

25 June 2019

The Director
Adjudication
Australian Competition and Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

Email - adjudication@accc.gov.au

Dear Director,

Thank you for forwarding a copy of the Victorian Labour Hire Authority's submission and allowing us an opportunity to respond.

The Authority's submission appears to have little to say directly about the Code 5 framework and what it does say tends to support the reasoning that has led RCSA to recalibrate its Code.

Some aspects of the Authority's submission do, however, seem either to be not entirely correct or to miss critical points, and therefore warrant comment.

For example, at page 2 and 3 of its submission, the Authority states:

One example of a civil penalty provision is section 16(2) of the Act which prohibits avoidance arrangements with subsection (3) providing that a person must notify the Authority as soon as practicable after they become aware, or reasonably suspect, that a proposed arrangement is for the purpose of avoiding or circumventing an obligation that would otherwise be imposed by the Act.

...

Persons who know or have reasonable grounds to suspect that proposed arrangements are for the purposes of avoiding or circumventing obligations under the Act represent an important source of information for the Authority. The onus is on the person to provide such information to the Authority in the first instance, and such information will assist the Authority's enforcement of compliance with the Act and the regulations.

Subsections 16(2) and (3) have a more limited application than the Authority suggests. In particular, the onus to notify the Authority of avoidance arrangements does not fall on all persons at large, as the Authority appears to contend. It is expressed to fall only upon "**clients**" as defined in subsection 16(1), who propose to enter into arrangements with unlicensed suppliers for the supply of an individual to perform work.

Any wider application would be a matter of ancillary liability arising under section 95 of the *Labour Hire Licensing Act 2018* (Vic).

Whilst the Authority correctly observes that:

such as the obligation to notify the Authority of a proposed avoidance arrangement cannot be avoided by a member of an industry association voluntary professional conduct regime, even where that regime includes a process to refer a matter to a regulator or for the professional association to investigate the matter itself

the observation is largely irrelevant to RCSA's application for authorisation, because it is nowhere proposed by RCSA that the Code 5 framework does avoid, replace or supplant those obligations.

The Authority's comment on page 3 that:

The opportunity for self-regulation of the on-hire worker services sector has passed, as Victoria, Queensland and South Australia have all introduced labour hire licensing schemes

does not note two critical points.

The first is that labour hire is only one of the service categories offered by Members of RSCA. Other service categories, such as private employment agent placement services, mostly sit outside the Authority's jurisdiction.

The second, as was made clear at page 4 of our submission on 9 April 2019, is that:

When we speak of "self-regulation" in this context, we are speaking of behavioural self-regulation in accordance with professional values, rather than the "closed shop", anti-competitive type of industry self (interested) regulation with which the Commission would be familiar.

Indeed, that is precisely why RCSA has contended throughout the application process that an Association Code of Conduct needs to be differently calibrated in order to sit comfortably with statutory regulators. This was made clear at page 13 of our original submission on 6 February 2019, when we said:

...there has been a significant change in regulatory oversight for the industry, including the introduction of labour hire licensing regimes in a number of state jurisdictions. In addition, there are a number of other new regulations that impact and govern a range of member business activities as well as the strong possibility of the introduction of a national licensing regime for the sector in the near future

In light of changes to the regulatory environment and increasing overlap of the industry code with statutory regulations, RCSA, being a domestic body, has formed the view that enforcement of legal obligations, both as a matter of comity and of practicality, is best handled by relevant statutory regulators. As a result, RCSA aspires to move away from its role as an industry regulator to that of an advocate for enhanced industry and professional standards.

In response [to] regulatory oversight and market expectations the industry has continued to evolve and demonstrate characteristics of a profession. Therefore, RCSA's proposed Code of Professional Conduct reflects competencies and expectations of a profession and professionals described by the Professional Standards Council. With its new proposed Code of Professional Conduct, RCSA hopes to align its activities more closely to the provision of member services and towards informing and championing ethical and professional standards in recruitment and workforce services.

And has remained the case right up to the time of our final remarks on 9 April, when we said regarding the Code 5 framework:

...it has been designed as a professional conduct framework that is capable of sitting comfortably alongside increased regulation through state and federal jurisdictions.

These points, however, seem mostly to be matters of subtle difference and nuance that will no doubt resolve and become better appreciated when RCSA embarks on the Member and public education programme that will support its new Code 5 framework. Nevertheless, RCSA thanks the Authority for raising them.

Finally, RCSA notes that under section 63 of his Act, the Labour Hire Licensing Commissioner, in carrying out a function or power, must —

- (a) act in a fair and impartial manner; and
- (b) act in a manner that is transparent, accountable and consistent; and
- (c) act in a consultative and collaborative manner to the extent that is consistent with the carrying out of a function or power

and now looks forward to establishing with the Authority the type of liaison contemplated by the Code 5 Framework.

Yours sincerely,



Charles Cameron
Chief Executive Officer