

Productivity Commission
Workplace Relations Framework – Draft Report

**Submission of
Recruitment & Consulting Services Association (RCSA)
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Recruitment & Consulting Services Association Ltd
RCSA Head Office
PO Box 18028 Collins St. East
Melbourne Victoria 8003
T: 03 9663 0555
E: info@rcsa.com.au
W: www.rcsa.com.au

Introduction to RCSA

The Recruitment & Consulting Services Association Australia & New Zealand (RCSA) is the leading industry and professional body for the private employment services sector in Australia and New Zealand which includes recruitment, labour-hire/on-hire worker and HR services. It represents over 3,000 company and individual members with over 60% of Australia's labour-hire/on-hire workers being employed by RCSA members.

RCSA members assign (on-hire) and place employees and independent contractors with businesses, governments and not-for-profit organisations operating within every industry in Australia and provide workforce consulting services to improve the productive capacity of Australia business in an ever-changing global economy.

Members of RCSA provide advice, information, support and guidance in relation to recruitment, employment and workforce management matters to business and government from small and medium sized business through to multinationals and the Federal Government.

The RCSA membership is focused on promoting positive outcomes for business, workers and governments across Australia. The RCSA sets the benchmark for recruitment and on-hire industry standards through representation, education, research, and business advisory support.

All RCSA member organisations and Accredited Professionals agree to abide by the RCSA Code for Professional Conduct.

RCSA members, as professional employers and work facilitators, operate within the Employment Relations Act with their clients and know it intimately. Their knowledge, understanding, interpretation and support of the aims of the Act are evident in dealings that they have with their clients, employees and independent contractors every day.

The RCSA believe that a progressive and pragmatic approach to the provision of on-hire worker service in Australia is, and will continue to be, a key element in the achievement of balanced Australian workplaces where vulnerable workers are protected and the workforce and business are free to prosper to provide productivity, wealth and security to Australia's workforce and the wider community.

RCSA Code for Professional Conduct

RCSA has a Code for Professional Conduct (the Code) which is authorised by the Australian Consumer and Competition Commission (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.

Employment Services – Definitions and Terminology

The following definitions and service categories were developed by RCSA to promote a better informed marketplace and a more sophisticated understanding of the role and contribution of the employment services sector in a modern economy.

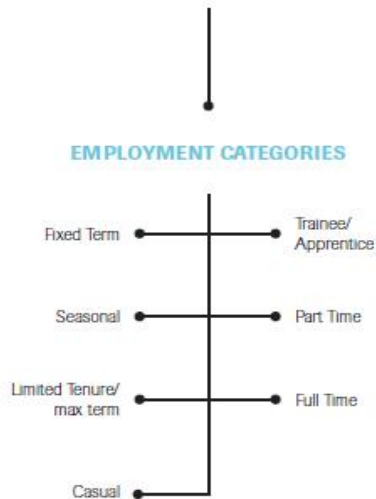
RCSA CORPORATE MEMBERSHIP CATEGORIES OF SERVICE



1

ON-HIRED EMPLOYEE SERVICES

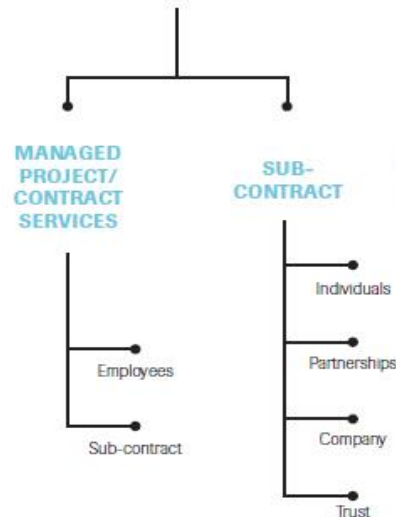
A commercial service where an organisation, in return for an hourly fee, assigns one or more of its employees to perform work for a third party (client) under their general management and instruction.



2

CONTRACTING SERVICES

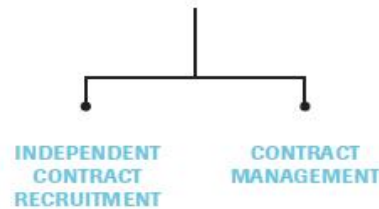
A commercial service where an organisation, in return for a fee, completes a defined scope of work for a third party (client). Such services may be performed utilising employees or sub-contractors employed or engaged by the service provider.



3

CONTRACTOR MANAGEMENT SERVICES

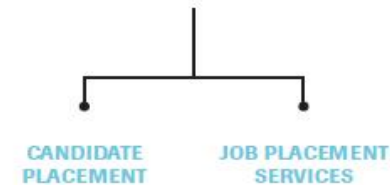
A commercial service where an organisation, in return for a fee, recruits independent contractors on behalf of a third party (client) and, following direct engagement of the independent contractors by the client, the organisation manages the ongoing supply of the independent contractors and their contract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



4

JOB PLACEMENT

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.



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.



RCSA Submission

RCSA appreciates the opportunity to make a submission on the Australian Government's Productivity Commission *Workplace Relations Framework – Draft Report*. As key labour market intermediaries, our members are particularly impacted by the maintenance of a functioning and efficient labour market, and workplace relations regulation is a key component in the achievement of that outcome. Our members are professional employers who maintain a vested interest in compliance, flexibility and currency of suitable regulation.

Upon examining the discussion paper we invite the Commission to revisit our submission, given its relevance to the regulation and facilitation of non-traditional working relationships, an aspect we feel the draft report failed to adequately consider.

With significant changes in technology impacting the organisation of work both domestically and internationally we feel that a fuller examination of non-standard forms of work within the Commission's report is warranted in order to ensure Australia's workplace relations framework accounts for existing and future change.

We outline below the principle areas of interest for the RCSA and welcome the opportunity to discuss them in more detail with the Commission.

Chapter 3 - Safety Net

RCSA supports the introduction of a simpler Award system. Whilst recognising that Awards play an important part in the establishment of minimum terms and conditions of employment, it is important to ensure ease of compliance as Australia moves away from historically driven workplace relationships toward greater small and micro employment. RCSA members in particular can be challenged by the employment of on-hire employees across multiple Awards.

RCSA defaults to the industry associations and employer representative groups as to the suitability of varying weekend penalties, as employers of on-hire employees are covered by awards by virtue of host organisation coverage and do not belong to an industry award per se. RCSA does however, encourage the adaptation of awards to meet changing social organisation whilst not creating additional complexity through additional regulation.

Chapter 4 - Unfair Dismissal

RCSA supports the recommendations outlined in Chapter 4 of the Draft Report. In particular, greater balance can be achieved by making amendments to the Fair Work Act so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a valid dismissal, unless there is evidence of ongoing failure to meet such requirements.

Furthermore, the ongoing focus on reinstatement as a remedy is particularly unhelpful for the on-hire employment services sector given that it is not possible for an employer of an on-hire employee to direct a host organisation to reinstate an on-hire assignment which is, in essence, a commercial relationship.

RCSA would welcome the introduction of a graded system of fees based on the length of employment and, possibly, the financial vulnerability of the applicant concerned. It could also be possible to grade fees based on the nature of the application whereby claims based on substantively detrimental aspects may attract a lower fee. RCSA also supports the introduction of a pre-screening mechanism to assess the prima facie merits of unfair dismissal claims.

In relation to General Protections claims, the RCSA welcomes the Commissions recognition of claims being ill conceived in relation to 'labour hire' outsourcing arrangements and encourages ongoing variation to the legislation to specifically identify that such arrangements should not be restricted by General Protections laws. Of additional concern is that the unlimited compensation associated with this jurisdiction promotes an apparently high proportion of settlements which has the effect of promoting the offering of 'go away money' and also limits the amount of case law available following arbitration of such matters before the Federal Circuit Court. RCSA supports the introduction of a cap on compensation available within this jurisdiction.

Chapter 5 - Enterprise Bargaining

Whilst Enterprise Bargaining has significant limitations within the on-hire employment services sector, RCSA supports a move to a 'no disadvantage test' approach to the assessment of agreements such that it promotes a more holistic, or global, assessment methodology in lieu of a line-by-line test. The very purpose of Enterprise Bargaining is to promote greater flexibility and enterprise specific conditions of employment and we believe such a move would support the achievement of this goal.

RCSA also strongly supports amending the Fair Work Act to limit the capacity of agreements to regulate the use of contractors and labour hire. This amendment would support the promotion of greater competitiveness and is consistent with earlier submissions of RCSA and others.

Chapter 6 - Individual Arrangements

RCSA supports the variation of the Fair Work Act to introduce the capacity of employers to make an Enterprise Contract to existing and prospective employees on the basis that many individual employees are unlikely to be attracted to, or covered, by an enterprise agreement under current arrangements. RCSA supports the setting of a no-disadvantage safety net, assessed holistically or globally, to ensure such instrument cannot be used to undercut exiting terms and conditions of employment.

Chapter 24 - Interactions between WR and competition policy

This submission addresses chapter 24 of the Draft Report concerning interactions between competition policy and the workplace relations framework - in particular, the claim¹ that there is a strong policy rationale that the regulation of labour markets should continue to be separated from the regulation of other markets for goods and services.

RCSA submits that there are grounds for widening the capacity of competition and consumer policy to address conduct in the market for the supply and acquisition of employment services that results in labour market distortions.

The widened focus of competition and consumer policy should address conduct of suppliers and users of employment services consistently with:

- *broad principles of unconscionability already established in the Australian Consumer Law;*
- *principles adopted from ILO C181 Private Employment Agencies Convention, 1997 and Private Employments Agencies Recommendation , 1997 as consistent with national law and practice; and*
- *principles adopted from the United Nations Guiding Principles of Business and Human Rights, 2011 as consistent with national law and practice.*

¹ made at page 769 of the Report

RCSA's Proposed Employment Services Industry Code (ESIC)

RCSA notes that the Commission's assessment of Australia's workplace relations framework takes place at the same time that RCSA is proposing the establishment of an *Employment Services Industry Code* of conduct (**ESIC**) for prescription under the *Competition and Consumer Act 2010*. RCSA itself is engaged in a process of consultation and would welcome the opportunity to discuss in greater detail with the Commission matters of co-regulatory interest.

RCSA's response to the Commission's Draft Report is informed by its experience gained since 2003 in administering its own ACCC authorised member voluntary Code of Conduct and in handling in excess of an estimated 3,000 code inquiries and complaints – approximately 40% of which are now received in relation to non-members.

That experience indicates that left to itself and current regulation (including workplace relations regulation), the private employment services market has not been able to eradicate concerning incidences of the following conduct that potentially impacts upon the operation of a "well- functioning labour market"²:

- Discrimination against work seekers
- Disguised work relationships
- Exploitation of vulnerable work seekers
- Sub-standard work seeker representation (candidate care)
- Restraints of trade upon work seekers in the form of undisclosed temp-to-perm fee arrangements
- Contested claims to candidate ownership
- Contested claims to right to represent employers
- "Phoenix" operations
- Dubious fee arrangements - where charged to work seekers - sometimes for bogus training or job notification services
- Misleading job ads
- Job scraping/ job skimming
- Conduct that may impede good faith bargaining
- Professional knowledge deficits
- Offshoring of practices not conforming to international standards
- Information asymmetries affecting job seekers - including withholding about the remuneration on offer

² Preamble to ILO C181 *Private Employment Agencies Convention*, 1997

- Resume spamming
- Disruptive supplier transitions
- Uncertainty about work seeker suitability assessment processes and responsibilities
- Refusal or failure to undertake voluntary dispute resolution processes in good faith

It is experience that would appear to have been borne out, at the extremities, by the FWO's *Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales* (June, 2015) and the findings and recommendations made concerning governance, transparency and exploitation.

Whilst it is not a pretty picture, RCSA complaint statistics and anecdotal evidence suggest that these problems remain prevalent within the wider industry. In each of the last two years RCSA has received on average two such complaints per week. Prior to authorisation of its current code, the incidence of complaints was much higher. That would suggest that the RCSA Code is having some positive effect. But RCSA cannot enforce its code against non-members. And currently, more than 40% of complaints received are in relation to non-members or respondents, whom the complainant is unable or unwilling to name.

Consultation undertaken by RCSA

RCSA's response to the Commission's Draft Report is also informed by work done since January 2015 by its Code Development Committee and an extensive public consultation program in the course of which RCSA recorded over 80 submissions. An especially important and relevant theme emerged during the consultation in relation to the complexity of regulating business practices and labour market functions at the intersection of industrial relations and trade and commerce (competition & consumer protection) systems of law.

One element of the position put by ESIC submission #78 was that it would be preferable to:

maintain regulation of traditional employer-employee relationships, rather than wrapping up multiple parties in regulation.

However, in the business context in which the ESIC would operate, extension to parties beyond the traditional bi-partite employment relationship is considered essential because the terms on which those employment services are supplied, and the manner in which they are supplied, can impact directly upon the work relationship. That is to say, many aspects of the ESIC (most notably those that cover work seeker protections and fair work practices) operate at the intersection of the labour market and the market for services.

A need to engage business in market regulation

A concern here is that labour market regulation by itself has not been effective to eradicate unfair practices in those cases, where the practices are supported (or disguised) by conduct in the employment services market. ILO *Convention C181* acknowledges this to the extent to which it:

[recognises] the role which private employment agencies may play in a well-functioning labour market.

An ESIC submission received from Professor Gillian Triggs, President of the AHRC emphasised the AHRC's view that:

Industry and business are best placed to determine the most effective responses to addressing human rights.

The AHRC ESIC submission explained the importance of *United Nations Guiding Principles on Business and Human Rights* as means by which “business engagement” with human rights (including worker rights) might be mediated:

...to address issues of exploitation and discrimination in commercial supply chains.

Whilst some public submissions received in response to the ESIC proposal questioned the need for ESIC, most supported its development and saw it as a positive step for an industry in need of specific, coherent and nationally consistent regulation.

In this context, ESIC submission #18 noted:

Having a national industry code that assists with the users and providers of recruitment services in Australia to eradicate unfair practices in the engagement of labour is an important initiative.

It is an initiative that seeks to integrate fair work, fair competition and fair consumer protection principles within a coherent code that respects human rights and market freedom and is supported by accessible dispute resolution and assurance mechanisms.

The separation of labour market regulation from employment services market regulation has not served the Australian community well.

Separately, Qld, ACT, NSW, SA and WA each see a need to retain some form of employment services industry specific regulation. But none of these states or territories regularly enforces its employment agency regulations.

Queensland has an elaborate but somewhat abstract regulatory code of conduct that has not been enforced in 10 years of operation. Whilst it contains offence and penalty provisions, it lacks mechanisms that assist work seekers and consumers (including business consumers) to pursue complaints. Anecdotally, when Queensland receives a complaint under its Private Employment Agents Code of Conduct it refers it to RCSA regardless of whether the respondent is an RCSA member or not!

An illustration: money for jobs

Queensland has a provision that prohibits a private employment agency from charging a fee to a work seeker. But it does not extend to an on-hire worker services firm, also known as a 'labour-hire agency' in the industrial sector. There is a corresponding "employment premium" provision in that state's *Industrial Relations Act* that applies more broadly to any employer; but its effect is doubtful in view of the FWA's exclusion of state industrial laws in relation to national system employees.

Restrictions on employment agencies' ability to charge fees to work seekers exist in NSW, the ACT and WA. They are not consistent and may be easily avoided. The more broadly operating employment premium prohibition is not replicated in federal legislation nor in the legislation of any of the States or Territories.

What would be the point of preventing an employment agency from charging a work seeker for services it supplies in Queensland but not preventing a national system employer in Queensland for charging the same work seeker for a job? What would be the point of prohibiting an employment agency in NSW from charging a "candidate fee" for a service, if the same service could be supplied from Victoria without the prohibition having any effect?

Effective regulation for the private employment services market in its interactions with the labour market must be nationally consistent and coherent.

Mono-centric options cannot deal with poly-centric problems

There are many state and territory laws, as well as commonwealth laws, to which recourse could be had by way of regulatory alternative in the case of the employment services industry. These include:

- Fair work laws
- Workplace relations laws
- Work health & safety laws
- Anti-discrimination laws
- Fair trading and consumer protection laws
- Employment agency laws
- Privacy laws
- Criminal laws
- Common law

In some cases they overlap. However, in most cases their dispute resolution and enforcement mechanisms are mono-centric - i.e. they are restricted to a single field of operation. A privacy or consumer grievance is unlikely to be dealt with in the course of a discrimination complaint, even although there may be privacy and consumer elements “at large” in the complaint. Enforcement can therefore become a matter of forum shopping, as remedies and processes for enforcement are not consistent.

RCSA complaints handling experience suggests that employment services disputes and problems do not present as mono-centric problems. That is they will frequently engage several different systems of law at once - e.g. discrimination, privacy, criminal law and fair work law as well as consumer law. Other problems may engage systems of fair work laws competition laws and consumers.

The effectiveness of RCSA's disciplinary and dispute resolution scheme in dealing with poly-centric problems arising under its broad reach members code has been demonstrated by its high resolution rate - albeit within the limited field of its operation.

Elsewhere, “accrued jurisdiction” is not encountered until a complainant reaches court.

What is needed (and what must be able to be imagined without the impediment of an outdated “policy rationale” for keeping complimentary systems of law separate from each other) is a regulatory scheme that is sufficiently broad in its reach to be able to engage its dispute resolution mechanisms across a sufficient range of industry participant and labour market related issues.

ESIC does this by the broad scope of its operation, not reproducing already existing laws, but providing “touchpoints” to them so that they may be accessed through an efficient and comprehensive dispute resolution scheme.

Response to Recommendations and Request for Information

RCSA specifically supports the inclusion of the following recommendations into the final report of the Commission. An absence of support does not imply opposition to other recommendations.

| Recommendation Number / Request for Information | Support / Response |
|---|--|
| 5.1 | Yes |
| 5.2 | Yes |
| 5.3 | Yes |
| 6.2 | Yes |
| 6.3 | Yes |
| 6.4 | Yes |
| 9.2 | Yes |
| 15.1 | Yes |
| 15.2 | Yes |
| 15.3 | Yes |
| 15.4 | Yes |
| 16.1 | Yes |
| 16.2 | Yes |
| 19.2 | Yes |
| 19.8 | Yes |
| 20.1 | Yes |
| 21.1 | Yes |
| 22.1 | Yes |
| Additional Information - Feasibility of casual loading trade off. | RCSA believe such a concept would be feasible and a standard clause could be incorporated in to all Awards. The provision could be invoked by mutual agreement only. |

Conclusion

RCSA commends the Australian Government's Productivity Commission on its initiative in undertaking the assessment of Australia's workplace relations framework and would welcome the opportunity to provide any further information that may be of assistance to the assessment, especially where that evidence may be suitably provided in person.

For further information please contact Simon Schweigert, Manager Media and Government Relations