

Productivity Commission SUBMISSION COVER SHEET (not for publication)



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Productivity Commission
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**RECRUITMENT AND CONSULTING
SERVICES ASSOCIATION
AUSTRALIA & NEW ZEALAND**

Productivity Commission

Inquiry into the Workplace Relations Framework

Submission of

Recruitment and Consulting Services Association (RCSA)

March 2015

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Introduction to RCSA

The Recruitment and 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, on-hire worker and HR services. It represents over 3,300 company and individual Members with over 60% of Australian 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 Australian 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 Commonwealth 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 ACCC authorised RCSA Code for Professional Conduct.

RCSA members, as professional employers and work facilitators, operate within the workplace relations framework with their clients and know it intimately. Their knowledge, understanding, interpretation and support of the aims of the framework 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 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 Submission Overview

RCSA's Core Submission

1. RCSA Members, in the provision of private employment services, contribute to productive Australian workplaces, and improved working lives, on a level which cannot be ignored. It is essential that this contribution is promoted, not restrained, within a contemporary workplace relations framework.
2. At the core, private employment service providers facilitate an efficient allocation of labour and management by sourcing, matching, placing, assigning and supporting the best individuals for the job at hand within the most effective engagement model for both worker and hirer.
3. Australian's are adapting to changing economic conditions, social demands and looking to work differently to how our parents, and earlier generations, worked. It is critical that the Australian workplace relations framework respects and accommodates those social and economic changes. Being locked in to an ideologically constrained framework is no longer a viable option if Australia is to remain progressive and competitive.
4. RCSA are committed to achieving the right balance between the protection of vulnerable workers and the promotion of a responsive and flexible workplace relations framework to ensure Australia can compete in the global market and under changeable economic conditions.

Private Employment Service Providers:

- ✓ as labour market intermediaries, facilitate the free flow of information between business and workers to ensure they are able to make quick and informed work and business decisions;
- ✓ as specialist employment outsource service providers, allow Australian business and government, large and small, to reduce undue administrative and compliance costs to allow them to focus on core business;
- ✓ enable adaptation to change in increasingly volatile and complex labour markets by more rapidly and effectively matching labour supply with labour demand following such change;
- ✓ reduce both structural unemployment by creating new jobs and skills and frictional unemployment by ensuring a better and faster match between supply and demand in labour markets;
- ✓ drive down segmentation of labour markets by providing a stepping-stone function that enables individuals to transition from education to work, from unemployment to employment and from job to job; and
- ✓ deliver decent work through a marriage of flexibility and security, whereby disparate direct hire casual and contract work can be combined through an employment service provider to become a permanent or regular engagement.

These submissions are supported by further evidence within the section of this submission titled *On-hire Worker Services – Time to Take a Fresh Look*.

Rather than respond to the relevant questions posed by the Issues Papers in isolation, we have chosen to provide an overarching submission. To assist the Commission to identify where our submission addresses specific discussion areas posed by the Issues Papers, RCSA has provided at Attachment 4, a directory.

The WR Framework and RCSA Member Services

RCSA Members influence, and are influenced by, the workplace relations framework within Australia in the following ways. The order of the list identifies the degree of influence from highest influence to lowest.

1. RCSA members employ casual employees whom they assign to work for clients on an hourly basis.
2. RCSA members employ permanent employees (ongoing and specified term) which they assign to work for clients on a weekly basis.
3. RCSA members engage independent contractors, primarily in professional occupations, which they assign to work for clients on an hourly, daily or weekly basis.
4. RCSA members employ staff and engage independent contractors to manage their operations and deliver service (internal staff).
5. RCSA members recruit and place employees and independent contractors within client businesses. This may be an individual recruitment brief or the provision of Recruitment Process Outsourcing (RPO).
6. RCSA members manage the provision of services of other on-hire, recruitment and contracting firms on behalf of clients. This is commonly known as an MSP (Managed Service Provider) service where the RCSA member would manage a range of service providers.
7. RCSA members provide workplace relations and HR advice to clients (category 5) on a professional service basis to enhance the ability of clients to operate productively.

Flexible and On-Hire Work – Time to Take a Fresh Look

On-hire worker services are the RCSA Member services most greatly influenced, and impacted upon, by the workplace relations framework.

It is essential that Government, policy makers and workplace relations stakeholders alike understand on-hire worker services, and its contribution, in a modern context in order to make the right decision for the future framework. When considered objectively and constructively the on-hire worker service sector can provide the solution to many of the labour market challenges being faced by Australia in 2015.

It is time to overcome the fear of the non-standard work form.

RCSA submits that a contemporary workplace relations framework would harness the benefits of on-hire worker services rather than restrain them. We rely upon the following arguments to support our case for the fostering of the industry.

The on-hire worker services industry is a significant contributor to the Australian economy.

Research completed by IBIS World in 2014¹ indicates that the on-hire worker services (*Temporary Staff Services*) industry generates revenues in excess of \$19 billion within Australia, more than that of accounting services (\$17 billion). When combined with Employment Placement and Recruitment Services (\$11 billion)² to revenue from private employment services, excluding the management consulting element, the revenues exceed \$30 billion.

The on-hire worker services sector employs over 300,000 employees.

The on-hire worker services industry is making tangible and genuine efforts to promote increased professionalism across the globe and to drive an agenda for ongoing improvement.

See the Boston Consulting Group and International Confederation of Private Employment Agencies (CIETT) report attached as Attachment 3.

A large percentage of on-hire workers are either skilled or professional workers.

RMIT University research into on-hire worker services conducted in 2003³ found that 61% of RCSA on-hire employees are skilled or professional workers with the remaining 39% being semi-skilled or unskilled.

On-hire workers are primarily employees, not contractors.

There is a common misconception that on-hire workers are primarily engaged as independent contractors and therefore, not receiving employment protections. RMIT University research found that the majority of on-hire workers are employees and that on-hire workers engaged as independent contractors are primarily professionals.

¹ IBISWorld, *Temporary Staff Services Market Research Report | ANZSIC N7212 | Nov 2014*

² IBISWorld, *Employment Placement and Recruitment Services Market Research Report | ANZSIC N7211 | Nov 2014*

³ 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*

An increasing number of on-hire employees are employed on a permanent basis.

RMIT University research found that 16% of on-hire employees are now employed on a permanent basis.

Where on-hire 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-hire 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 with 90 per cent of workers remaining in work for greater than 12 months⁴.

An overwhelming majority of people choose to work as an on-hire or casual employee and the reasons for this choice are not what you may expect.

RMIT University research found that 67% of on-hire employees chose to work as an on-hire employee and 34% prefer this form of work over permanent employment. The most important reasons for choosing on-hire employment are diversity of work, to screen potential employers, recognition of contribution and the payment of overtime worked.

In 2014, Flinders University conducted research into workers' experiences of nonstandard employment and how it related to health and wellbeing⁵ and found that "our most striking findings were that the majority of the participants made a deliberate choice for casual employment and to explain this, almost most of these cited *improved* health and wellbeing as a motivation." The findings identified that over half of the participants described being 'deliberate casuals' and had chosen casual employment despite having the option of permanency in the same or very similar job. Almost a third of all participants in the research explained that they had deliberately chosen casual work because it was protective of their health and wellbeing. Reduced responsibility, less 'workplace politics', less work-life conflict, and less job stress than in their prior (permanent) job were determining factors in their decision.

Business uses on-hire 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-hire 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-hire employees was related to pay.

Business is more productive and competitive because of the use of on-hire workers.

RMIT University research found that 76% of organisations using on-hire workers were more productive and competitive as a result of such service use.

⁴ *Ciett Economic Update 2015: Australia*

⁵ *Keuskamp D, Mackenzie CR, Ziersch AM, Baum FE. Deliberately casual? Workers' agency, health, and nonstandard employment relations in Australia. Journal of Occupational and Environmental Medicine, 2013*

On-hire drives down segmentation of labour markets by providing a stepping-stone function that enables individuals to transition from education to work, from unemployment to employment and from job to job.

Based on data from the HILDA Survey⁶ for 2001 to 2010, on average, about 30% of on-hire workers will still be in that state one year later and 38% will have moved to permanent employment. After 10 years only 4% will still be an on-hire worker and 56% will be in permanent employment. Furthermore, the HILDA Survey has identified that casual male employees are far more likely to obtain permanent employment compared with being unemployed. Therefore, if you have a choice between looking for work in casual employment and looking for work when unemployed, as a male, you are far better off being employed casually.

The 2015 Intergenerational Report clearly outlines that “continued efforts to encourage higher participation across the community would have widespread benefits for Australia’s economy and society” and RCSA members are at the forefront of workforce participation facilitation with employers.

On-hire employment creates jobs and doesn’t necessarily replace direct hire employment opportunities.

RMIT University research found that 51% of organisations using on-hire employees would not necessarily employ an equivalent number of employees directly if they were unable to use on-hire employees. In fact 19% of organisations said they would rarely do so. Furthermore, 19% of RCSA Members’ on-hire employees eventually become permanent employees of the host organisation they are assigned to work for, according to RMIT University research.

Casual employees are not paid less than permanent employees.

HILDA found that men and women have higher wages (wages per hour) in casual employment than full time employment (5% higher). However, with men, permanent employment wages per hour are slightly higher than casual, but not markedly. As Professor Sue Richardson, of the National Institute of Labour Studies at Flinders University observed, this is opposite to the image that part time and casual employment is lower paid work, and is not a finding that would be observed in other countries.

⁶ *The Household, Income and Labour Dynamics in Australia (HILDA) Survey*

Employment Services – A Need for Improved Definitions and Terminology

RCSA submit that the absence of precise and consistent terminology in the employment services industry is contributing to the confusion around, and lack of understanding of, the existing and potential contribution of the industry to the Australian economy and community.

RCSA has been instrumental in developing and promoting contemporary categories of service and terminology with a view to improving the capacity of the nation to have an informed and constructive discussion on the special role and contribution of the employment services intermediary within Australia and how it may contribute to a better future.

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”, developed by RCSA, has been incorporated into Modern Awards.

RCSA submit that future workplace relations legislation, statistical research and policy must be more precise and descriptive of the services provided within the employment services industry, particularly on-hire worker services and contracting.

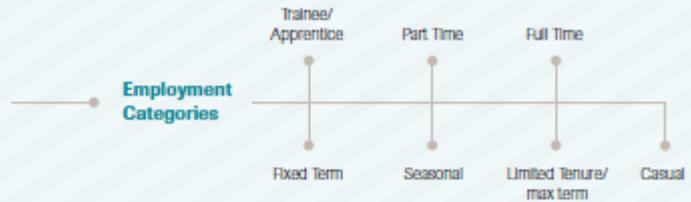
A more detailed outline of what constitutes a genuine on-hire service, in contrast to contracting services, is attached as Attachment 1 to this submission.

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.

1

On-hire Employee Services

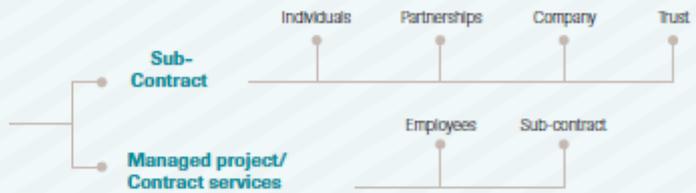
A commercial service where an organisation, in return for an hourly fee, assigns one or more of its employees to perform work for a third party (client) under their general management and instruction.



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

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.



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.



An Adapted Workplace Relations Framework

'Whether productivity growth comes from working harder or working smarter, people in workplaces are central to it. The incentives they face and how well their skills are deployed and redeployed in the multitude of enterprises that make up our economy underpins its aggregate performance.'

'It is therefore vital to ensure that regulations intended to promote fairness in Australia's workplaces do not detract unduly from their productivity. If we are to secure Australia's productivity potential into the future, the regulation of labour markets cannot remain a no-go area for evidence-based policy making.'

Gary Banks⁷ 2010

Segmenting the Workforce – Protecting the Vulnerable Worker without Impeding the Non-Vulnerable

Whilst the views of Gary Banks, former Chair of the Productivity Commission, will be well known by those conducting this inquiry, it is important to focus on the importance of balance in the development of an adapted workplace relations framework. One of the key elements of this statement, in our opinion, is the consideration of the balance of fairness and productivity.

It is the submission of the RCSA that the current workplace relations framework fails to cater for different segments of the workforce. A one size fits all approach to workplace relations based on purely ideological principles is both outdated and unhelpful. Whether it be the vulnerable or the entrepreneurial worker, it is time to examine ways in which the framework can be adapted to cater for the full spectrum.

The starting point is to identify the truly vulnerable workers and job-seekers and then to determine if there are ways to protect them without detracting from the capacity of the rest of the workforce to engage in working relationships which meet their personal needs.

When considering the place of independent contracting in on-hire worker services in 2011, the RCSA determined that vulnerable workers, that may require special protection, were made up of the following:

- Individuals under the age of 18.
- Migrant workers.
- Unskilled workers
- New job market entrants and those returning to the job market after a considerable time out of the market.
- Those with limited genuine employment options who feel this is their only work option (i.e. not desire or first choice).
- Low income earners.
- Workers with disabilities.
- Workers and job-seekers that have a limited capacity to obtain independent advice and representation on rights, coupled with low bargaining power.

⁷ Banks, Gary (2010), *Successful Reform: Past Lessons, Future Challenges*, Address to the Annual Forecasting Conference of Australian Business Economists, Sydney, 8 December.

The starting point of any adapted workplace relations framework would be to examine ways in which vulnerable workers and job-seekers could be protected whilst not extending those protections to the rest of the workforce. Later in this submission we consider ways in which such individuals may be protected from unintentional or undesirable independent contracting.

Casual v Permanent Employment – Time to Break the Polarity

Given that a majority of on-hire workers are casual employees, RCSA invites the Productivity Commission to consider whether there is not an alternative which would break the rigid and polarising effect of an employee and employer having to choose between either a purely permanent or casual employment relationship. With an adaptation of the workforce in response to constant economic and labour market change, and the dilution of notions of traditional employment security, is it not time to think outside the framework which is, in essence, over 100 years old?

By creating a new adaptable category of employment there would be no need for many of the existing restrictions which are placed upon, or being mooted for, casual employment. There needs to be greater flexibility around the capacity of individuals and enterprises to meet their changing lifestyle, family, earning and competitive needs.

We invite the Commission to explore a new hybrid of casual and permanent employment whereby casual employees could elect to trade a component of their casual loading for enterprise level accrual of universal paid leave / notice entitlement or other benefits which would promote social safety net during different phases of the workers lifecycle.

Under such a revised model, an accrued entitlement could not only be used for access to monetary payments during breaks in employment, but could also provide a payment upon termination, which would act as a form of payment in lieu of notice. These monies could be accessed, at their discretion, during periods where casual work is not being offered by an employer, for periods where an employee is unable to work because of carer's and other responsibilities or, where the employee is notified of the termination of their employment.

The fact RCSA members report that there is virtually no take up of the right to elect to become a permanent employee amongst casual on-hire employees who are afforded this entitlement within 19 of the 122 Modern Awards, underlines that this concept is worth exploring to provide individual employees with the ability to decide whether they wish to receive a full casual loading or whether, at different stages of their employment lifecycle, they wish to enjoy the benefit of accrued financial entitlements to cover unexpected life changes.

Individual Bargaining Agreements

Enterprise bargaining was designed for traditional workplaces where static workforces, with common and predictable employment conditions, look to adapt those conditions to a specific enterprise. They are not, in our opinion, designed or suited to promoting alternative conditions within businesses and across workplaces where there is short tenure and dynamic work patterns. In short, they are not suited to flexible work arrangements. This means that flexible workers and their employers are, in effect, locked in to an award structure which is similarly designed for traditional permanent employment relationships.

We invite the Commission to ask why bargaining is limited to collectives of employees? If suitable statutory arrangement are in place to prevent workers from becoming worse off, on a holistic basis, why should entrepreneurial and non-vulnerable workers not have the opportunity to negotiate employment conditions which suit their personal circumstances and inspire them?

The existing framework provides a vehicle for flexibility of terms and conditions to occur through Individual Flexibility Agreements, however, the inability to enter in to such an agreement prior to the commencement of employment makes such an agreement effectively unworkable in on-hire worker services because there is no certainty for employee, employer and client alike.

Individual Flexibility Agreements are currently not used in the on-hire sector because there is little certainty for employers of on-hire employees, and employees themselves, given that they are exposed to employee termination of such agreements, and that's even when they are successful in negotiating such an agreement following the commencement of work. Where an on-hire firm quotes charge rates for on-hire employee services the client procuring those services needs certainty as to cost and potential changes to wage rates following termination of an Individual Flexibility Agreement undermines this certainty. To utilise an Individual Flexibility Agreement under the current legislation an on-hire firm would need to advise the client that it cannot quote a charge rate until after the commencement of the supply of on-hire workers, and that such charge rate could become null and void in the event that any one of the on-hire employees gives notice of his or her decision to terminate the Individual Flexibility Agreement.

RCSA submits that it is time to trust the maturity of the marketplace and to implement an evolved Individual Flexibility Agreement framework which allows non-vulnerable employees the opportunity to negotiate alternative terms and conditions, prior to the commencement of employment, so long as such an agreement does not involve coercion of an employee and that the outcome satisfies a better off overall assessment which examines not just financial conditions but broader work-life and flexibility needs of workers.

Enterprise Bargaining in On-Hire Worker Services

A significant number of RCSA members' on-hire workers to clients for occupations in which the client already directly employs workers, and that are covered by an enterprise agreement. Many clients require employers of on-hire employees to mirror key terms and conditions of employment contained within the client enterprise agreement. There is a problem however, given that the enterprise agreements of clients do not lawfully apply to employers of on-hire employees, and therefore by mirroring key client enterprise agreement terms and conditions, such employers may be breaching underpinning award conditions which do lawfully apply to such employer.

There would be merit establishing a framework whereby an employer of on-hire employees could elect to apply the key terms and conditions of employment contained within a client enterprise agreement to ensure that such mirroring can occur without inadvertently breaching other industrial instruments. However, whilst attractive in principle, there would need to be significant consideration given to the process by which this would occur. For instance, it would not be suitable to have the entire enterprise agreement of a client apply to on-hire employees given that in many enterprise agreements there are client business-specific provisions which could not be easily and sustainably provided by an employer of on-hire employees. For example, many enterprise agreements provide for specific insurances, corporate discounts and other benefits which could not be mirrored by an on-hire firm.

It may be suitable to examine whether an Individual Flexibility Agreement, as adapted in line with our submission above, could be used to promote the capacity of an employer of on-hire employees to mirror a client's enterprise agreement. RCSA believe this solution would be desirable over the introduction of new law allowing a host organisation and on-hire firm to jointly negotiate an agreement with a collective of employees.

Remove Restrictions on External Workforce Services

Why is it, that in 2015, unions are able to restrict business capacity to utilise a flexible third party workforce to complement, its direct hire workforce? Third party workforce service providers, such as providers of on-hire employee services, are governed by the same regulation and controls as direct hire employers and there is no genuine policy argument to retain the existing capacity of unions to restrict or control the provision of on-hire worker services.

RCSA submits that there is no substantive reason to allow such restrictive and uncompetitive trade restrictions and support amending the legislation to make clauses of the following variety non-permissible within industrial instruments generally:

- a) clauses which impose restrictions on the engagement of independent contractors (including contracting firms);
- b) clauses which impose restrictions on the engagement of on-hire firms, contracting firms or conditions on the engagement of on-hire workers;
- c) clauses which require employers and host organisations to notify unions of, or seek approval for, the procurement or engagement of on-hire workers;
- d) clauses which limit the length of engagement of casual employees; and
- e) clauses which impose restrictions on particular types of supplies or suppliers (e.g. a requirement that Australian-made supplies must be used).

Allow Professional and Sophisticated Individuals to Choose their Preferred Form of Engagement with Confidence

Professional workers are increasingly choosing to work as 'freelance' independent contractors because it suits their lifestyle and work personality. Such workers should be free to enter in to such form of engagement without creating a potential liability for hiring businesses. Sham contracting and deemed employment are both business risks which are misaligned with the desires and intentions of many contemporary professional workers to work in a non-employment capacity and should be extinguished where certain point of hire criteria are satisfied between the hiring entity and the individual worker or corporation.

Based on RCSA Membership enquiries, most members are being directed by professionals as to whether they will work as independent contractors or employees, rather than the other way around. Candidates are advising, in many circumstances, that they will not work for members if they do not offer to engage them as independent contractors. The benefits that such individuals, preferring to work as independent contractors, outline include the following:

- The ability to earn more.
- Independence through flexibility and mobility.
- Aspirational motivations for independence and freedom.
- The convenience of not having to fill out tax declarations and the like with each new work relationship.
- The lifestyle benefits of not being an employee, regardless of perception and reality.
- The ability to maintain professional standards through diverse work experiences in a rapidly changing world.
- Diversity of work experience.

RCSA is concerned by decisions such as *ACE Insurance Limited v Trifunovski (No 2) [2012] FCA 793 (31 July 2012)* where individuals engaged as an independent contractors can, despite ongoing confirmation of their intention to operate as a contractor and earning weekly salary of \$11,172 (including \$127,683 in the first 11 weeks and three days of the financial year prior to termination of contract), can be deemed to be an employee by the Federal Court of Australia and receive a back payment of over \$325,000 in annual leave.

Protection of Vulnerable Workers

Once again, RCSA submits that it is necessary to protect the genuinely vulnerable without restraining business and government to enter in to a work engagement that is proportional to their level of sophistication and professionalism. RCSA submits that the workplace relations framework in Australia should be adapted to allow professional, and workers with a sophisticated understanding of independent contracting, and what it entails, to be able to enter in to such an arrangement without fear that such a relationship will be re-classified as employment.

RCSA submits that special protection from sham contracting and misclassification should be afforded to the following worker categories whilst those falling outside this category should, subject to an earnings threshold, be free to enter into a non-employment working relationship such as independent contracting.

- Individuals under the age of 18.
- Migrant non-professional workers.
- Unskilled workers.
- New job market entrants and those returning to the job market after a considerable time out of the market.
- Low fee earners.
- Workers with disabilities
- Workers and job-seekers that have a limited capacity to obtain independent advice and representation on rights, coupled with low bargaining power.

High Fee Threshold

RCSA supports the introduction of a threshold where individuals that earn more than a prescribed hourly fee would be prohibited from claiming deemed employment and such hirers of those workers would be protected from sham contracting actions under the Fair Work Act. RCSA believes that the fee should be one that is predominantly related to labour services, rather than equipment and other, and should equate to similar exemption thresholds under the unfair dismissal provisions of the Fair Work Act.

Fair Engagement Notice and Checklist

RCSA submits that hirers of independent contractors that earn less than the high fee threshold should be required to be issued with a notice, prepared by the Fair Work Ombudsman and similar to the Fair Work Notice issued to new employees, which outlines what independent contracting is, how it differs to employment and where additional information can be sourced. This notice could be coupled with a Fair Engagement Checklist which would need to be completed by the hirer representative and retained on record for at least 7 years as a way of demonstrating clear communication of what independent contracting is, how it would impact the candidate/worker and where they could get independent advice from a statutory body such as the Fair Work Ombudsman. A sample Fair Engagement Checklist has been attached as Attachment 2 for consideration as a concept and to promote discussion.

Promote a Baseline for the Future of Non-Employment

As technology changes the way we work, Australia is seeing the emergence of new online platforms which facilitate the performance of non-employment work. Any workplace relations framework will need to cater for a fair and even playing field.

RCSA is increasingly aware of what are described as Freelance Management Systems which provide a technology enabled method of sourcing and matching individuals to organisations in need of 'freelancers' (non-employed workers). RCSA is concerned that many users of such systems or platforms may not be aware of the compliance obligations that come with engaging a non-employee and submit that there should be baseline standards for the engagement of all non-employees. We provide an outline of that baseline for consideration and discussion with the Commission.

RCSA submits that the Productivity Commission should consider introducing legislation that respects the right of a professional individual to freely enter in to a non-employment work relationship with a hiring organisation where that form of engagement suits their personal circumstances, so long as the following criteria are met to provide protection to such individuals, especially vulnerable individuals.

1. The individual is clearly informed by the hiring organisation that the work relationship is not an employment relationship.
2. The individual is openly informed by the hiring organisation*, in a manner they understand, of the work relationship consequences of entering into the proposed non-employment relationship.
3. The individual freely enters into the non-employment work relationship (no exploitation or coercion).
4. The individual is not charged a fee.
5. Based on reasonable enquiries of the hiring organisation, individuals are able to demonstrate a reasonable level of commercial sophistication and knowledge to enter in to, and sustain, a non-employment work relationship in a compliant manner.
6. The individual's health and safety is protected by the existence of work health and safety standards within the hiring organisation including, but not limited to the following:
 - clear work scopes being provided which allow the individual to assess and control the associated risks;
 - reviewing the individual's skill and competence and comparing it to the services proposed to be provided to ensure no demonstrable misalignment;
 - the provision of workplace specific work safety information and training where the work is being undertaken in the hiring organisation's workplace; and
 - ongoing processes for cooperation, coordination and communication on work safety between the hiring organisation, the individual and other workers.
7. The individual, or their legally appointed representative, is free to make reasonable enquiries as to the proposed work relationship.
8. The individual receives a fair remuneration that, when considered over the period of engagement, is equal to or better than the National Employment Standard pay entitlement.
9. Individuals are fully informed, by the hiring organisation, of all hirer-controlled costs and penalties associated with entering in to, and exiting from, the work relationship.
10. Where the work relationship involves more than two parties, the hiring organisation clearly declares and defines the role, responsibility and function of the third party and its intersection with the hiring organisations role, responsibility and function.
11. Where a third party facilitates the introduction of an individual to a hiring organisation, the third party introducer promotes the fulfilment of criteria 1 to 9 by the hiring organisation.

* may include a representative or agent of the hiring organisation.

^ may include a recruitment agent, online freelancing services, online outsourcing service and online crowdsourcing service.

ATTACHMENT 1

Understanding the Difference Between On-Hire Services and Contracting Services

'Labour hire' is a term which has been apparent in the Australian business marketplace since the 1960's. It is a term which is often misunderstood and misused. The term has been misused by media, unions, industry participants, industry observers and third party contracting service providers to describe any form of service which involves the supply of the services of a worker which is engaged by a third party service provider, regardless of the broader service being provided.

The term 'labour hire' is being replaced by 'on-hire' following the intention of the RCSA, the peak industry body, to promote a clearer and more descriptive term and definition.

Despite its misunderstanding and misuse, 'labour hire', or what is now on-hire, in its pure form, is a simple concept which is characterised by individual workers being employed or, in the case of individual independent contractors, engaged by an on-hire firm and then assigned, or on-hired, to a client controlled workplace to perform work on an hour-by-hour basis under that client's general management and instruction. In return for the on-hire of a worker on an hourly basis the on-hire firm receives a fee from the client which is based upon the number of hours the worker works on assignment for the client or, in the case of on-hire permanent employees, the number of days or weeks worked. The fee structure is typically inclusive of the following components:

- a) an hourly or weekly wage rate;
- b) allowances, penalties and loadings from an industrial instrument (where applicable);
- c) superannuation;
- d) a workers compensation premium loading based upon the relevant insurance premium percentage established by the relevant insurer in that State or Territory;
- e) payroll tax;
- f) a general insurance loading (in some cases); and
- g) a margin.

In an on-hire arrangement, the client, or service recipient, is commonly described as the 'host employer' because the client takes responsibility for supervising and directing the on-hire employee much as they would their own directly hired employees. The use of the term 'host', rather than 'principal', as commonly used in typical contracting services, provides a key insight into the difference between a 'on-hire' arrangement and typical forms of 'contracting'. In an on-hire arrangement the client takes on significantly more responsibility for an on-hire worker given the worker is, in effect, on loan to the client and is not presented in a way where the contractor is responsible for supervising, instructing and directing the performance of the labour and the contracted outcomes. In an on-hire arrangement a worker is on-hired without additional integrated services, property or special know-how.

Additional services may be provided to a client, however those services do not fall within the scope of on-hire services, are not integrated with the on-hire services and are effectively ancillary in nature.

The key indicia of a genuine on-hire arrangement are outlined below.

- a) A Worker is employed or engaged by the On-Hire Service Provider.
- b) The On-hire Service Provider pays the Worker and is responsible for paying work-related costs, fees and charges such as wages, penalties, allowances, public holiday payments, leave payments, workers compensation insurance, superannuation, payroll tax (where applicable) and portable leave entitlements (where applicable).
- c) The Worker is assigned to a client, which is otherwise known as a 'host' (Client/Host), and performs personal labour services (the work) for the host employer on an hour-by-hour basis or, in select circumstances, for a specified term.
- d) The Worker performs the work under the general guidance and instruction of the client or a representative of the client.
- e) The On-hire Service Provider does not directly supervise, instruct nor direct the Worker on an hour-to-hour or day-to-day basis.
- f) In select circumstances, the On-hire Service Provider may, at the request of the Client/Host also assign a team leader on an on-hire basis and that team leader may lead the Worker in relation to defined scopes of work. In circumstances where a team leader is also assigned to a Client/Host that team leader will be directly supervised, instructed and directed by the Client/Host or a representative of the Client/Host.
- g) The On-hire Service Provider does not provide plant, equipment or other work related materials with the Worker, other than personal protective equipment or, in circumstances where the Worker is a tradesperson, worker-owned trade tools. The On-hire Service Provider may provide other services to the Client/Host, however, those services are ancillary or complementary in nature rather than being an inherent component of an 'on-hire' service.
- h) Rosters for the performance of work are typically prepared by the Client/Host and communicated to the Worker and On-hire Service Provider.
- i) The Client/Host will typically maintain the discretion as to whether additional 'labour' is required;
- j) The On-hire Service Provider does not provide systems of work, management systems, intellectual property, work planning, other non-labour services or property to the Client/Host as an inherent component of the service.
- k) The contract between the Client/Host and the On-hire Service Provider provides for the payment of services on the basis of an hourly fee attributable to the performance of work by each Worker assigned to work for the Client/Host on an hourly basis. This may, in select circumstances, extend to weekly fee payment arrangements.
- l) The contract between the Client/Host and the On-hire Service Provider would rarely include commercial terms whereby the On-hire Service Provider's fee is contingent upon the completion of a scope of work or delivery of a result.
- m) In recognition of the labour-only, and unsupervised, nature of the services, the contract between the Client/Host employer and the On-hire Service Provider typically indemnifies the On-hire Service Provider against liability for the inadequate performance of work by the Worker on assignment.

Contracting Services in Contrast

The key element of Contracting Services, in contrast to on-hire employee services, is that the service provider receives a fee for completing 'a defined scope of work'. This fee is commonly a lump sum or fixed fee, rather than an hourly fee. Implied in this is the commercial risk associated with the completion of that scope of work. Unlike on-hire employee services, where the on-hire worker service provider typically receives a fee based on each hour that an on-hire employee performs work for the client/host on assignment, a Contracting Service Provider payment is conditional upon the completion of scopes of work.

ATTACHMENT 2

Fair Engagement Checklist

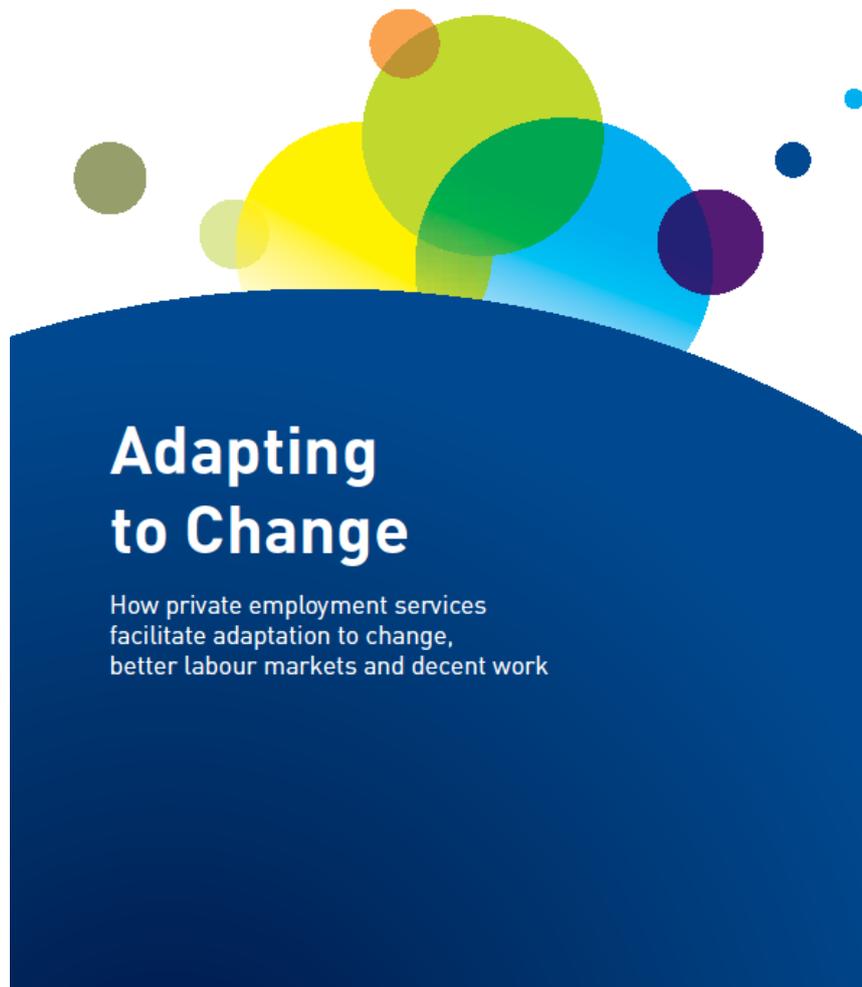
No.	Compliance Issue	Answer	Additional Comments
1.	Are all staff members with a recruitment function fully informed of the different forms of engagement that exist, and the related rights and obligations?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<i>Hirers should consider providing fact sheets and FAQs to staff members, along with regular updates on new developments.</i>
2.	Are these staff members comfortable in explaining the forms of engagement, rights and obligations to candidates, workers and clients?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<i>Internal training sessions, along with the relevant literature can be provided, if required.</i>
3.	When a new assignment is received from a client, is it assessed to determine whether the proposed form of engagement is appropriate?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<i>What an assignment is actually called is not necessarily determinative – it is the nature of the actual relationship that is important, and needs to be assessed.</i>
4.	If the proposed form of engagement is not appropriate, and an agreement cannot be reached with the client, is the assignment declined?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<i>Checklists and advisory notes are available to assist.</i>
5.	Are workers fully informed of the various engagement options available to them, along with the related rights and obligations?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
6.	If the worker has any language or learning difficulties, have steps been taken to accommodate this?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<i>This is important to ensure that the worker has sufficient capacity to enter into the contract. Advisory notes are available to assist.</i>
7.	Has the worker been given the opportunity to ask questions and have these questions been adequately answered?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
8.	Has the worker been able to make a free, informed decision as to the form of engagement?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
9.	Is the relationship assessed on a regular basis to ensure that it continues to resemble its “title”?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<i>As terms of engagement regularly change, it is important to ensure that the effect of the change on the status of the engagement is considered.</i>

ATTACHMENT 3

Adapting to Change – The Boston Consulting Group

How private employment services facilitate adaptation to change, better labour markets and decent work

Refer to separate file attachment which contains the following report



ATTACHMENT 4

Directory to Answers to Specific Discussion Paper Questions

Issues Paper 3:

Issues Paper Questions	Chapter within RCSA Submission (Blue Heading)
To what extent does the current system allow for bargaining with the most appropriate enterprise?	Individual Bargaining Agreements
Would there be any advantages or disadvantages to employee groups negotiating a joint agreement with both the labour hire agency and the host business?	Enterprise Bargaining in On-hire Worker Services
What aspects of the employee/employer relationship should be permitted matters?	Remove Restrictions on External Workforce Services and Casual Employment
How should a WR system address the desire by some employers and employees for flexibility in the workplace?	Flexible and On-Hire Work – Time to Take a Fresh Look Casual v Permanent Employment – Time to Break the Polarity Individual Bargaining Agreements Allow Professional and Sophisticated Individuals to Choose their Preferred Form of Engagement with Confidence
What are the benefits and costs of IFA's and similar provisions? Why are employers reluctant to use IFA's Are the notice periods adequate?	Individual Bargaining Agreements

Issues Paper 4:

Issues Paper Questions	Chapter within RCSA Submission (Blue Heading)
Protections for Employees (generally considered under Issues Paper 4)	Segmenting the Workforce – Protecting the Vulnerable Worker without Impeding the Non-Vulnerable

Issues Paper 5:

Issues Paper Questions	Chapter within RCSA Submission (Blue Heading)
<p>Are there any general concerns about the WR system as it applies to independent contractors?</p> <p>Do any aspects of the WR system represent a barrier to independent contractors?</p> <p>To the extent that the current provisions are insufficient, what changes could be made to strengthen the Act?</p> <p>How much of sham contracting is deliberate rather than mistaken?</p>	<p>Allow Professional and Sophisticated Individuals to Choose their Preferred Form of Engagement with Confidence</p>
<p>Are there any general concerns about the treatment of labour hire workers under the FWA?</p>	<p>Flexible and On-Hire Work – Time to Take a Fresh Look</p> <p>Employment Services – A Need for Improved Definitions and Terminology</p> <p>Casual v Permanent Employment – Time to Break the Polarity</p> <p>Individual Bargaining Agreements</p> <p>Allow Professional and Sophisticated Individuals to Choose their Preferred Form of Engagement with Confidence</p>
<p>What types of restrictions have been applied to the use of independent contracting?</p>	<p>Allow Professional and Sophisticated Individuals to Choose their Preferred Form of Engagement with Confidence</p>
<p>What are the implications of international labour standards for Australia’s WR system?</p>	<p>Attachment 3 addresses ILO standards and their application to the regulation of ‘private employment services’.</p>