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Australian workplace law clearly moving towards "co-employment"

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Unfair dismissal is "the last frontier" yet to be touched by the co-employment doctrine, says RCSA policy advisor Charles Cameron, but recruitment companies face increasing litigation risks from dismissed workers even without it.

The doctrine, which dictates that several parties can be liable in employment matters, has colonised virtually every area of Australian workplace law, Cameron told yesterday's ATC Contingent Workforce conference.

The model WHS legislation is an example of how far it has spread, he says, with the definition of 'employer' "out the window" and replaced by any 'person conducting a business or undertaking' (PCBU), and 'employee' replaced with 'worker' – which includes casuals, labour hire staff, permanent staff, sub-contractors, and even volunteers.

"We've heard a lot from the ACTU campaigning around this idea that we should see the introduction of co-employment. Co-employment is all around us already."

Cameron says discrimination is also covered by co-employment now, and in most matters his firm deals with involving alleged discrimination against an on-hire worker, both the client and the on-hire agency are respondents, and both bear the onus of proving they didn't breach the legislation.

In unfair dismissal cases, he says, liability still rests with the employer, and courts will determine whether that is the agency or client. But in many dismissals, the worker might have the option to bring an adverse action case instead.

In a case where a client terminates a contractor's assignment prematurely because they are absent due to carer commitments, for example, a labour hire company could still face litigation.

"In that situation claims can be made against the on-hire firm and indeed the client as well. So let it be understood that co-employment is a notion that really is found in just about every element of workforce law in Australia."