Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

Senate Employment, Workplace Relations and Education Committee Inquiry

Submission of

The Recruitment and Consulting Services Association

June 4, 2007

Recruitment & Consulting Services Association Ltd
RCSA Head Office
PO Box 18028 Collins St. East
Melbourne Victoria 8003

The Recruitment and Consulting Services Association

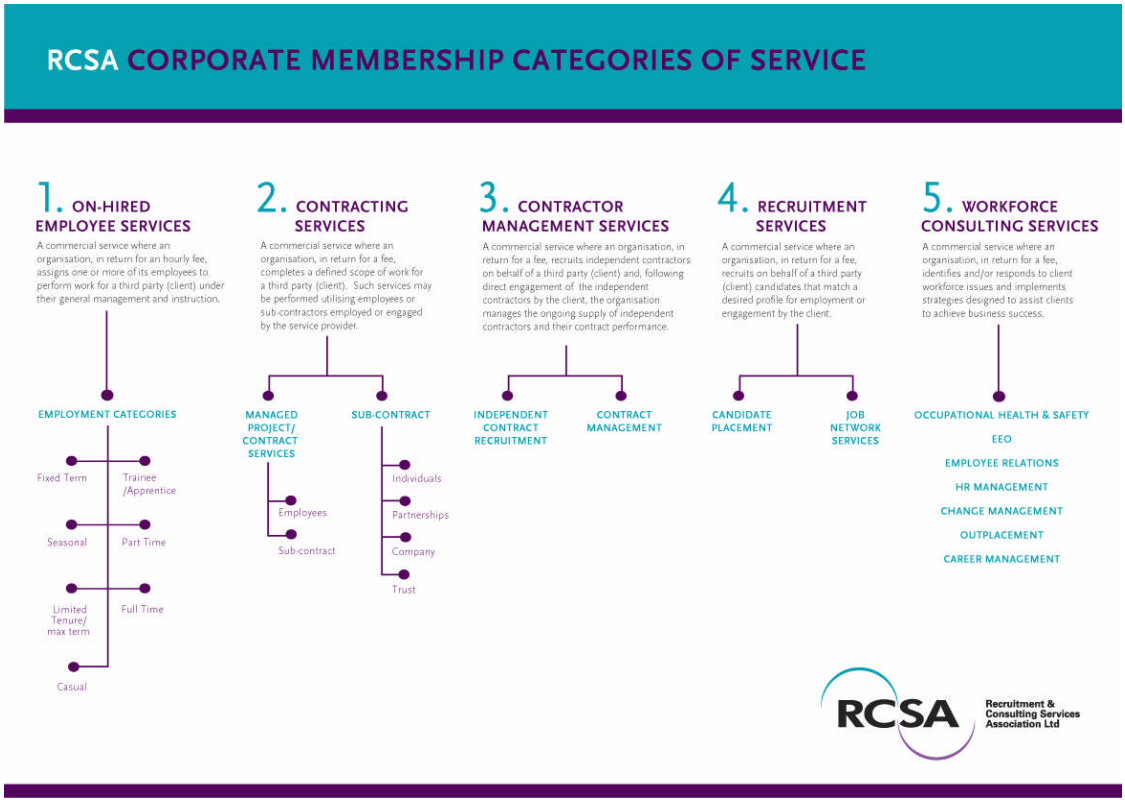
The RCSA is the peak body for the employment services industry throughout Australia and New Zealand. It is a not-for-profit Association that is managed by a Board of Directors.

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* 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.

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.

* RMIT Research

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

Introduction

The Recruitment and Consulting Services Association (RCSA) supports the existence of a workplace relations system where the test for making workplace agreements is not only fair but also responsive and adaptive enough to cater for modern work arrangements within Australia.

Whilst supporting the introduction of a test to maintain fairness in employment, RCSA is concerned that the Fairness Test, as provided for within the Bill, is designed for employment arrangements that are typically static and traditional. RCSA submits that the Workplace Relations Amendment (A Stronger Safety Net) Bill ('the Bill') needs to be amended so as to accommodate Australia's increasingly variable and short term employment relationships.

If passed in its current form the RCSA is concerned that the Fairness Test will effectively eliminate the use of workplace agreements in on-hired employment other than in select long term assignments.

RCSA Member support for workplace agreements primarily exists because of the simplicity and efficiency of the agreement making process. Whilst attractive to direct hire employment it is the unique nature of on-hired employment, where terms and conditions of employment often need to be set at very short notice that makes the current system so attractive. Such terms and conditions of employment must adapt to constantly varying client requirements. Workplace agreements, prior to 7 May had a highly adaptive capacity which particularly suited our Members on-hired employment arrangements and therefore their clients needs.

Workplace agreements prior to 7 May allowed RCSA Members to set consistent base terms and conditions of employment and then to provide additional terms and conditions on an assignment by assignment basis. These additional terms and conditions of employment were typically provided by way of a common law contract as it is only the common law contract, utilised with a workplace agreement that allows the speed necessary to set assignment terms and conditions at short notice.

Workplace agreements prior to 7 May provided RCSA Members with the first real opportunity to remove the confusion associated with circumstances where the award applying to on-hired employees is often inconsistent with the terms and conditions of employment applying to employees of the client doing the same or similar work. Workplace agreements prior to 7 May allowed employers of on-hired employees to confidently mirror the terms and conditions of employment being paid to client employees and to do so quickly and accurately. Under agreement making system proposed by the *Workplace Relations Amendment (A Stronger Safety Net) Bill* ('the Bill'), this will not be possible.

Concerns with the Bill

RCSA is concerned that the Bill, if introduced without amendment, will significantly impact upon our Members for the following reasons:

1. The application of the fairness test under the Bill is focused on the needs of individual workplace circumstances and does not lend itself to a broad based template for multiple on-hire assignments where adaptation of terms and conditions of employment are required regularly and at short notice.

2. The above award terms and conditions of employment that are regularly offered to on-hired employees on an assignment are typically not evident at the commencement of the employment relationship when a workplace agreement is being offered. Therefore, the Fairness Test as provided for within the Bill will not be able to take in to consideration such terms and conditions for the purpose of assessing fair compensation at the commencement of employment. Therefore, it will be very difficult for an employer of on-hired employees to meet the Fairness Test without establishing employment conditions that will quickly fail to reflect client workplace conditions.

3. The hours of work, both number and spread, are assignment dependant and therefore, an assessment of what compensation would be required to cover penalties and loadings applying to such work on assignment would not be able to be carried out at the commencement of the employment relationship.

4. The introduction of the Fairness Test will remove the capacity of on-hired employee service providers to have one workplace agreement covering all employees with additional, assignment specific, terms and conditions for each new assignment. The passing of the Fairness Test on one assignment will not provide for passing of the test on another assignment because of the changing terms and conditions and the speed at which such changes often need to take place.

5. There is no proposed maximum time period for the processing of the Fairness Test by the Workplace Authority and the inability of employers, especially employers of on-hired employees, to schedule the application of going terms and conditions of employment with confidence will severely impede the confidence of such employers to meet client needs in a responsive and sure manner.

6. The introduction of the Fairness Test will remove the practical ability of Members to legally mirror client employee terms and conditions of employment. For example, where an award applying to an on-hired employee provides for overtime to be paid at time and a half for the first two hours and double time thereafter where a client award provides for time and a half for the first three hours, the payment of such overtime entitlements by the service provider will be unlawful and the fairness test is unlikely to be responsive enough to be suitable solution.

7. The Fairness Test, as provided for within the Bill does not allow for discretion to be applied to circumstances where an on-hired employee service provider is supplying on-hired employees to a client that has a short term crisis or is experiencing other relevant industry, location or economic issues.

8. The designation of an award for the purpose of the Fairness Test being conducted in circumstances where an employee would be award free greatly

reduces the attractiveness of workplace agreements. Furthermore, the ongoing application of designated award 'protected award conditions' even when an employer does not proceed with a workplace agreement further reduces the appeal of workplace agreements as a standard employment tool.

The government communication on the introduction of the Fairness Test, dated 4 May, 2007 announced that they would 'introduce a simple Fairness Test to protect all workers **who would have otherwise been entitled to the benefit of protected award conditions** such as penalty rates in an industrial award and are paid under $75,000 a year' (our emphasis added). Clearly the designation of awards for non-award employees and the ongoing application of protected award conditions from such goes well beyond this commitment.

Moreover, in the Government response to the Award Review Taskforce Report on Award Rationalisation states under Principle 3 that 'the Government does not consider it necessary to extend award coverage to those employers and employees who are currently award free as the Australian Fair Pay and Conditions Standard provides appropriate minimum entitlements for award free employees'.

RCSA strongly encourages the government to remove the designation of awards for the application of the Fairness Test within the Bill.

9. The introduction of civil penalties for employers that choose not to proceed with the employment of an employee following any failure of the fairness test presents very real concern for employers of on-hired employees. Given the time the Fairness Test is likely to require for processing, many employers of on-hired employees will employ on-hired employees under workplace agreements where an estimate of the fairness test requirements has been made. If subsequently an estimate is determined by the Workplace Authority to be incorrect and the employer is advised of the failure of the Fairness Test, such employer will advise a client of the improvement required to pass the test. If such client advises such employer of on-hired employees that they are unable to sustain the passing on of such increased compensation then the employer may be required to end the employment of the on-hired employee. The termination of employment of an individual in such circumstances may well be in breach of S.346ZF and the onus of proof would be upon the employer to prove otherwise.

10. The existence of such penalties would greatly reduce the likelihood of employers of on-hired employees making a workplace agreement with on-hired employees until after the completion of a pre-lodgement assessment against the Fairness Test. In effect, such a delay would render workplace agreements impractical for the majority of on-hired employment relationships.

Recommended Amendments

1. Amend the Bill so that any compensation required to pass the fairness test is payable from the date of notification by the Workplace Authority, not from the date of lodgement of the agreement. In the interim period from date of lodgement to date of the test result notification, it is proposed that the workplace agreement, as lodged, would become the legally binding document. This would place emphasis upon the efficient turn around of Fairness Test assessments by the Workplace Authority.

2. In the alternative, amend the Bill to require the Workplace Authority to process the application of the Fairness Test (both pre-lodgement and post employment assessments) within seven (7) days of lodgement by an employer, subject to the provision of suitable information by the employer. This is the proposed turn around time offered by the Opposition in relation to collective agreements in its industrial relations policy.

3. Remove the civil penalties within the Bill that will apply to employers where an employee's employment is terminated or threatened to be terminated following a failure of the Fairness Test. In the alternative, amend the Bill to provide an exemption for employers of on-hired employees where the decision to terminate employment arises primarily as a result of the decision of a host organisation not to continue with an on-hire assignment.

4. Amend the Bill to remove the designation of an award where an employee is award free. In the alternative, amend the Bill to remove the ongoing application of protected award conditions derived from a designated award following the decision of an employer and/or employee not to proceed with a workplace agreement.

5. Amend the Bill to allow employers of on-hired employees to mirror existing legal employment conditions being paid to the same or substantially similar employees directly employed by a client / host organisation. In such circumstances, where a workplace agreement is made solely to mirror client terms and conditions and does not remove or amend any other protected award conditions the Fairness Test should be automatically passed.

   The ability of on-hired employee service providers to mirror principal client terms and conditions of employment would be facilitated by the amendment of s.355 of the *Workplace Relations Act 1996.* Section 355 of the Act places limitations on instruments that can be "called up" under new workplace agreements. It requires that Awards or workplace agreements incorporated by reference into new workplace agreements must only be instruments that apply to an employer and its employees immediately before the new workplace agreement is made. Consequently, on-hired employee service providers are prevented from "calling-up" the content of their client's instruments without reproducing them in full.

   Amendments to s.355 should occur in such a way so that the workplace agreements of on-hired employee service providers can validly incorporate statutory instruments by reference, being Awards and/or workplace agreements applying to clients where the provider is not respondent to or a party to such instrument.

6. Amend the Bill so that the proposed section 346M(4) extends the discretion of the Workplace Authority Director to consider the industry, location or economic

circumstances of a host organisation, not just a direct employer. The Bill could be amended so that such conditions can be taken in to account in relation to the employment of an on-hired employee working for that host organisation but any concession would only apply to that supply arrangement.