Submission in response to

Fair Work Act Amendment Bill 2013

Submission of

The Recruitment and Consulting Services Association (RCSA)

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Recruitment and Consulting Services Association
Australia and New Zealand
RCSA Head Office

Introduction to RCSA

The Recruitment and Consulting Services Association Australia & New Zealand (RCSA) is the leading industry and professional body for the recruitment and the human resources services sector in Australia and New Zealand. It is a not-for-profit Association that is managed by a board of directors, and represents over 4,400 Corporate and Individual members.

RCSA members provide permanent full time, permanent part time, casual and on-hire workers to a range of businesses across almost all industries throughout Australia and New Zealand. On-hire workers are often referred to as 'labour hire workers', 'agency workers', 'temporary employees' and a range of other titles. The term on-hire has been incorporated into Modern Awards and will be used for the purpose of clarity.

Members of RCSA provide advice, information, support and guidance in relation to recruitment and employment matters to employers and workers from small and medium sized businesses to multinationals. 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.

The RCSA membership is focused on ensuring the most positive outcomes for business, workers and workplace relations across Australia. The RCSA sets the benchmark for industry standards through representation, education, research and business advisory support so Members may concentrate on their core business. All RCSA Member organisations and Accredited Professionals agree to abide by the ACCC authorised RCSA Code for Professional Conduct.

RCSA members work first hand with the Fair Work Act and Modern Awards on a day to day basis. Their knowledge, understanding, interpretation and support of the aims of the Act are evident in dealings that they have with their clients and employees on a day to day basis.

RCSA Code for Professional Conduct

The RCSA has a Code for Professional Conduct which is authorised by the ACCC. In conjunction with the RCSA Constitution and By Laws, the Code sets the standards for relationships between Members, best practice with clients and candidates, and general good order with respect to business management, including compliance. Acceptance of, and adherence to, the Code is a pre-requisite of Membership. The Code is supported by a comprehensive resource and education program and the process is overseen by the Professional Practice Council, appointed by the RCSA Board. The Ethics Registrar manages the complaint process and procedures with the support of a volunteer Ethics panel mentored by RCSA's Professional Practice barrister.

RCSA's objective is to promote the utilisation of the Code to achieve self-regulation of the on-hire worker services sector, wherever possible and effective, rather than see the introduction of additional legislative regulation.

RCSA Member Service Categories and Terminology

RCSA believes that the absence of precise terminology is contributing to the confusion and lack of accountability amongst any non-compliant element of the industry. RCSA has been instrumental in developing and promoting the following categories of service and terminology, with a view to identifying the various forms of third party employment and contracting services.

Put simply, the term 'labour hire' is now used to describe most a-typical forms of employment and is no longer descriptive of genuine on-hire employee services, and this results in misinformation, misrepresentation and ultimately harbours both intended and unintended non-compliance.

See the attached diagram for RCSA definitions and service categories along with additional information, which provides some context around on-hire worker services.

RCSA CORPORATE MEMBERSHIP CATEGORIES OF SERVICE

RCSA

1 ON-HIRED EMPLOYEE SERVICES

A commercial service where an organisation, in return for an hourly fee, assigns one or more of its employees to perform work for a third party (client) under their general management and instruction.

EMPLOYMENT CATEGORIES

- Fixed Term
- Trainee/ Apprentice
- Seasonal
- Part Time
- Limited Tenure/ max term
- Full Time
- Casual

2 CONTRACTING SERVICES

A commercial service where an organisation, in return for a fee, completes a defined scope of work for a third party (client). Such services may be performed utilising employees or sub-contractors employed or engaged by the service provider.

MANAGED PROJECT/ CONTRACT SERVICES

- Employees
- Sub-contract

SUB-CONTRACT

- Individuals
- Partnerships
- Company
- Trust

3 CONTRACTOR MANAGEMENT SERVICES

A commercial service where an organisation, in return for a fee, recruits independent contractors on behalf of a third party (client) and, following direct engagement of the independent contractors by the client, the organisation manages the ongoing supply of the independent contractors and their contract performance.

INDEPENDENT CONTRACT RECRUITMENT

CONTRACT MANAGEMENT

4 PERMANENT PLACEMENT SERVICES

A commercial service where an organisation, in return for a fee, recruits on behalf of a third party (client) candidates that match a desired profile for employment or engagement by the client.

CANDIDATE PLACEMENT

JOB PLACEMENT SERVICES

5 WORKFORCE CONSULTING SERVICES

A commercial service where an organisation, in return for a fee, identifies and/or responds to client workforce issues and implements strategies designed to assist clients to achieve business success.

OCCUPATIONAL HEALTH & SAFETY

EEO

EMPLOYEE RELATIONS

HR MANAGEMENT

CHANGE MANAGEMENT

OUTPLACEMENT

CAREER MANAGEMENT

ON-HIRE WORK IN CONTEXT

The on-hire employment industry is a significant contributor to the Australian economy

Research completed by the Australian Bureau of statistics and IBIS World indicates that the on-hire services industry generates revenue in excess of $20billion within Australia, more than that of accounting services and more than that of legal services.

Most on-hire employees employed by the RCSA Members are either skilled or professional workers, with a growing number employed on a permanent basis

RMIT University research[i] found that 61% of RCSA on-hire employees are skilled or professional workers with the remaining 39% being semi-skilled or unskilled. The research also found that 16% of on-hired employees are now employed on a permanent basis.

Where on-hire employees are employed on a casual basis, RMIT Research found that half of all on-hire casual employees 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 reason for choosing on-hired employment appears to be the diversity of work, to screen potential employers, recognition of contribution and the payment of overtime worked.

Business uses on-hire employees to help with recruitment and urgent labour requirements, and contrary to popular belief, not to reduce cost or payments to employees.

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 shortages (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 their 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.

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 constant changing needs of business and government.

The RCSA members support clients and candidates across a range of industries and employment categories to ensure they achieve compliance. Further, members seek to promote the aims of the Fair Work Act in ensuring there is a balanced framework for cooperative and productive workplace relations; one that promotes national economic prosperity and special inclusion for all Australians.

RCSA members aim to promote the aims of the Fair Work Act foremost in ensuring that there is a balanced framework for cooperative and productive workplace relations. However the RCSA is concerned that there are certain elements of the Fair Work Act Amendment Bill that will have a challenging impact on 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 is more than willing to provide further detail or assistance if required.

RCSA submits that whilst our Member's workplace relation needs and challenges are relatively unique, our Member's services are vital to a prosperous economy and play a special role in the provision of learning, earning and lifestyle needs of thousands of Australian workers across all industries, sectors and occupations.

The RCSA makes the following comments on certain aspects of the Fair Work Amendment Bill.

SUBMISSIONS

1. Anti-Bullying Measures

Bullying is currently regulated by state and territory work health and safety (**WHS**) legislation, in addition to some criminal legislation in Victoria. Whilst the RCSA acknowledges that bullying is a major issue in some workplaces and there are issues with the current legislation's ability to address bullying and, in the RCSA's view, there are more appropriate ways of dealing with bullying than the proposed amendments to the Fair Work Act.

RCSA submit that the proposed amendments allow "workers" to put in claims but the remainder of the Fair Work Act refers to only "employees". It is the RCSA's assumption is that that the term "worker" was used because this is the term has been used under work health and safety model legislation and it would be unfair to deprive workers who currently have a right to make complaints under WHS legislation. However, employment and industrial relations is already a complex area for the lay person, and the proposed amendments risk creating confusion amongst workers by creating multiple layers of legislation like that currently existing in the anti-discrimination jurisdiction. RCSA submit that there is adequate, low cost, access to anti-bullying legislation under WHS legislation in each jurisdiction and that significant resources have been invested in aligning the anti-bullying agenda with the WHS agenda. Extending anti-bullying to the workplace relations jurisdiction is, ultimately, undesirable.

The RCSA submits, bullying should continue to be dealt with under WHS legislation and amendments should be made to the respective state and territory legislation in order to deal with any perceived issues. For instance, if the amount of time between when a claim is lodged and when it is resolved is an issue, perhaps time limits should be imposed on inspectors to deal with the matter.

The RCSA is also concerned that under the proposed amendments, an employee who believes he or she is being bullied will be able to bypass their employer and go straight to lodging a claim with the FWC. As the employer will have to appear before FWC within 14 days, the amendments deprive employers of the opportunity to properly investigate the matter, assess the validity of the claim and/or take appropriate remedial action. This is fundamentally unfair to employers who have put the right processes and procedures in place. This short time frame is particularly concerning for RCSA members as member firms on-hire their employees to clients and are often from the immediate supervision of their employees. In addition to this, one disgruntled employee has the potential to interfere with an RCSA member's relationship with their client by putting in a claim against them. The RCSA submits, in the first instance, employers should be given an opportunity to rectify the matter in a specified time frame and only if the employee is still unhappy should the FWC commence dealing with the matter. This will allow the FWC to direct its already scarce resources to other areas.

In addition to the above, it is the view of the RCSA that the proposed changes will result in a rise in bullying claims which are unmeritorious and vexatious. This trend is currently being seen with general protection and unfair dismissal claims. The RCSA is concerned that some employees may use a bullying claim as a defensive tactic, if for example they are unhappy about being managed for underperformance or misconduct. The clarification in relation to what bullying is not, namely, the definition of bullying "does not apply to reasonable management action carried out in a reasonable manner" does little to resolve this issue. Many Fair Work Commission and Federal Court decisions already state reasonable performance management actions do not

amount to adverse action, and claims still appear to be on the rise. The RCSA submits, an incentive to not put in such claims is necessary, namely, a costs order in the event of vexatious claims.

2. Right to Request Flexible Working Arrangements

The RCSA submits that its members are already limited in their capacity to provide flexible working arrangements as their employees are on hired to clients. The broadening of the categories of employees which may make a flexible work request will only add to the difficulties faced by of RCSA members.

While the RCSA supports the inclusion of a non exhaustive list of "reasonable business grounds" upon which an employer may refuse an employee's request for flexible work the RCSA submits that factors beyond the control of the employer should be specified as a relevant factor in determining whether flexible working arrangements are a reasonable business ground for refusing flexible work arrangements

In the RCSA's view all casuals, including long-term casuals, should be exempt from the entitlement to flexible working time arrangements on the basis that such employees knowingly enter in to flexible work arrangements and that casual employment caters for personal needs through breaks in employment.

The RCSA is also concerned about employees seeking flexible working arrangements because they are experiencing family violence or to provide care and support to a member of an immediate family or household who is experiencing family violence. Family violence is a sensitive issue and it will be very difficult for an employer to ask for evidence of family violence. This may lead to dubious requests coming through. In addition to this, it is questionable whether someone experiencing family violence should even be at work. In some instances it may be appropriate for employees to take personal or carers leave.

3. Consultation about changes to rosters and working hours

The RCSA is primarily concerned about the proposed changes which, if passed, would require employers to consult with employees in relation to roster changes and working hours. This is because the on-hire industry employs predominately casual employees, on changing, rotating and floating rosters.

> **The very nature of casual employment is grounded upon irregular hours and, if strictly applied, the application of the proposed law would result in a grossly disproportionate amount of consultation.**

RCSA members often have no control over the work that will be available to employees. The RCSA therefore submit that the provisions should not extend to casual employees, as they have unpredictable hours to begin with. In addition to this, the RCSA submits an exception should be provided for emergency situations and employers who have limited control over rosters and working hours. Alternatively, the consultation requirements should not apply to on-hire employees.

4. Parental leave

The RCSA does not opposed this variation to the Act.

5. Modern Awards Objective

In the RCSA's review the proposed amendments that the Modern Awards objective take into account the need to provide additional remuneration for employees working overtime, unsociable, irregular or unpredictable hours, weekend or public holidays and shift work is both vague and unnecessary. Employers are already required to take additional remuneration into account when requesting an employee work overtime or public

holidays. In addition to this, in the RCSA's view the modern awards are already predominantly focused on ensuring employees receive penalties and loadings for working particular times of the day, on special occasions and for irregular or unpredictable work. The amendment would therefore be a double up in the legislation.

The RCSA also submits, there is uncertainty in relation to what is meant by "unsociable" in a 2013 work context. Furthermore, the RCSA is concerned that, should the amendments be passed, the legislation will not, or will be slow to, take into account that the changing definition of "unsociable". In addition to this, "unsociable" hours means something different to each person. For example, some employees because of other commitments such as family or study may consider working Monday to Friday 9am to 6pm challenging and thereby unsociable.

The RCSA submits, if any changes should be made to penalty rates and shift loading, there should be capacity for an employer and employee to amend award conditions to accommodate flexible working arrangements. For example, an employee requesting an earlier start time to allow for early departure to collect children from school should be allowed to forego morning shift allowances so that the employer is not burdened as a result of the accommodation without having to pass the Better Off Overall test.

RCSA strongly opposes the aforementioned proposed amendments.

6. Changes to Right of Entry Provisions

The RCSA strongly opposes the proposed amendments which will allow permit holders and employees to hold discussions in a room or area the employees ordinarily take their meal or other breaks if no agreement can be reached as to where discussions are to be held. With approximately 12% of the private sector workforce currently union members, it affords unions an opportunity that would not even be available to the employer and provides unions with unnecessary capacity to impose pressure on employees to join as members.

To allow unions to interfere workers during their rest break would be a grossly disproportionate right that would not be afforded to any other party and there is no reason to allow this to occur when in almost all circumstances employers are able to provide suitable meeting places for willing participants.

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[i] 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