



**RECRUITMENT & CONSULTING
SERVICES ASSOCIATION
AUSTRALIA & NEW ZEALAND**

**Western Australian Government
Review of the Employment Agents Act 1976**

**Submission of
Recruitment & Consulting Services Association (RCSA)
September 2015**

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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 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, and 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) 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.

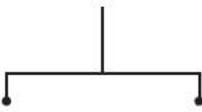
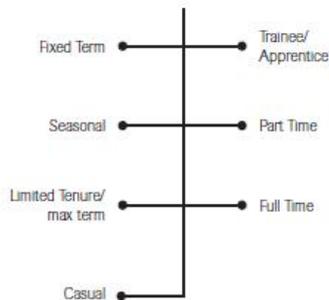
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WORKFORCE CONSULTING SERVICES

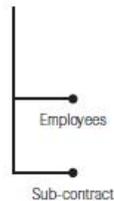
A commercial service where an organisation, in return for a fee, identifies and/or responds to client workforce issues and implements strategies designed to assist clients to achieve business success.



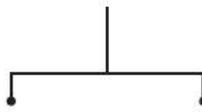
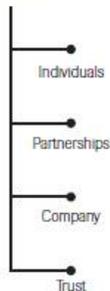
EMPLOYMENT CATEGORIES



MANAGED PROJECT/ CONTRACT SERVICES



SUB-CONTRACT



INDEPENDENT CONTRACT RECRUITMENT

CONTRACT MANAGEMENT



CANDIDATE PLACEMENT

JOB PLACEMENT SERVICES



OCCUPATIONAL HEALTH & SAFETY

EEO

EMPLOYEE RELATIONS

HR MANAGEMENT

CHANGE MANAGEMENT

OUTPLACEMENT

CAREER MANAGEMENT

RCSA Proposed Employment Service Industry Code (ESIC) Overview

In making this submission, RCSA has provided answers to the questions identified in the Consultation Paper, and considered these responses in terms of its own proposal for the establishment of an *Employment Services Industry Code of conduct (ESIC)* to be prescribed 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 West Australian government matters of co-regulatory interest.

The objects and means provisions of the RCSA proposed ESIC are stated:

2. Objects

The purpose of this code is:

- (a) to help regulate the role which private employment services providers may play in a well-functioning labour market; and*
- (b) to promote and support good faith in dealings in connection with the supply of private employment services; and*
- (c) to help to regulate standards of business conduct in the private employment services industry and to build and sustain trust in that industry; and*
- (d) to ensure transparency and certainty in commercial transactions in the private employment services industry and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between parties; and*
- (e) to provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes in connection with dealings for the supply of private employment services; and*
- (f) to promote within the private employment services industry principles of C181 - **Private Employment Agencies Convention, 1997**.*

3. How the objects are achieved

One of the purposes of the code is to promote and support good faith in dealings in connection with the supply of private employment services. This purpose is to be achieved by:

- (a) stating an obligation to act in good faith in dealings in connection with the supply of private employment services to which regard may be had whenever there is a need to determine whether any conduct of a party to such dealings is unconscionable within the meaning of the **Australian Consumer Law**.*

- (b) *prescribing certain conduct and practices, which are consistent with the obligation to act in good faith in dealings in connection with the supply of private employment services;*
- (c) *prohibiting certain conduct and practices, which are inconsistent with the obligation to act in good faith in dealings in connection with the supply of private employment services;*
- (d) *establishing the Employment Services Industry Advisory Council to review and report on the operation of the code from time to time and to undertake certain functions to facilitate the code's dispute resolution objective.*

RCSA's approach seeks not only to provide guidance to employment services providers as to how they can avoid unconscionable conduct; it extends to impose an obligation upon users of employment services to act in good faith.

21. Parties must deal lawfully and in good faith

(1) *Parties, who have dealings with each other for the supply of private employment services must deal with each other lawfully and in good faith within the meaning of the unwritten law from time to time in respect of any matter arising under or in connection with:*

- (a) *their dealings; and*
- (b) *this code.*

*This is the **obligation to act in good faith.***

(2) *A reference in this Division to a party to dealings for the supply of a private employment service includes a reference to a third party beneficiary, who acts with actual or constructive knowledge those dealings.*

22. The obligation to act in good faith

The obligation to act in good faith:

(a) *requires parties to dealings for the supply of a private employment service to be active and constructive in establishing and maintaining a lawful and productive relationship in which they are, among other things, responsive and communicative; and*

(a) *requires a private employment services provider:*

(i) *to observe a high standard of ethics, probity and professional conduct which requires not simply compliance with the law; but extends to honesty, equity, integrity, social and corporate responsibility in its dealings and holds up to disclosure and to public scrutiny; and*

(ii) *to comply with the provisions of Division 2 of this Part.*

23. Matters to which a court or arbitrator may have regard

Without limiting the matters to which a court or arbitrator may have regard for the purpose of determining whether a party to dealings for the supply of a private employment service has contravened the obligation to act in good faith, the court or arbitrator may have regard to:

(b) whether the party acted honestly and not arbitrarily; and

(c) whether the party cooperated to achieve the agreed objects or specified purposes of any relevant private employment services agreement.

It is proposed that ESIC should be capable of operating alongside preserved state and territory regulatory schemes rather than in replacement of them. However, in the event that ESIC passes into regulations, RCSA would invite suggestions from co-regulatory agencies as to whether local schemes might provide some mechanism to facilitate opting out in favour of a prescribed industry code made under the *Competition and Consumer Act 2010*.

RCSA Submission

RCSA appreciates the opportunity to make a submission on the Western Australian government's review of its *Employment Agents Act 1976*. RCSA's response to the consultation paper is informed by its experience gained since 2003 in administering its own ACCC authorised Members 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.

Its response 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.

Question 1: Do you support the government's proposal to abolish the licensing of employment agents and replace it with negative licensing scheme?

Yes. Restrictive licensing schemes (i.e. where business cannot be carried on without a license) have been demonstrated in Australia to have not been effective in eradicating industry malpractice. They have been plagued by complex definitions, as attempts have been made to include or exclude various service categories. As definitions are rigid, they have operated as an impediment to the development of innovative services and business models that, if they do not fit squarely within the definition, must operate outside or on the margins of restrictive license regulation.

By contrast, a negative license regime, provided it is supported by clear guidance about what specific conduct might result in restricted practice orders and also provided it is supported by accessible dispute resolution mechanisms, would appear to be a model that is more able to respond to market demands for new services, whilst providing an effective basis for regulation.

RCSA has considered the issue in the context of its own proposed Employment Services Industry Code.

Question 2: Do you support the government's proposal to retain the prohibition against charging fees to jobseekers?

RCSA supports the prohibition against charging fees to vulnerable work seekers and in circumstances where such a fee may be unconscionable.

In this context it notes:

- the prohibition is not consistent across all Australian jurisdictions.
 - Queensland, New South Wales, ACT and Western Australia have retained prohibitions.
 - In New South Wales and the ACT, the prohibition may depend upon whether the agent is providing services in a strict principal/agent relationship – which is often doubtful.
 - In those states where the restriction is maintained, there is often some doubt as to whether the firm charging the fee is an *employment agent* as defined by the local legislation. Some states attempt to exclude labour hire firms, others do not. However, the exclusion is complicated by the fact that many labour hire firms charge a temp-to-perm placement fee, which is essentially a fee for making a placement.
 - The various Australian jurisdictions are also inconsistent concerning what fees may be charged and what fees are excluded. Some jurisdictions permit the charging for ancillary services such as sales training, outplacement support and resume review services, whilst others do not. There may be no unconscionability in charging some fees for services provided to jobseekers. Such services might include training, outplacement support or resume review services.
- There is a question as to whether the prohibition should extend more widely to include employers, rather than apply only to employment agents. Queensland's employment premium provisions, still preserved in s.669 of its *Industrial Relations Act 1999*, are an example of prohibitions that apply more broadly. However, there may now be some doubt about the extent to which they would apply to a national system employer. New Zealand has preserved a broadly operating prohibition contained within section 12 A of its *Wages Protection Act 1983*.
- There is a question about whether it would be unconscionable to charge a fee for services provided to work seekers, who would not be considered to be vulnerable. What mischief is to be avoided by preserving such a prohibition in the case of, say, an experienced lawyer established in one of the eastern states, who wishes to relocate to Western Australia and who seeks the assistance of an employment agent to do so?

One might say that the prohibition on charging for services provided to the lawyer, in such a case, merely loads or externalises the cost to a Western Australian client who might consider employing such a candidate.

- Employment services are supplied within what is now recognised as a national market. Unless the prohibition is capable of operating extraterritorially, it will be of little effect as there would be nothing to stop a fee being charged by an employment agent in Victoria, Tasmania, South Australia or the Northern Territory to a candidate seeking employment in Western Australia.

RCSA has considered the issue in the context of its own proposed Employment Services Industry Code. Recognising that different laws do apply in each of the states and territories, it has approached the issue in a way that seeks to address the harshness or unconscionability of such a fee.

RCSA provisional approach is reflected in the following draft provision:

52. Work seeker fees

- (1) A private employment services provider must not charge to a work seeker any fee that is not permitted by law.*
- (2) A private employment services provider may only charge a fee to a work seeker provided that all the following conditions have been met:*
 - (a) the charge is permitted by law applicable to the transaction in respect of which it is made;*
 - (b) the private employment services provider has disclosed the charge in writing to its customer and to the work seeker;*
 - (c) the private employment services provider has obtained professional advice that the fee and its amount is lawful and not unconscionable.*
- (3) A private employment services provider must keep a register of all fees charged to work seekers and, upon reasonable request, make it available for inspection by the Commission and any statutory body that has authority to inspect it in connection with the investigation of any alleged breach of human rights in work and pre-work areas.*
- (4) A private employment services provider must keep any register required by sub-clause (3) for at least 6 years after the end of the year to which the last entry in the register relates.*

Question 3: Do you support the government’s proposal to remove the requirement to submit a scale of fees to the Commissioner for approval?

Yes. Western Australia is the only state that retains the provision. RCSA agrees that the requirement to submit a scale of fees to the Commissioner for approval is an unnecessary regulatory burden on Western Australian employment agents.

Question 4: Do you support an amendment to the act to require employment agents to disclose their fee structure to employers prior to commencing work?

Consistently with the answer given to question 3, RCSA would agree that there should be no requirement to disclose fee structures generally prior to commencing work. However, there is a case for disclosing fee structures where work is undertaken on behalf of, or for the benefit of, a customer. RCSA would take a broader view of the objects of employment services industry regulation than that which is suggested in the consultation paper (see above).

Generally, RCSA would contest the proposition that:

...the negotiation of contract between an employment agent and employer is a business transaction that has no bearing on the eventual relationship between the jobseeker and the employer.

Placement fees, temp-to-perm fees, agency switching fees and prohibitions on direct engagement, which may be found in commercial arrangements made between an employment agent and its customer, and job/client/candidate “ownership” claims all potentially operate in restraint of trade and can act as an impediment to a job seeker’s ability to find future employment. To that extent they do bear upon the jobseeker/employer relationship. See in this regard: *Earth Force Personnel Pty Ltd v E A Negri Pty Ltd & Anor* [2010] VSC 426.

RCSA has considered the issue in the context of its own proposed Employment Services Industry Code. The ESIC proposes that employment services providers should disclose fees and charges before undertaking work for the benefit of or in behalf of a customer. With regard to job seekers, it goes further and states:

50. Disclosure to work seeker

- (1) A private employment services provider must disclose the general nature of any arrangement, including any fee arrangement that may impede the work seeker from obtaining work from any other source.*
- (2) To avoid doubt, sub-clause (1) does not require a private employment services provider to disclose the amount of any such fee.*

Question 5: Do you support retention of the requirement to provide a notice of employment offered? Are there are instances where it is impracticable to provide a notice?

No. The requirement would likely result only in broad role and salary information being provided and so be of little benefit. RCSA notes that National System Employers would be obligated to provide a Fair Work information statement in any event.

In many instances, employment agents do not operate within a strict principal/agent relationship and do not have authority to bind a client to a work contract.

RCSA has considered the issue in the context of its own proposed Employment Services Industry Code and has identified a different interest that requires protection. Under ESIC, the interest requiring protection is that of ensuring that work seekers are provided with accurate information during the course of negotiations.

ESIC deals with this in the following provision:

47. Work seeker to be informed of offer

(1) A private employment services provider must inform work seekers of all matters, which are or which ought reasonably to be within the private employment services knowledge, relevant to their consideration of any offer of work.

(2) A private employment services provider must not make a false or misleading representation about the range of remuneration offered, sought, or likely to be accepted.

Ethic otherwise deals with the matter by its requirements for certainty with regard to the contents of Employment Services Agreements.

Conclusion

RCSA commends the Western Australian government on its initiative in undertaking the review and would be welcome the opportunity to provide any further information that may be of assistance to the review.

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