

Your Ref: AA1000435



ABN 89 900 498 344

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21 June 2019

Susie Black
Director
Adjudication
Australian Competition and Consumer Commission
23 Marcus Clarke Street
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Email – adjudication@accc.gov.au

Dear Ms Black

AA1000435 – RCSA – submission

The Labour Hire Authority (Authority) thanks the Australian Competition and Consumer Commission (ACCC) for its letter dated 6 June 2019, and the opportunity to make a submission in response to the ACCC's draft determination granting authorisation to the Recruitment, Consulting and Staffing Association (RCSA) for:

- 12 months in respect of its Code of Professional Conduct (Old Code) and Disciplinary and Dispute Resolution Procedures (DDRP)
- five years commencing from the date of authorisation for the Professional Conduct Grievance Intervention Guidelines (PCGIG) and the new Code of Professional Conduct (New Code 5)
- five years commencing from the date of authorisation, in respect of specific clauses of the RCSA's Constitution and By-Laws, identical to those previously authorised.

The Authority is an independent statutory authority established under the *Labour Hire Licensing Act 2018* (Vic) (the Act) and is responsible for licensing and regulating the provision of labour hire services across all industry sectors in Victoria.

The key objects of the Act are to protect workers from being exploited by providers of labour hire services and hosts, and to improve the transparency and integrity of the labour hire industry.

The Authority understands the RCSA is a professional association which helps to educate its members and maintain standards and ethical behaviour. The Authority notes that, as a professional association, the RCSA must ensure that its membership criteria, voluntary codes and advice to members comply with the *Competition and Consumer Act 2010* (Cth) (the CC Act).

The ACCC has proposed to revoke authorisation of A91388 and grant authorisation AA1000435 in substitution to enable the RCSA to administer its revised professional conduct regime, which sets out the professional standards for, and regulates the conduct of, its members in relation to the provision of recruitment and human resources services.

It appears that the New Code 5 specifies and guides standards of ethics, probity and professional conduct; and the proposed PCGIG establishes procedures for managing professional conduct

grievance interventions and disputes, in accordance with which members may be liable to the imposition of sanctions including exclusion, suspension and fines.

The RCSA stated rationale for the changes includes its objective to promote the utilisation of New Code 5 to achieve self-regulation of the on-hire worker services sector, wherever possible and effective, rather than see the introduction of additional legislative regulation to address deficiencies in the industry.

The RCSA informed the ACCC that there are likely to be professional conduct grievances that the RCSA is well placed to investigate as a voluntary industry body and that where it refers conduct to a regulator or otherwise, this does not preclude it from monitoring those processes and any findings, or from conducting its own investigations as appropriate. RCSA also stated that New Code 5 establishes a continuous disclosure duty on RCSA members for events and findings that could reasonably be expected to reflect adversely on the character or reputation of the member, the association, or the industry.

The Authority notes the ACCC's draft assessment that the RCSA's professional conduct regime is likely to result in the promotion of consistency across the industry for higher standards of services, ethics and professional conduct.

The labour hire licensing scheme in Victoria commenced on 29 April 2019. The labour hire industry is now subject to significant regulation whereby at the end of the six-month transition period, providers of labour hire services will be required to hold a licence and hosts must use licensed providers.

To obtain a licence, providers are required to pass a 'fit and proper person test' and show compliance with a variety of laws including workplace laws, labour hire laws, occupational health and safety and minimum accommodation standards, as well as report annually on their activities.

Labour hire providers who operate without a labour hire licence, and host employers that use unlicensed providers, face fines of more than \$120,000 for an individual and \$500,000 for a corporation.

Pursuant to the Act, a holder of a licence is required to notify the Authority within 30 days of a change of matters such as a relevant person no longer being a fit and proper person as required by section 22 of the Act and a relevant person no longer being compliant with legal obligations required by section 23 of the Act. A licence holder must also comply with a variety of licence conditions including an obligation to report annually on whether they complied with all specified legal obligations.

The Act includes a range of civil penalty provisions which are supplemented by criminal offences for the most serious breaches of the Act. 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. Contravention of these civil penalty provisions are subject to fines of more than \$120,000 for an individual and \$500,000 for a corporation entering into an avoidance arrangement, and more than \$32,000 for an individual and \$128,000 for a corporation for failing to notify the Authority of a proposed avoidance arrangement.

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.

Obligations 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 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.

The Authority does not make any comment on whether the RCSA's professional conduct regime constitutes a cartel provision under the CC Act.

The Authority is available to provide further information regarding the labour hire licensing scheme should this be of assistance to the ACCC.

Yours sincerely

A handwritten signature in black ink, appearing to read 'H. Chau', with a stylized flourish extending to the right.

Hanh Chau
Chief Operating Officer