

4 YEARLY REVIEW OF MODERN AWARDS

Submission in response to the Commission's provisional view in relation to the Miscellaneous Award 2010 - Coverage (AM2014/237)

Wednesday 4 March 2020

This submission is made by RCSA in relation to the Decision of the Full Bench of the Fair Work Commission published on 12 February 2020 concerning coverage of the Miscellaneous Award 2010.

We welcome the opportunity to respond to the provisional conclusions regarding clause 4.2 of the Miscellaneous Award.

This brief submission addresses the coverage issue specifically as it applies to recruitment & staffing consultants employed by workforce services firms, including private employment agents, executive search, workforce contracting, consulting, and on-hire (labour-hire) firms.

RCSA is well-placed to speak to that issue as the peak body for the recruitment and staffing industry in Australia and New Zealand and as the Australasian member of the World Employment Confederation.

Recruitment and staffing consultants, because of the nature or seniority of their roles, have traditionally not been covered by awards. Recruitment is neither a new industry nor a new occupation. Examples of industry regulation in Australia date back to at least the late 1800s and early 1900s.ⁱ

On those counts alone, recruitment consultants, in our respectful submission, would fall outside the coverage of the Award due to existing clause 4.4 (proposed clause 4.3) and consistently with the provisions of s. 143(7) of the FWA and the Consolidated Request for preparation of Modern Awards.ⁱⁱ

Provided that clearly remains the case, RCSA would have no significant concerns regarding the proposed change to clause 4.2 unless it were clearly and expressly informed of a change to the *status quo*.

That said, RCSA acknowledges that the proposed change to clause 4.2 does make it clear that managerial and professional employees are still excluded. However, RCSA is not convinced that the changes add any greater clarity. RCSA is concerned that the provisional wording of clause 4.2 is likely to trigger unnecessary and unproductive arguments about subjective matters that may be difficult to prove.

Whereas, previously, managerial/professional status was merely an *example* of a class of employees who were traditionally award-free because of the nature or seniority of their roles (and therefore not covered by the Award), the change advances managerial/professional status as a *class-closing characterisation test*, which is complete in itself.

In RCSA's respectful submission, it is a test that is both unnecessary and apt to invite philosophical debate, in any given case, about which callings and employees have professional status and which do not.

It is, moreover, a notoriously a difficult test to apply, and one that is quite different from the simple historical test required by clause 4.2 in its current form. As the Australian Professional Standards Councils point out:

The word "profession" means different things to different people.

<https://www.psc.gov.au/what-is-a-profession>

Nevertheless, RCSA is confident that recruitment & staffing consultants employed by its Members, including consultants who hold individual accredited professional membership of RCSA, demonstrably meet the proposed characterisation test - both as recognised professionals in their own right and as practitioners of a recognised specialism within the Human Resources field.

RCSA draws support for its view that the recruitment and staffing consultants of its Members meet the characterisation test having regard to their adherence, directly as individual Professional Members and indirectly through their employers, to a Code for Professional Conduct which imposes strict ethical and professional standards, including maintenance of a satisfactory and up-to-date level of relevant professional knowledgeⁱⁱⁱ and obligations of continuous disclosure.

The professional responsibilities of RCSA Members are supported and enforced through a sophisticated Professional Conduct Grievance Intervention framework which is designed to correct unsatisfactory conduct and which can lead to the imposition of sanctions, including suspension and expulsion.

RCSA's professional conduct framework was authorised by the ACCC in July of 2019 (AA 1000435). In granting authorisation of RCSA's Professional Conduct framework, the ACCC made the following evaluation at [4.11]:

The ACCC considers RCSA's Professional Conduct regime is likely to reduce this imbalance and to result in a public benefit by: firstly, raising standards in the industry so that unprofessional or inappropriate conduct becomes less likely, and secondly by providing job seekers and clients with an assurance that by choosing to deal with an RCSA member, they can expect a high standard of ethical conduct and professional behaviour. In turn, job seekers can make more efficient and informed decisions about which recruitment services provider is likely to best suit their needs.

The RCSA Code for Professional Conduct and the governance framework which supports it meet clearly articulated public benefit objectives, consistently with RCSA's *Pathways-To-Professionalism* and *Business Enablement* strategies.

RCSA makes no comment about the recruitment consultants employed by firms that are not Members of RCSA but recognises that persons who may be described as "recruitment consultants" demonstrate differing degrees of professionalism and specialisation and that they may be employees of recruitment & staffing firms that have no affiliation with any professional body.

That is likely to raise difficult questions of interpretation such that employers, if they are not Members of RCSA or an equivalent professional body, will not know whether their employees meet the characterisation test or not.

In our respectful submission, that would be an unsatisfactory outcome; and one that may be best avoided by preserving clause 4.2 in its original form.

ⁱ See for example the *Employees Registry Office Act 1915* (SA).

ⁱⁱ *Award Modernisation - Decision - re Stage 4 modern awards* [2009] AIRCFB 945 at [146] to [149].

ⁱⁱⁱ *cf Agents Regulation 2003* (ACT) Sched 8, sections 8.2 and 8.4; *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld) Sched 1, sections 5 and 6.