



**Submission to**

**Senate Employment, Workplace Relations and  
Education Legislation Committee**

**Inquiry into the Provisions of the Independent  
Contractors Bill 2006 and Workplace Relations  
Legislation Amendment (Independent Contractors) Bill  
2006**

**The Recruitment and Consulting Services Association**

**July 2006**

## **The Recruitment and Consulting Services Association**

The Recruitment and Consulting Services Association Ltd ('RCSA') is the peak body of the employment services industry in Australia and New Zealand.

Formed in 1996 the RCSA boasts a national membership of 3,000, all of which are drawn from a diverse range of organisations and individuals including small owner-operator businesses, listed and non-listed Australian companies and Australia's large multinational corporations.

Members of the RCSA provide an extensive range of services including on-hired employee services ('labour hire employment'), contracting services ("including on-hired independent contractor services"), recruitment services, *Job Network* services and consulting services.

The RCSA maintains its head office in Melbourne and six Secretariats located in Victoria, New South Wales, South Australia, Western Australia, Queensland and New Zealand. The current Chief Executive Officer of the RCSA is Mrs. Julie Mills and the current President is Mr Stephen Shepherd MRCSA.

The RCSA is instrumental in setting standards in the employment services industry. Such standards are set and maintained in relation to individual and corporate member professional development, education, training, industry compliance, industry performance and the establishment and maintenance of sustainable and effective legislative and regulatory regimes relevant to the industry.

The RCSA Australia/New Zealand boasts a very effective member committee structure that review and contribute to the establishment of professional conduct and equitable outcomes for corporate members, individual members, employees of corporate members (direct and on-hired) and independent contractors.

Committees include the Australia/New Zealand Workplace Relations Committee, Australia/New Zealand Workers Compensation and Occupational Health and Safety Committee, Australia New Zealand Insurance Committee, Australia New Zealand

Education and Training Committee and the Australia New Zealand Taxation Committee. This committee structure, which is supported by State based committees provides the RCSA with an unparalleled capacity to respond to inquiries of this nature in a manner that is accurate, effective and insightful.

## Introduction

As one of the principal industry organisations representing independent contractors within Australia, the Recruitment and Consulting Services Association Ltd ('RCSA') appreciate the opportunity provided by the Committee to contribute to the review of the *Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* ('the Bill').

RCSA represents the interests of members across a wide range of service types including, amongst others, the engagement and on-hire of independent contractors to clients as well as the sourcing, recruitment and placement of independent contractors within client organisations for client direct engagement. RCSA are advocates of contemporary workplace solutions to meet the increasingly flexible requirements of clients across all industry levels.

At the time of writing 748 RCSA members were providing contracting services to clients a large proportion of which would be on-hired contractor services. This represents 44% of RCSA member corporate entities. In December 2003 in a report released by RMIT University titled *On-Hired Workers in Australia: Motivations and Outcomes* it was found that, on average, RCSA members had 54 independent contractors on assignment each day.

A copy of the RCSA service category definitions and diagrams are included in this submission as Appendix A to aid the Committee's understanding of where independent contractors fit in to the RCSA member service categories.

The popularity of independent contracting is evident amongst RCSA membership who each day are being asked by workers to engage their services as independent contractors as opposed to employees without any solicitation whatsoever. In response, RCSA members are happy to facilitate this request however they do so with the increased understanding that such commercial relationships must be based upon solid intention and genuine choice.

RCSA supports the rights of individuals to make a choice as to the form of engagement they wish to enter into in relation to the provision of personal services. As a fundamental principle, so long as the decision of an individual is made without coercion and is made with genuine intent and understanding as to consequence, RCSA believe an individual should be free to provide services by way of a commercial relationship in contrast to one based upon a contract of employment.

RCSA therefore supports the Bill with the amendments outlined in this submission.

## **Principles of RCSA Support for the Bill**

Further to our introductory comments RCSA supports the Bill subject to the amendments proposed within this submission.

Our support is based upon the following principles as they relate to independent contracting within Australia:

1. Individuals should be afforded the right to freely enter into a commercial relationship with another party to provide personal services with the obligations, rights and protections afforded to them under commercial law.
2. When an individual has freely chosen to enter in to a true commercial relationship to provide personal services they should be able to do so without being deemed to be employees under general employment or industrial relations law.
3. When and individual has freely chosen to enter in to a true commercial relationship to provide personal services they should be able to do so without such relationship being re-written or otherwise interfered with.
4. The common law remains the most appropriate mechanism for the determination of true and free independent contracting relationships. The common law is flexible enough to take in to account the diversity of factual circumstances that surround independent contracting and this is evidenced by a growing body of new law in this area.
5. Statute may, in certain circumstances, provide clarity and facilitation of sustainable commercial worker relationships so long as such statute does not interfere with the common law principles upon which the relationship is based.
6. Independent contracting relationships that are not founded upon openness between the parties, freedom of entry and agreement that is free of coercion undermine the integrity of the common law commercial contract and should not be enforceable.

7. True independent contracting contributes to the Australian economy through the facilitation of flexibility, entrepreneurial endeavour and productivity.
8. Independent contracting is a work arrangement of choice that provides individuals with the freedom to achieve in commerce and society through the facilitation of improved work/life balance at a time where Australia and Australians are increasingly becoming part of a global economy and society.
9. The Bill complements the recent Work Choices legislative reform that is founded upon individual choice and a recognition that Australian's are increasingly confident and content about the performance of work in a manner that contrasts with traditional work arrangements of the twentieth century.
10. Independent contractors and principals are benefited by a single piece of legislation rather than legislation for each State jurisdiction which contributes to confusion and non-compliance.
11. Independent contractors should be free to provide their service through on-hire arrangements where they are engaged by one party and assigned to work for one or more clients.

## **Proposed Amendments**

Whilst RCSA support the intention behind the Bill we believe there are some aspects that require amendment in accordance with the following recommendations:

1. Clause 7(2)(c) of the principal bill provides for an unlimited regulation that could provide for the exclusion of State and Territory laws. RCSA do not support such a provision within the legislation and recommend that any exclusion's be specified in the primary legislation.
2. As a matter of principle, RCSA oppose the preservation of State law governing owner drivers on the basis that there appears to be no sustainable reason why such individuals should not be afforded the rights and protections afforded by the proposed legislation. RCSA support the removal of such exemptions within the legislation.
3. RCSA supports the establishment of a federal unfair contracts jurisdiction which encourages resolution of disputes by mediation however RCSA does not believe that comparisons with 'similar employee remuneration', as is provided in Clause 15 of the principal bill, is an appropriate consideration of whether a contract is harsh or unfair. RCSA believe that Part 5 of the bill should be amended accordingly.
4. RCSA recommends that the determination of harshness and unfairness in relation to unfair contracts would be best assessed at the commencement of the contractual relationship and not thereafter. The foundation of independent contracting is that it is a commercial relationship and such relationships provide for a degree of risk, and reward, that is typically not present at the same level within an employment relationship. Therefore, individuals should go in to a commercial relationship with their 'eyes open' to the risks and opportunities presented not only at the commencement of the relationship but throughout the life of the contractual relationship.
5. RCSA recommends that clause 902 of the supplementary bill be amended so that termination of employment for the 'whole or dominant purpose' of an individual



becoming an independent contractor is not an offence where such termination is to genuinely establish an independent contracting relationship and is therefore not a sham arrangement. Furthermore, the reverse onus of proof should be amended such that the individual claiming the offence is required to establish the breach.

6. RCSA opposes providing unions with the power to prosecute pursuant to clause 904 of the supplementary bill. RCSA believe that the provision of such prosecutorial power to workplace inspectors and the individuals themselves provides a suitable and accessible mechanism.

## Appendix A

### RCSA Service Definitions

- Client:** An organisation engaging and utilising the services of a provider of on-hired employee services, contracting services, recruitment services or employment consulting services.
- Contracting Service Provider:** An organisation that provides contracting services to a client through direct provision of managed project/contract services, or through the engagement of a sub-contractor.
- Contractor:** An individual, partnership, entity or trust engaged under a contract for services.
- Employee:** An individual engaged under a contract of service.
- Employment Consulting Services:** The provision of services where an organisation identifies and/or responds to client needs regarding workplace issues and implements strategies designed to assist client to achieve business success. For example, occupational health and safety, equal employment opportunity, employee relations, human resource management, change management, organisational development and outsourcing.
- Managed Project/ Contract Services:** The provision of project/contract services to an organisation where the client has outsourced defined operational functions. Typically organisations providing this service shall be responsible for the delivery of a contract package including labour, plant, management, and associated systems of work.
- The service provider directly engages and instructs employees and sub-contractors in the performance of work to ensure contract completion.
- On-Hired Employee:** An individual engaged under a contract of service to perform work for his or her employer's client in accordance with the client's specifications at a location nominated by such client.
- On-Hired Employee Service Provider:** An organisation that provides its employees to clients to perform work as specified, at a place nominated by the client.

**On-Hired**

**Employee Services:** The provision of services by an organisation that provides one or more of their employees to clients to perform work as specified at a place nominated by the client.

**Recruitment Services:**

The provision of services where an organisation acts to recruit appropriate candidates that match a desired profile on behalf of a client for employment or engagement by the client.

**Sub Contract Services:**

A contracting relationship exists where a client passes the risk and responsibility for the completion of a scope of works to a contract service provider then sub-contracts all or part of the project to an independent contractor.

**RCSA Categories of Service Diagram (On-hired and Contracting Services)**

