Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

Senate Education, Employment and Workplace Relations Committee

Submission of
The Recruitment and Consulting Services Association

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The Recruitment and Consulting Services Association

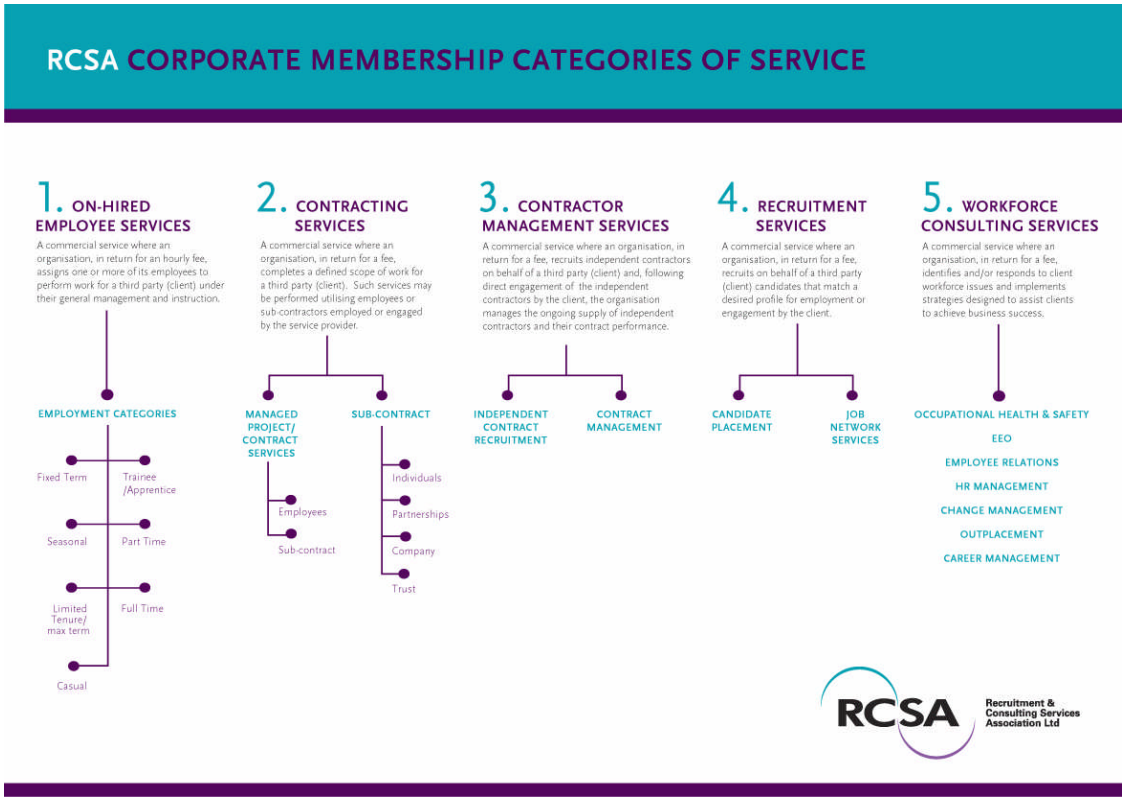
The RCSA is the peak body for the employment services industry throughout Australia and New Zealand. It is a not-for-profit Association that is managed by a Board of Directors.

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.

RCSA and the Workplace Relations Amendment (Transition to Forward with Fairness) Bill ('the Bill')

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 transparency of the new Labor Government in relation to its workplace relations policy *Forward with Fairness* and commends the Government for its adherence to the policy as stated. Such an approach provides very important clarity and consistency within business at a time of change. RCSA looks forward to working with the Government to assist in the design 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 proposed first phase of the Government's workplace relations transition legislation 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 hopes to be provided with the opportunity to further illustrate and substantiate our thoughts by way of presentation in person during the public submissions in Melbourne, Sydney or Canberra.

RCSA submits that whilst our Members 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.

Workplace Agreements

Collective Agreements

RCSA is concerned that collective agreements in their current legislative form, whilst being suitable to many traditional forms of work, 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 legislation is such that they are not an attractive instrument, especially for workers who are increasingly seeing themselves as individuals with individual workplace needs. 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.

With some of these challenges in mind we look forward to working with the government to ensure the collective agreement making system is accessible, responsive and relevant to all employees, especially those that are covered by awards.

Elements of collective agreement making under the proposed legislation that are problematic can be summarised as follows:

- It is difficult to determine what an existing employee is for the purpose of determining which casual employees should be given an opportunity to vote.

- The logistics associated with coordinating a vote across multiple client sites.

- The determination of suitable terms and conditions of employment for on-hired employees working across multiple and varied client sites.

- The application of the no disadvantage (and Fairness Test) to large numbers of on-hired employees working across multiple awards and sites when the award that might apply to next weeks assignment is unknown, as are the likely work patterns.

These are some of the problems associated with the making of collective agreements in on-hired employment. RCSA Members have endeavoured to make collective agreements for many years however, evidence suggests the process is one that is very time consuming and difficult, thus often outweighing the value.

Moreover, as has been outlined below, RCSA submits that it is critical for a model *Award Flexibility Clause* to be fast-tracked for introduction in to awards and NAPSA's, simplified or not, to ensure that flexible arrangements are available to all employers and employees, especially where collective agreements remain too cumbersome for their individual and unique workplace needs.

AWA's, ITEA's and Individual Flexibility

RCSA commends the Government's recognition of the need for employers who were reliant on Australian Workplace Agreements (AWA's) to be able to have certainty in their ongoing application beyond the introduction of the Bill.

Many RCSA Members introduced AWA's for their internal staff and on-hired employees owing to an AWA's capacity to accommodate individual needs and adapt to client work conditions. Whilst many RCSA Members had a current AWA as at 1 December, 2007 there were many who did not.

Whilst RCSA supports the introduction of the Individual Transitional Employment Agreement (ITEA) for those employers looking for flexibility in working conditions through until 1 January 2010, there are many RCSA Members who will be unable to obtain suitable flexibilities in individual employment arrangements.

RCSA is very concerned that new business employers and employers that did not have a current AWA as at 1 December, 2007 will be locked out of being able to agree to flexible individual working arrangements until the introduction of award flexibility clauses into simplified awards, a process that could take until 2010.

ITEA's are only available to employers that had a current AWA as at 1 December, 2007 and in on-hired employment an employers business and employment requirements change daily because of client requirements, which means that new individual flexibility options will be required where a collective agreement is unworkable.

RCSA was of the understanding that the abolition of AWA's would be replaced by flexibility through *Award Flexibility Clauses* however, such clauses are not scheduled for introduction until the operation of simplified awards in 2010. Such a flexibility void will be heavily felt in the on-hired employee services industry given that collective agreements are not a highly suitable tool for short term, variable engagements as previously outlined.

RCSA proposes that this Bill should provide for the making of the *Model Award Flexibility Clause* by the Australian Industrial Relations Commission, as contemplated by the Government's policy of Forward with Fairness, prior to the abolition of AWA's for insertion in to all Awards and NAPSA's until such time that the award simplification process is complete.

RCSA submits that such a proposal is not outside the spirit of the Government's *Forward with Fairness Policy Implementation Plan* and would provide for a an immediate and fair solution for all, regardless of whether employment is under a 'priority' award or not.

Such a model clause should provide for genuine flexibility, albeit *upward flexibility* as contemplated by the Government's policy, and should not require

the approval of third parties. The model clause should provide a genuine alternative to statutory individual contracts.

The No Disadvantage Test

The introduction of a no disadvantage test is accepted as a fair and reasonable response by the Government given the concerns relating to pre-Fairness Test agreement making. However, as is currently the case with the Fairness Test within the *Workplace Relations Act* there remain a number of problems associated with the test's application to both ITEA's and collective agreements for on-hired employees.

In general, RCSA is concerned by the following elements of the no disadvantage test and submits that the Bill is a further opportunity to improve the agreement making process by rectifying the following:

- When an ITEA or collective agreement is proposed to be made for on-hired employees that may be working for multiple clients over an extended period of time, it has historically been difficult to determine the appropriate award or awards to consider for the purpose of applying the no disadvantage test.

  The Bill proposes that 'any relevant general instrument' will be considered for the purpose of applying the no disadvantage test but does not contemplate which instrument should be applied where the range of instruments over the proposed life of the agreement can not be determined. In particular, sub-clause 346E (4)(a) contemplates work 'to be performed' however, does not provide instruction to the Workplace Authority Director on which 'relevant industrial instrument' should be considered.

  There is an opportunity to clarify within the Bill, whether the no disadvantage test assessment is simply a point in time test, that is to consider awards applicable upon commencement or whether *future relevant general instruments* and *relevant collective instruments* must also be considered. Section 346F talks about the agreement being considered as it is in existence immediately after lodgment however, this does not clarify which instruments must be taken in to consideration when such instruments may not be known at the time of making the agreement because clients have not been determined.

  RCSA submits that the Workplace Authority Director should be provided with the power to make and publish a *no disadvantage test application guide* to aid employers in the making of collective agreements and ITEA;s and provide consistency of application within the Workplace Authority. Such guide would need to be given the capacity to override the Act so as to allow for certainty in collective agreement making.

- Similarly, when an ITEA of collective agreement is proposed to be made for on-hired employees that may be working for multiple clients over an extended period of time, it has been equally difficult to determine a suitable pattern of working hours, against which the no disadvantage would be applied. Proposed section 346J requires the Workplace Authority Director to have regard for *the work obligations* of the employees under the workplace agreement. Whilst it may be open to the Director to inform

himself or herself in any way he or she considers appropriate, this is of no assistance to employers attempting to determine whether a collective agreement may pass the no disadvantage test.

For similar reasons RCSA submits that the Director should be given the power to make and publish a no disadvantage test application guide.

Collective Agreement Coverage and Voting

To encourage greater clarity in the collective agreement making process amongst casual employees, especially on-hired casual employees, RCSA submits that the Bill should provide one of two things to resolve issues relating to section 327 of the *Workplace Relations Act* 1996.

As previously mentioned, one of the frustrations associated with making collective agreements for casual employees is the inability to determine, with a sense of confidence, what is meant by 'persons employed at the time' under section 327. The problem arises when there is a casual workforce and at the time of voting a number of casual employees are not working, yet they may have an expectation of work in the near future.

RCSA submits that clarity in relation to this ambiguity could be provided within the Bill itself or within a statutory guide, a guide that the Workplace Authority Director could be given the power within the Bill to draft and publish.

Award Modernisation

RCSA supports the modernisation of Australian awards and the process for such within the Bill, subject to our earlier submission in relation to the fast-tracking of the model *Award Flexibility Clause* into existing Awards and NAPSA's.

Without going in to the detail of the Bill, RCSA submits that the modernisation process is a great opportunity to provide simplicity and most importantly, without extending existing award entitlements and application, consistency amongst awards. This is especially the case in relation to the calculation and application of entitlements.

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.

The award modernisation process should not be used to expand upon existing entitlements of employees or it will lose the support of employers. The process should focus on simplicity and where possible, without extending existing award entitlements and application, consistency of interpretation.

RCSA will make submissions in relation to the proposed National Employment Standards in due course following consideration of the Discussion Paper which has been released for comment.