants, scientists, change management specialists – all of whom are highly qualified and have deliberately sought out flexibility to provide them with the lifestyle balance and professional development they desire.

Supporting The ILO Convention

The current legislation, prior to the *Hamzy* case, follows the International Labour Organisation's convention precluding short-term casual employees from accessing unfair dismissal instruments.

The ILO Convention states that "A member may exclude the following categories of employed persons from all or some of the provisions of the convention ….(c) workers engaged on a casual basis for a short period"[2].

It has been determined that short-term casuals should not have access to claims, and that they should be legitimately excluded. It is essential for the business community to be able to engage employees for a period of time without the opportunity for a claim to be made against it. While there is no definitive ruling of 'short-term' by international regulatory bodies, the RCSA's view is that a period of employment less that 12 months would constitute a 'short-term' arrangement under the ILO convention.

The convention has been reproduced in Schedule 10 of the *Workplace Relations Act 1996.*

It can therefore be concluded that the 12 month exemption follows the ILO convention, and Australia is justifiably following the standards set by the world's leading authority

[2] C158 Termination of Employment Convention, International Labour Organisation, Article 2, June 22, 1982

both on employment and labour. Without the reasonable exclusion period applying, Australia will be out of step with an established convention, adopted worldwide.

Preventing A Litigious Environment

Without the exclusion period applying, there will be a major impact on the way the on-hire industry operates. Agencies will have to take extreme care to ensure casual employees are not terminated in what could be 'perceived' as unfair circumstances.

The industry could face a far more litigious environment. The recent focus on Public Liability claims has highlighted Australia's attraction to resolve disputes of any magnitude through expensive legal process.

Labour Hire agencies could face an increasing number of unfair dismissal claims if the 12 month ruling was not retained. Currently Labour Hire agencies bound by the *Workplace Relations Act 1996* have the ability to remove casuals at the request of the client or where their work was not perceived to be of the standard required, for the first 12 months of employment. Quite rightly, the Regulations do not exclude a casual employee bringing a claim for unlawful termination, where that employee alleges discrimination, or termination for an unlawful reason. These protections are still available to a casual employee with any length of service.

If the exclusion period is removed or reduced, the employment of casual employees will become an increasingly litigious endeavour, potentially reducing the ability of employers to engage employees for short periods of time. Employers, and the labour hire industry in particular, will be required to provide counselling of performance related issues normally afforded to longer serving permanent employees. This will place a greater burden on all employers of casual labour.

Maintaining Business Confidence in a Flexible Workforce

The value of casual workers to employers is that they enable a business to respond to a specific increase in demand for their goods or service.

Australian businesses will also be affected if the Regulation is not supported.

Those companies which hire casual employees directly, if bound by a federal award, or in Victoria, NT or ACT, will also face the same litigious environment.

Employers will have reduced confidence and incentive to consider hiring casual workers.

THE CASUAL WORKFORCE

Casuals are not the vulnerable and disadvantaged members of the community that some have positioned them to be. They are a major part of the Australian workforce, and casual work is a deliberate and often lifestyle-based choice.

As stated earlier, the Australian Bureau of Statistics (ABS) defines casual employees as employees who do not receive paid, sick or holiday leave. To compensate these employees for loss of those benefits casual employees receive a loading of somewhere between 15% and 30%, depending on the award they are employed under.

Research by the ABS found "there has been a strong growth in the number of casual employees compared to other employees between August 1988 and August 1998, 69% of net growth in the number of employees was in casual employment"[3].

Another ABS report found in its employment survey in 1998 that of those paid by an employment agency, 65% were self-identified casuals[4].

"They (casuals) usually receive a high rate of pay to compensate for a lack of job security and paid leave"[5].

LABOUR HIRE INDUSTRY AND CASUALS

The RCSA understands that the difference between a casual worker and a part time or full time employee is that they are in essence hired on an hour by hour basis. This lack of permanency is offset with an hourly income loading.

Following this line of thinking, casual workers determine which times they are unable to work because of other commitments, they can give an hour's notice if they decide to leave, and likewise receive an hour's notice if they are no longer required to work. They are not hired on the basis of, nor do they automatically have the expectation of, ongoing employment.

The unfair dismissal legislation contradicts the notion of 'casual' employment, which is to receive a loading because of the reduced expectation of ongoing employment. If such employees can pursue fair termination claims for a tenure that was not meant to be permanent then employers would be obliged to reduce the loading to cover the additional risk of fair termination action.

The appeal of casual employment

The reasons for the growth of the casual workforce and flexible labour has come about as businesses change their structure, and people seek a balance between work and personal time.

[3] ABS, catalogue no 6203.0, Special Article – Casual Employment, July 1999
[4] ABS, catalogue no 6359.0, Tables 1 and 12, August 1998
[5] ABS, catalogue no 6203.0, Special Article – Casual Employment, July 1999

An increasingly flexible and mobile work force must be acknowledged and encouraged in order for Australia to thrive and prosper in the increasingly competitive global markets.

With businesses seeking to concentrate on core business, ancillary functions can be outsourced, and likewise, a company's workforce can be adjusted to reflect the business demands.

Similarly, there has also been an emphasis on people seeking flexible employment. Reasons for this type of employment vary from the desire to gain family and work balance, to having the ability move across industries or careers.

In mid 2001, the RCSA surveyed 5500 people in conjunction with monster .com to find out what was attractive about outsourced work – the majority responded with flexibility (39%) and diversity (30%)[6].

While the RCSA does not approve of the supposed practice of employing people as full-time casuals for long periods to avoid paying permanent entitlements, it does not accept that all casual employees would choose to trade the flexibility and the attractive wages of casual employment, for the security of permanent employment. This approach preserves an outdated employment model which fails to take into account the increasing mobility and flexibility of Australia's work force and the growing preference of employees for casual employment.

One of RCSA's major corporate members, Manpower Services (Australia) Pty Ltd , has in fact noted that since the federal Metal, Engineering and Associated Industries Award was amended in 2001, enabling casuals to become full time employees after six months employment – not one of their casual employees engaged in accordance with this award has taken the opportunity to become a permanent employee. Manpower's Workplace Relations Manager, Jennifer Gray, reports that when the casual employees are faced with a reduction in their hourly rate of pay once the casual loading has been removed, the casual employees prefer to remain casual employees. She reports that a significant number do not see the immediate benefit of paid annual leave, sick leave and public holidays. They enjoy the flexibility and loading that comes with working in this environment and are prepared to continue trading of other benefits such as annual leave.

It is clear that the Fair Termination legislation will have a significant impact on the labour hire industry because outsourced placements are its core business. The industry's value is being able to supply a capable workforce at short notice.

[6] monster.com employment survey, conducted by TMP in conjunction with the RCSA, September 2001

CONCLUSION: RCSA SUPPORTS 12 MONTH EXEMPTION

In summary the RCSA recommends that the Senate support the Federal Government's Regulation made on 6 December 2001 to exclude casuals with less than 12 months service from pursuing fair termination claims.

Without the 12 month Regulation;

- the Labour Hire industry and Australian businesses will be thrust into an unwelcome litigious environment,
- it will stifle industries who require a flexible workforce for more than six months, but less than 12
- it will inhibit the opportunities for casuals seeking work, who enjoy a flexible work environment, thus reducing freedom of choice
- the industry whose growth has been built on the need for a flexible workforce in a strong, global economy will be less attractive to major corporate clients
- it undermines the ILO convention that has been incorporated into Australia's *Workplace Relations Act 1996* and *Workplace Relations Regulations 1996*.