



**National Review into
Model Occupational Health and Safety Laws
Issues Paper**

National OHS Review Secretariat

Department of Education, Employment and
Workplace Relations

**Submission of
The Recruitment and Consulting Services Association
(RCSA)**

July 2008

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The Recruitment and Consulting Services Association

The RCSA is the peak body for the employment services industry throughout Australia and New Zealand. It is a not-for-profit Association that is managed by a Board of Directors.

The principal focus of the RCSA is “to represent and serve the interests of Members for the increased profile and professionalism of the industry”. The RCSA has more than 3200 Members in Australia and New Zealand comprising multi-national companies, single consultancies, and individual practitioners operating within a recruitment consultancy.

The Association is instrumental in setting the professional standards, educating and developing Member skills, monitoring industry participant performance and working with legislators to formulate the future. Members are kept up-to-date on information regarding best practice techniques, resources and technological innovation, along with legislative changes impacting on employment.

The RCSA also acts as a lobbying voice, representing its Members on issues that impact upon the industry. It has a strong relationship with the public and private sector.

Every year the industry places millions of individuals in on hired employment in an increasingly broad range of sectors from nursing, hospitality and engineering to secretarial placements, call centres and accounting. Each of our Members client workplaces have vastly different levels of occupational safety (OH&S) compliance and similarly, every client organisation - even if they are in the same industry - considers OHS management with a differing priority.

Listed on the following page are the services offered by RCSA Corporate Members, listed by category.

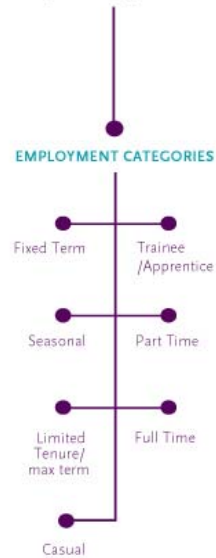
Member services as a percentage of total RCSA Member revenue:

- Permanent recruitment - 43% of total RCSA Member revenue
- On-hired employment - 38%
- Contractor services - 10 %
- Other (Contractor Management and Workforce Consulting) – 9%

RCSA CORPORATE MEMBERSHIP CATEGORIES OF SERVICE

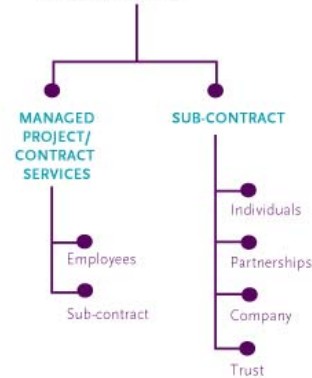
1. ON-HIRED EMPLOYEE SERVICES

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.



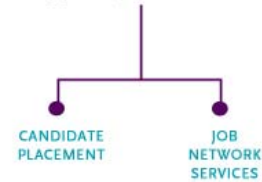
3. CONTRACTOR MANAGEMENT SERVICES

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 independent contractors and their contract performance.



4. RECRUITMENT 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.



On-Hired Employment in Context

The on-hired employment industry is a significant contributor to the Australian economy

Research completed by the Australian Bureau of Statistics in 2002 indicated that the on-hire services industry contributes \$10 billion to the Australian economy, more than that of accounting services and more than that of legal services. The annual revenue of the industry is \$16 billion, according to both Recruitment Super and RCSA Member Research.

Most on-hired employees employed by RCSA Members are either skilled or professional workers

RMIT University research¹ found the 61% of RCSA on-hired employees are skilled or professional workers with the remaining 39% being semi-skilled or unskilled.

Many on-hired employees are employed on a permanent basis

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

Where on-hired 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-hired 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.

¹ 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 overwhelming majority of people *choose* to work as an on-hired employee and the reasons for this choice are not what you may expect

RMIT University research found that 67% of on-hired employees chose to work as an on-hired employee and 34% prefer this form of work over permanent employment.

The most important reasons for choosing on-hired employment are diversity of work, to screen potential employers, recognition of contribution and the payment of overtime worked.

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

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

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

On-hired employment creates jobs and doesn't necessarily replace direct hire employment opportunities

RMIT University research found that 51% of organisations using on-hired employees would not necessarily employ an equivalent number of employees directly if they were unable to use on-hired employees. In fact 19% of organisations said they would rarely do so.

Furthermore, 19% of RSCA Member on-hired employees eventually become permanent employees of the host organisation they are assigned to work for, according to RMIT University research.

Introduction

“As a matter of principle the legislation should not have the effect of imposing obligations on employers concerning circumstances over which they have no control, such as when employees are normally working neither at their home base nor other premises or sites within the control of the employer” – Robens Committee²

The issue of worker safety and that of occupational health and safety legal compliance affects Australian business, community organisations and all levels of Government. The Recruitment and Consulting Services Association Ltd (RCSA), collectively one of Australia’s largest employers and a \$10 billion industry, is also significantly affected by the failure of existing occupational health and safety legislation to keep pace with the changing nature of work as well as its failure to adequately cater for cross jurisdictional employment and service provision. The challenges associated with OHS compliance in third party employment within Australia has attracted the attention and resources of RCSA for many years now.

RCSA is delighted that the Rudd government has chosen to address the inconsistency of Australian OHS law across State and Territory boundaries through proposed model legislation. We look forward to working with all relevant parties to ensure that such model legislation caters for the way Australians work in 2008.

The nature of the relationship between on-hired employee (formerly known as labour hire) service providers, their clients (host organisations) and on-hired employees is a unique one that has been recognised by virtually all State and Territory OHS regulators as a relationship requiring special consideration. Inappropriate regulation of occupational health and safety in relation to third party employment services has dire consequences, particularly for on-hired employees and independent contractors. Inappropriate and outdated occupational health and safety legislation will not only

² Robens, A. 1972, page 51 quoted in 2004 Maxwell Report pg 110.

threaten the lives of workers within Australia, it also has the capacity to threaten employment opportunities, skill development and employment flexibility and as such Australia's competitive edge in the global marketplace.

On-hired employee service providers are now essential stakeholders when it comes to labour market facilitation in Australia and it is the aim of the RCSA to ensure that such labour market facilitation is achieved within an environment of best practice occupational health and safety management. RCSA seek to assist the Rudd Government to establish a system of consistent OHS law where employer, client, employee and workplace colleague work in cooperation to ensure an optimal use of risk management resources at a time when the working model is moving away from the relative simplicity of the traditional two party relationship between employer and employee.

The principal objective of the RCSA is to assist the Rudd government to establish a system of consistent OHS law which facilitates greater safety and health for workers, and does not unduly focus upon the prosecution of employers and workplace controllers in achieving that outcome.

In increasingly complex and dynamic workplaces where multiple parties and responsibilities are commonplace, it is critical that modern OHS law promotes achievable accountability, relevance and an efficient use of limited resources.

Preamble

The ambiguity of most Occupational Health and Safety legislation in Australia in relation to third party employment services combined with the assignment of certain liability to parties without effective control of particular workplace risk thwarts the ability of on-hired employee service providers (on-hire firms) to confidently and effectively comply with their obligations under that legislation. This lack of confidence consequently inhibits the ability of such service providers to protect the health and safety of their workforce and those that work in conjunction with them.

One of the greatest difficulties in addressing OHS issues in this sector is that Australian OHS legislation continues to be drafted with traditional employment patterns in mind. This is despite an increasing number of organisations within Australia continuing to regularly supplement existing workforces with the use of on-hired employees and independent contractors in almost all industries and the effect of outdated legislation compounds on a daily basis.

It is therefore imperative that model OHS legislation be drafted so as to enable OHS legislation and its policy objectives to more accurately reflect current labour market practices.

By doing so, it is submitted that the well-being and welfare of the on-hired worker will be greatly improved, afforded greater protection and will reduce the incidence of accidents and injuries in the workplace. The non-traditional worker is here to stay and it is imperative that the legislation facilitates the most effective and efficient relationship between multiple general duty holders within workplaces of the new millennium.

RCSA submits that legislation which is both non-delegable and overlapping where there are multiple employers and principals within the workplace creates confusion and it is the on-hired workers safety which is jeopardised. RCSA supports the establishment of 'interlocking' duties rather than overlapping duties in relation to employers of on-hired workers and host organisations. The draft legislation provided for within this submission was prepared by Dr. David Neal and is an attempt to

demonstrate how such 'interlocking' duties could be achieved within the on-hire industry. The assignment of clear and unambiguous duties upon both parties reduces the likelihood that either duty holder will presume that the other party was controlling the relevant risk.

Host Organisation Cooperation

An RMIT University report commissioned by the RCSA identified a fundamental compliance issue for RCSA Members which is the ability to get the cooperation of the host organisation in order to manage risks within their workplaces³. Host organisations often view on-hire employer OHS obligations within their workplace as an intrusion into the running of their business by persons who do not have any relevant knowledge or expertise of their operations. A significant percentage⁴ of members reported that host organisations held the view that the on-hired employee service providers should rarely, if ever, have the right to instruct them on how to manage workplace safety for the protection of the on-hired employee.

Apart from any regular audits and the terms of the contract of engagement, the employer who on-hires has to rely on the cooperation of the host organisation to provide the safety measures required in order for the employer who on-hires to comply with the duty of care provisions of the OHS legislation accompanying Regulations. RCSA submits that such a constraint on the ability and capacity to comply with OHS legislation is untenable and we propose this be catered for in the drafting of the Model legislation

³ 62% of the members of RCSA reported difficulties and 63% of non-members reported similarly.

⁴ 36%

Definitions

Placing aside the multitude of alternative terms used to describe the following; 'labour hire' has been used to describe three principal forms of labour provision since it was first adopted many decades ago, including but not limited to the supply of employees to work for third parties, the supply of contractors to work for a third party and the provision of contract staff services utilising employees and/or contractors to deliver a specified result under contract.

It is the submission of the RCSA that third party employment must be specifically catered for within OHS legislation and that the continued utilisation of the term 'labour hire' to define and describe the provision of third party employment services in Australia contributes to the confusion and misinformation surrounding this contemporary employment arrangement.

Therefore, if the model legislation incorporates specific provisions for on-hired employee and/or contracting services as we RCSA later submit, we believe that it would be inappropriate to utilise the term 'labour hire' to define such arrangements.

The term labour hire is so broad so as to not provide any assistance to the Review Panel in its inquiry and the facilitation of meaningful and concise debate about the nature and scope of the employment arrangement.

Moreover, the term 'labour hire' competes with a multitude of other terms which have been adopted in the absence of more descriptive terminology. Whilst 'labour hire' finds its roots in production and construction based industry where organisations utilise the services of an individual engaged or employed by another party, such terminology has not been widely accepted to describe services provided in industries such as service, health, retail, professional, technical, professional and government support.

Interestingly the terms that compete with 'labour hire' to describe the abovementioned arrangements are often found to contribute even greater confusion

and misinformation. We pose some questions to assist the committee to understand our concern.

1. Why could 'labour hire' not be used to describe a traditional employment arrangement given that there is labour and it is hired?
2. How does 'temping' assist the debate when it does not cater for circumstances where an employee is assigned to work for a third party for a period greater than six months or on a permanent basis as a permanent employee?
3. How does utilisation of the term 'contract labour' assist anyone to understand the nature of the engagement when an employee is engaged under a contract and an individual contractor, partnership, entity and/or trust can all be engaged to provide labour in accordance with a contract?
4. How does the term 'agency worker' assist employers or engagers of such workers to understand their respective responsibilities for occupational health and safety management when it suggests a role being performed on behalf of another party as principal?

In the absence of consistent and descriptive terminology to aid the facilitation of an informed debate on third party employment services in Australia, the RCSA has developed definitions which we believe provides a lead in the pursuit of constructive debate.

RCSA strongly believes that precise and descriptive definitions are critical for a full and proper consideration of OHS within third party employment services within Australia

The diagram provided on page 4 of this submission outlines the categories of service provided by RCSA members and the Panel will note that the two categories, namely on-hired employee services and contracting services are the categories of service that are regularly described as 'labour hire'. The RCSA strongly believe that it is necessary to define what would otherwise be described as the sub-categories of

'labour hire' on the basis that each is significantly different and is appropriately dealt with differently under law.

The definitions contained within that diagram are reproduced on the following page for convenience.

RCSA Definitions

On-hired 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.

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.

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 independent contractors and their contract performance.

Client / Host Organisation

An organisation engaging and utilising the services of a provider of on-hired employee services and/or contracting services.

On-hire Employer / On-hire Firm

An organisation employing or engaging workers for the purpose of providing a commercial service where, in return for an hourly fee, the organisation assigns such worker to perform work for a third party (client) under their general management and instruction.

Specific Responses to the Issues Paper

RCSA has chosen to respond to the questions and chapters within the Issues Paper according to RCSA priority. RCSA has not responded to all elements of the Issues Paper and has chosen to focus on those matters most relevant to our Members services.

As a general Principle, other than where our submission specifically addresses issues within the paper, RCSA supports the adoption of the Victorian *Occupational Health and Safety Act 2004* as the Model OHS Act. RCSA specifically submits that the following aspects of the NSW legislation should be avoided:

- A reverse onus of proof i.e. Employers are guilty until proven innocent
- Strict liability of employers regardless of what is reasonably practicable and the degree of control
- Automatic personal liability of directors and managers following conviction of a corporation
- Union right to prosecute employers and receive a share of any resulting fine

Defining the Duty of the On-Hire Firm under the Model OHS Act

Response to Chapter 3: Duties of Care – Who owes them and to whom?

1. Response to 3.2 – ‘Control’

1.1 The concept ‘control’ and the general duties of employers

(1) The National Review into Model Occupational Health and Safety Laws – Issues Paper (the ‘Issues Paper’) recognises the prevalence of the concept of ‘control’ within OHS law in Australia and RCSA commends the Review team for their recognition of this matter as one requiring attention and resolution. Different jurisdictions have utilised the notion of control in different ways and it is often used to determine the extent to which a duty is owed.

(2) In a number of jurisdictions the general duty of an employer to employees is extended in some circumstances so that an employer owes the same duty to independent contractors and their employees in

relation to certain matters. This extension of the employer's duty applies to independent contractors 'engaged' by the employer and extends the employer's duty in relation to 'matters over which the employer/principal has control'⁵. The interpretation of these provisions has been developed by courts over a number of years and there is now a persuasive legal argument governing the operation of such provisions.

1.2 The meaning of 'engaged'

(1) The Victorian case *R v ACR Roofing Pty Ltd*⁶ examined the meaning of 'engaged' within section 21(3)(a) of the *Occupational Health and Safety Act 2004* (Vic). The court held that the word 'engage' means "to secure or obtain the services of". Such a definition has a very broad application with the judge indicating that "a contractor could just as well be regarded as engaged by the employer in relation to matters over which the employer has control if the contractor were engaged directly by the employer under a contract with the employer, or by another contractor under a sub-contract, or by a sub-contractor under a sub, sub-contract, or under a sub, sub, sub-contract or some remoter species of sub-contract; regardless of the layers of contractual relations that might separate the contractor from the employer."

(2) The practical effect of the *ACR* case is that whenever a contractor performs work for an employer they will be considered to have been 'engaged' by that employer even if the employer had no direct involvement in contracting with that particular contractor. This does not appear to be a logical definition of 'engaged' and potentially imposes a duty on employers in relation to subcontractors that they do not even know exist because they were not directly involved in any way in contracting with that subcontractor.

⁵ Section 21(3) *Occupational Health and Safety Act 2004* (Vic); section 16A(4) of the *Occupational Health and Safety Act 1991* (Cth); section 23D of the *Occupational Health and Safety Act 1984* (WA); Section 4(2) *Occupational Health, Safety and Welfare Act 1986* (SA).

⁶ [2004] VSCA 215.

(3) The model OHS Act must define the term ‘engaged’ if it is to be used in any provisions within the Act. Any definition should be narrower than that suggested by the courts in the *ACR* case so that the employer must have some knowledge of or involvement in contracting with the contractor.

1.3 The meaning of ‘control’

(1) From the Victorian case *Stratton v Van Driel*⁷ it is known that there are two types of control that an employer can have, namely contractual and practical. Contractual control exists when an employer has a legal right under the contract with the independent contractor to direct the independent contractor and their employees to perform work in a certain way. Practical control occurs when an employer does not have a legal right to direct the independent contractor and their employees, nonetheless the employer believes they have authority to give a direction and if given the direction would be accepted and acted upon. This definition of control has been applied and followed in a number of cases in other Australian jurisdictions and is now well-established law.

(2) From *Complete Scaffold v Adelaide Brighton Cement*⁸ it is known that ‘control’ “...should be read as referring to actual control, that is to things which the deemed employer is managing or organising.” In this case the independent contractor was found that to have control over the task that they had been contracted to perform, which was scaffolding. The Court also noted that it was not reasonably practicable for Adelaide Brighton Cement to exercise supervision at the level that would have been required to prevent the accident occurring. That is, to supervise the activities of all expert contractors at all times.

1.4 The extent of an employer’s ‘control’

⁷ [1998] VSC 75.

⁸ [2001] SASC 199.

(1) There have also been a number of recent West Australian cases dealing with the issue of 'control'. In *MacCarron v Coles Supermarkets Aus Pty Ltd*⁹ the Court found that the proper approach when considering what the employer had 'control' over was to first examine the manner by which the primary duty imposed was said to be breached. It is then necessary to determine whether the employer had control over the particular manner by which the duty was said to be breached. In this case the employer was found not to have control over the particular system of work that was the subject of the alleged breach of the employer's duty.

(2) In *Reilly v Devcon Australia Pty Ltd*¹⁰ the Court found that general control is not enough to extend the employer's duty to its independent contractors. What is crucial to whether the employer's duty is extended to its independent contractors is ***whether the employer had control over the specific matter which gave rise to the risk*** that is the subject of the alleged breach of the employer's duty. In this case the court directly applied the principle of 'practical control' formulated by the Victorian Supreme Court in *Stratton v Van Driel*. In the appeal from this case (*Reilly v Devcon Australia Pty Ltd*¹¹) the Court again indicated that the provision extending the employer's duty to independent contractors does not impose a general obligation on a principal to supervise the way that a contractor, having expertise that the principal lacks, performs their work in relation to that expertise. The Court applied Complete Scaffold and found that control should be read as referring to actual control – things the employer is managing or organising. .

2. Response to Question 16

2.1 A 'control' test or definition

⁹ [2001] WASCA 61.

¹⁰ [2007] WASC 106.

¹¹ [2008] WASCA 84.

(1) There is now a substantial body of case law dealing with the meaning of 'control' within Australian OHS law. Therefore, to some extent, it is unnecessary to include a test or definition of 'control' with the model OHS Act. We believe that the case law that has developed in Victoria, South Australia and more recently Western Australia (see 1.3 and 1.4 above) illustrates the correct approach to be taken in relation to the issue of 'control'. We would argue that the case law is sufficient in this sense and that the Advisory Panel should endorse this case law when indicating the interpretation to be given to 'control' under the model OHS Act. If any test or definition of 'control' were to be included in the model OHS Act then we would argue that it should be consistent with the body of case law discussed in 1.3 and 1.4 above. In particular, the test or definition should incorporate the notions of contractual and practical control enunciated in *Stratton v Van Driel*¹² and the limitations to 'control' developed in the *Reilly v Devcon Australia Pty Ltd*¹³ cases.

3. Response to Question 17

3.1 Applying 'control' to the duty of employers

(1) The recent Western Australian case law provides a persuasive example of the manner in which control can be used effectively to determine who is a duty holder and the extent of the duty that is owed. These cases involve provisions that extend the duty of an employer to their employees so that it also applies to independent contractors and their employees who have been engaged by the employer. However, the employer only owes a duty to these independent contractors in relation to 'matters over which the employer has control'. The case law indicates that 'control' in this sense is not general control but rather control in relation to the specific risk that is alleged to form the basis of the breach of the employer's duty. This outcome is logical and just for all parties involved.

Employers cannot be expected to owe duties to independent contractors in relation to risks that are beyond their control and within the expertise of the contractor. Likewise, independent

¹² [1998] VSC 75.

¹³ [2007] WASC 106 and [2008] WASC 84.

contractors that perform work for an employer should not be exposed to risks that the employer has control over and could reduce or eliminate.

This principle has particular relevance to the provision of on-hired employee (or labour hire) services and should be recognised in the model OHS Act. It is about the assignment of duties in circumstances where there are multiple duty holders, not the avoidance of duties where that duty will not be fulfilled by another, more suitable, duty holder.

(2) The Western Australian cases are yet to be applied in other Australian jurisdictions and so are not binding elsewhere. When formulating the model OHS Act the National OHS Review Advisory Panel should incorporate provisions that are consistent with this body of case law. In addition, when the Panel is explaining the interpretation that is to be given to the provisions of the model OHS Act the Panel should indicate that the principles developed within this body of case law are to be applied.

4. Response to 3.3 – ‘Work Relationships’

4.1 The labour hire problem: who is the ‘employer’ of on-hired employees?

(1) To date courts have treated companies providing on-hired employee services (referred to as the “on-hire employer”) as the traditional employer for the purposes of prosecutions under various Australian OHS Acts¹⁴. This point is recognised on page 13 of the Issues Paper (see footnote 10 in particular). Courts have set the standard of care owed by the on-hire employer at the same level as the company utilising the services of the on-hired employee (referred to as the “host organisation”).

4.2 The labour hire problem: host organisations as ‘employers’

¹⁴ The decision in *Wilton and Cumberland v Coal and Allied Operations Pty Ltd* [2007] FCA 725, which reviews the existing case law on employment relationships, confirms that the employment relationship exists between the on-hire employer and the on-hired employees not the host organisation and the on-hired employees. The court also found there was great difficulty in imputing any implied contract of employment in circumstances of labour hire.

(1) Whilst the on-hire employer is considered to be the 'employer' of on-hired employees the host organisation may also owe duties to the on-hired employees under OHS legislation. In particular, the host organisation may owe the same duty to an on-hired employee as it owes to its own employees if the relevant OHS Act contains a provision extending employer's duties to independent contractors (see 1.1(2) above). In these circumstances the host organisation will owe a duty of care to the on-hire employer in relation to matters over which the host organisation has control (see discussion in 1.2 and 1.3 above).

4.3 Duplicating the duties owed by on-hire employers and host organisations

(1) The courts have said that there is a special duty owed by the on-hire employer because the employee is working away from the employer's premises. When courts have spelt out the duties owed by the on-hire employer, those duties duplicate the duties owed by the host organisation. For example, the courts require the on-hire employer to conduct risk assessments relevant to the tasks to be performed at the host premises. The on-hire employer cannot simply rely on the risk assessments carried out by the host organisation.¹⁵

(2) Duplicating the host organisation's functions is an unreasonable requirement on the on-hire employer because:

(i) The on-hire employer will usually not have a sufficiently detailed knowledge of the host organisation's premises, plant and work practices;

(ii) The on-hire employer will commonly not have effective and real control over the host organisation's premises, plant and equipment;

¹⁵ See the decision in *Inspector Blume v TMP Worldwide Resourcing* [2003] NSWIRComm 37 (19/2/03). The Court cites the various *Drake Personnel Cases*. The court imposed exactly the same fine on the host organisation and the On-hire firm. Victorian magistrates have adopted the same approach.

(iii) The temporary nature of many on-hire assignments exacerbates the problems identified in (i) and (ii);

(iv) The temporary nature of many on-hire agreements means that the cost of effectively duplicating and maintaining the host organisation's risk assessments and workplace specific risk management systems would be prohibitive. Since cost is a factor in determining what is 'reasonably practicable' (see the definition of "practicable" in s4 of the Victorian *OHS Act*), duplicating the risk assessment is not required in these circumstances. To this point, the cases involving on-hire employers have not recognised this issue.

4.4 Conflicts in 'control' within labour hire arrangements

(1) Duplicating of the role of the host organisation by the on-hire employer also raises problems in relation to control of the host organisation's work place and safety systems. Duplicating the roles confuses the lines of responsibility. What is to be done in the event of a conflict between the requirements of the host organisation's risk assessment and that of the on-hire employer? Why should both be put to the potentially significant expense of conducting a risk assessment?

(2) Host organisations also owe a duty to non-employees affected by their "undertaking" under certain Australian OHS legislation. This includes a heightened duty to new and inexperienced personnel, as on-hired workers may well be. This will mean that even if the host organisation does not owe a duty to an on-hired employee through the extension of their general duty to employees (see 4.2 above) then they will owe a duty to that on-hired employee as a 'non-employee'.

4.5 The on-hiring of contractors

(1) There is another type of on-hire arrangement where the worker does not become an employee of the on-hire firm but remains a

contractor who agrees with the on-hire firm to work at various sites as arranged by the on-hire firm. In these circumstances both the on-hire firm and the host organisation still owe separate duties to the on-hired contractor. Such duties may be owed under a provision extending the duties of employers to employees to apply to independent contractors (i.e. section 21(3) of the *Occupational Health and Safety Act 2004* (Vic)). Provided that the on-hire contractor has been 'engaged' by the on-hire employer and host organisation (see discussion of *R v ACR Roofing Pty Ltd*¹⁶ in ... above) then the duties of the on-hire employer and host organisation will extend to the on-hire contractor in relation to matters over which the on-hire employer and host organisation have control (see discussion in 1.2 and 1.3 above).

(2) Alternatively, these duties may arise under a provision which covers duties owed to persons other than employees 'arising from the conduct of the undertaking of the employer' (ie section 23 of the *Occupational Health and Safety Act 2004* (Vic)). In this case the on-hire firm contractor is not considered an 'employee' of the on-hire employer or host organisation because they are not employed under a contract of employment and/or service. The on-hire firm employer and host organisation will then owe a duty in relation to risks arising out their undertaking.

5. Response to Questions 18, 19 and 21

5.1 Separate duties for on-hire employers and host organisations (Dr. David Neal)

(1) The draft amendments proposed in (4) and (5) below are based on *separate* duties for the on-hire employer and the host organisation and are, in the opinion of Dr. David Neal, a suitable way to address the issues associated with an on-hire employers lack of effective control once an assignment commences. The duties are divided according to their separate areas of control. The on-hire employer has control over

¹⁶ [2004] VSCA 215.

the recruitment process, inducting staff to the on-hire employer's own safety and complaints systems, assessing and matching staff to vacancies listed by hosts, and satisfying themselves that host organisations have adequate safety systems in place. Host organisations have control over the premises, plant and processes, and induction, training and supervision of the on-hired worker.

(2) The draft amendments are modelled on section 21 of the *Occupational Health and Safety Act 2004 (Vic)* and proceed on the assumption that on-hire employers continue one of the main existing arrangements under which the worker becomes and remains an employee of the on-hire employer. The draft amendments adopt the concept of control which is already included in section 21(3) of the *Occupational Health and Safety Act 2004 (Vic)* and is an established concept in employment law (see 1 above). Control then sets the content of the separate duties owed by the on-hire employer and the host organisation.

(3) The extent of the duty to assess the host organisation's safety systems, supervision and training may raise some problems (see 21(3A)(b)(iv) and (v) of the draft amendments in (5) below). The extent of that duty is not precise but when linked to the concept of control and perhaps to commentary in the Minister's second reading speech about "separate duties", there are grounds to expect a more realistic approach by the courts.

(4) Definitions such as the following could be incorporated into the model OHS Act:

on-hire agreement includes an agreement between an employer and an employee under which the employee agrees to be hired to host organisations as the employee's principal work.

on-hire employer means an employer who hires employees to host organisations under on-hire agreements.

on-hire contractor agreement includes an agreement between a person and a contractor under which the contractor agrees to be hired to host organisations as the contractor's principal work.

on-hire firm means a person who hires contractors to host organisations under an on-hire contractor agreement.

host organisation means an organisation who engages workers under on-hire agreements and on-hire contractor agreements.

(5) Based upon these definitions a sub-section such as the following could be incorporated into the model OHS Act's provision relating to the general duty of employers to employees (this subsection is designed to be incorporated as subsection (3A) in section 21 of the *Occupational Health and Safety Act 2004* (Vic)):

For the purposes of sub-sections (1) and (2) –

- (a) the duties of an on-hire employer under an on-hire agreement extend to its employees only in relation to matters over which the on-hire employer has control.
- (b) without limiting the generality of (a), an on-hire employer has control over:
 - (i) assessment of the employee's qualifications;
 - (ii) induction of the employee into the on-hire employer's occupational health and safety systems, including the means of communication with the on-hire employer regarding occupational health and safety matters;
 - (iii) assessment of the suitability of an employee for the task specified by the host organisation;

(iv) assessment of whether the host organisation has adequate occupational health and safety systems;

(v) assessment of the host organisation's systems for training and supervising the employee.

5.2 Duties in relation to on-hiring contractors

(1) The draft amendments proposed under (2) below are designed to deal with circumstances involving the on-hiring of contractors (see discussion in 4.5 above). The draft amendments are modelled on section 23 of the *Occupational Health and Safety Act 2004* (Vic). The draft amendments again adopt the concept of control which is an established concept in employment law (see 1 above). Control then limits the extent of the duty owed by the on-hire employer in relation to on-hire contractors.

(2) Based upon the definitions in 5.1(4) above sub-sections such as the following could be incorporated into the model OHS Act's provision relating to the duty of employers to non-employees (these subsections are designed to be incorporated as subsection (2) and (3) of section 23 of the *Occupational Health and Safety Act 2004* (Vic)):

(2) For the purposes of this section, the duties of an on-hire firm in relation to a person other than an employee whose services are hired pursuant to an on-hire contractor agreement extend only to matters over which the on-hire firm has control.

(3) Without limiting the generality of (1), an on-hire firm has control over:

(i) assessment of the contractor's qualifications;

(ii) induction of the contractor into the on-hire firm's occupational health and safety systems, including the

means of communication with the on-hire firm regarding occupational health and safety matters;

(iii) assessment of the suitability of the contractor for the task specified by the host organisation;

(iv) assessment of whether the host organisation has adequate occupational health and safety systems;

(v) assessment of the host organisation's systems for training and supervising the contractor.

5.3 Second Reading Speech clarifying amendments

(1) For the purpose of the draft amendments outlined in 5.1 and 5.2 above the following Second Reading Speech could be given to clarify the interpretation to be given to the new provisions:

Notes on s21(3A)(iv) and (v) and s23(3)(iv) and (v)

The courts have interpreted the duties of on-hire employers as if they were traditional employers. This plainly does not match the reality of on-hire arrangements where there are quite separate spheres of control between the on-hire employer and the host organisation. It leads to duplication, cost and potentially to confusion.

The amendments separate the content of the duty owed according to the established common law concept of control. The same concept is already used in the OHS Acts in numerous Australian jurisdictions¹⁷, particular attention is drawn to section 21(3) of the *Occupational Health and Safety Act 2004* (Vic), which the amendments are modelled on. Plainly, the on-hire employer has control over the assessment of the employee's qualifications and experience, and matching those against the tasks specified by the host organisation. It also has control over its

¹⁷ Section 21(3) *Occupational Health and Safety Act 2004* (Vic); section 16A(4) of the *Occupational Health and Safety Act 1991* (Cth); section 23D of the *Occupational Health and Safety Act 1984* (WA); section 4(2) *Occupational Health, Safety and Welfare Act 1986* (SA).

own induction systems and systems for that employee obtaining assistance on safety issues if they arise at the host organisation's business.

The host organisation also has a duty to make an assessment of whether the host organisation has adequate safety systems. However, this does not extend to a duplication of the host organisation's systems and risk assessments. For example, it is clearly impractical and expensive to require the on-hire employer and the host organisation to conduct separate risk assessments for the same tasks. The on-hire employer should be required to ensure that risk assessments have been done, that they have been done by competent people, that they are current, and that they cover the tasks that the on-hired employee will be required to perform.

Merely requiring the host organisation to tick a box saying that it has done a risk assessment would not be enough to discharge the on-hire employer's duty. On the other hand, the amendments make it clear that the on-hire employer is not required to duplicate the host-employer's duty. What is adequate will vary from case to case, but the amendments clarify that the content of the duty is determined by the concept of control.

Similar considerations apply to the amendments to s23.

Response to Chapter 4: 'Reasonably Practicable' and Risk Management

6. Response to 4.1 – Concept of 'Reasonably Practicable'

6.1 Defining 'Reasonably Practicable'

(1) The term 'reasonably practicable' is incorporated into the OHS Act of nearly every Australian jurisdiction. It can be used either to define the limits of a duty or as a defence. However, the meaning of 'reasonably practicable' has been left largely to the courts to decide. Only in Victoria and Western Australia are there provisions in the OHS Act that provide guidance as to the factors that should be taken into consideration when determining whether a measure is 'reasonably practicable' or not. These statutory definitions are consistent with the case law in this area and indicate that the following issues should be considered when determining what is 'reasonably practicable':

- (f) the likelihood of a risk occurring;
- (g) the degree of harm that will occur as a consequence of the risk;
- (h) the knowledge available regarding the risk;
- (i) the availability and suitability of ways to eliminate or reduce the risk; and
- (j) the cost of eliminating or reducing the risk.

6.2 'Reasonably practicable' and 'control'

(1) At present, considerations of what is 'reasonably practicable' do not take into account the level of control that a duty holder has over the risk in question. This means that a duty holder charged with an alleged breach could argue that it was not reasonably practicable for them to eliminate or reduce the risk because they did not have the requisite level of control. Thus, there is some suggestion that control should be incorporated into the list of considerations to be taken into account

when assessing whether a measure is ‘reasonably practicable’. There is, however, some difficulty with duty holders having to argue that a measure was not reasonably practicable because they did not have control. This approach necessarily means that a person owes a duty in relation to an issue over which they do not have control. We would argue that is a fundamental premise of OHS legislation based upon the principles of the Robens Report that only persons with control over an issue should owe a duty in relation that issue. To this end we reproduce a quote from the Robens’ Report that was also reproduced in the 2004 Maxwell Report:

“As a matter of principle the legislation should not have the effect of imposing obligations on employers concerning circumstances over which they have no control, such as when employees are normally working neither at their home base nor other premises or sites within the control of the employer”

– Robens Committee¹⁸

7. Response to Questions 5, 37 and 40

7.1 ‘Control’ as a fundamental principle

(1) We believe that ‘control’ should be a fundamental principle underlying any duty owed under the model OHS Act. Therefore, rather than incorporating ‘control’ as an element of the ‘reasonably practicable’ standard the model OHS Act should have ‘control’ as one of the key principles of health and safety under the Act. Section 4 of the *Occupational Health and Safety Act 2004* (Vic) provides five ‘principles of health and safety protection’. Under the ‘Objects’ of the Act (section 2) regard is to be had to these principles in relation to the ‘Objects’ and the administration of the Act. A similar set of principles should be

¹⁸ Robens, A. 1972, page 51 quoted in 2004 Maxwell Report pg 110.

incorporated into the model OHS Act and referred to in the 'Objects' of the model OHS Act.

(2) We believe that the approach to 'principles' under section 4 of the *Occupational Health and Safety Act 2004* (Vic) is the correct approach and should be followed by the model OHS Act. In particular, any set of principles included in the model OHS Act should refer to the issue of control as a first principle in determining whether a duty is owed.

7.2 'Control' as an element of 'reasonably practicable'

(1) We believe that a definition similar to the current definition of 'reasonably practicable' under section 20(2) of the *Occupational Health and Safety Act 2004* (Vic) should be included in the model OHS Act. Such a provision reduces confusion amongst duty holders and provides a guide to courts as to the appropriate issues to be given consideration when making a determination as to what is 'reasonably practicable'. Our preferred position is that duties are limited to the extent that duty holders have 'control' over certain issues (see 6.2 and 7.1 above). This will mean that where a duty holder does not have 'control' they will not owe a duty and so there will be no need to make arguments in relation to 'control' and what was 'reasonably practicable'. As a consequence there is no need to incorporate the concept of 'control' as an element of 'reasonably practicable'. In fact, it suggests that duty holders can owe duties in relation to issues over which they don't have control, but that they are able to defend breaches of these duties by arguing that it was not 'reasonably practicable' for them to take certain measures. Such a position goes against the notion of 'control' as a first principle and creates confusion amongst duty holders.

8. Response to 4.2 – Risk Management

8.1 Defining ‘risk management’

(1) Risk management is a concept that is used in OHS legislation across Australia. However, the way in which it is used and incorporated in the OHS laws of different jurisdictions varies greatly. In most jurisdictions the notion of ‘risk management’ is incorporated into the regulations and codes of practice. Often risk management principles will be defined separately and then the requirements of the regulations in relation to certain physical hazards, hazardous substances and hazardous industries will be based upon a risk management approach¹⁹. The general definitions of risk management focus on three key steps, namely:

- (i) identification of each hazard to which a person at the workplace is likely to be exposed; and
- (ii) assessment of the risk of injury or harm to a person resulting from each hazard, if any; and
- (iii) consideration of the means by which the risk may be controlled.

(2) In Queensland the principal OHS Act contains a provision detailing the meaning of ‘risk management. In this case ‘risk management’ is one of the principles that the general duties under the Act are formulated around. In addition to the three key steps of risk management identified in 8.1(1) section 27A(1) of the Workplace Health and Safety Act 1995 (Qld) also incorporates the requirement to implement control measures and monitor and review the effectiveness of the measures. Section 27A(2) of the Act goes on to identify the

¹⁹ For definitions of ‘risk management’ see: regulation 3.1 of the *Occupational Safety and Health Regulations 1996* (WA); regulation 17 of the *Workplace Health and Safety Regulations 1998* (Tas); regulations 1.3.2 - 1.3.3 of the *Occupational Health, Safety and Welfare Regulations 1995* (SA); and regulations 9 – 10 of the *Occupational Health and Safety Regulations 2001* (NSW).

hierarchy of control measures, such that a risk must be eliminated and if elimination is not possible then it must be minimised by substitution, isolation, engineering, administration, personal protective equipment. Similar 'hierarchy of control' provisions are found in the regulations of other jurisdictions.

9. Response to Question 44

9.1 'Risk management' as a regulatory process

(1) 'Risk management' as defined above is a systematic step-by-step process that details the manner in which a duty holder can satisfy their general duty to prevent risks to health and safety. Therefore, the proper place for risk management provisions is within regulations rather than the principal Act the focus of which is general duties. A provision defining the risk management process and principles is not necessary with the model OHS Act. However, in order to avoid confusion and to provide general guidance to duty holders it is useful for the regulations to contain a general 'risk management' provision, which specifies the three key steps of risk management.

Response to Chapter 1: Legislative Approach

10. Response to Questions 1, 3 and 4

10.1 Regulatory Approach

(1) RCSA supports the establishment of model legislation where behaviour is principally influenced by principles-based standards consistent with those contained within the Victorian *Occupational Health and Safety Act* (2004), coupled with process-based standards where there are multiple parties with traditionally overlapping duties such as that experienced in relation to on-hired employment.

10.2 Title, Objects and Principles

(1) RCSA submits that an appropriate title for the model OHS Act is the Occupational Health and Safety Act.

(2) The model legislation objects should be consistent with those contained within section 4 of the Victorian *Occupational Health and Safety Act* 2004. In particular, RCSA supports the incorporation of sub-section 4(2) of that Act. That object, which provides that *persons who control or manage matters that give rise, or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable*, is consistent with the principles espoused in the Robens report.

Response to Chapter 5: Consultation, Participation & Representation

11. Duty to Consult and Inform

11.1 Other than the specific submissions made below, RCSA supports the utilisation of the consultation, participation and representation provisions currently within the *Occupational Health and Safety Act 2004* (Vic)

11.2 There is a need to address consultation and communication provisions as they relate to third party employment in the model Act to ensure on-hire employers are provided with adequate information to fulfil their general duties under the

Act. This includes greater communication of information between multiple duty holders.

- 11.3 The RCSA submits that the model Act or Regulation should impose a duty upon host organisations to communicate information to the employer of on-hired employees in their workplace or under their control where such information has or may affect, or have the potential to impact upon, the health and safety of on-hired employees, or any other workers at the workplace under the control of the controller. This obligation should extend to a specific obligation to provide minutes and outcomes of occupational health and safety committees of the host organisation where such information has the potential to impact upon on-hired employees along with information relating to incidents and hazard identification as soon as practicably possible.
- 11.4 The model Act should impose a duty upon host organisations to communicate information to on-hired employees in their workplace or under their control where such information has or may affect the health and safety of on-hired employees. This obligation should extend to a specific obligation to provide the same level of information, instruction and training as is provided to direct hire employees of the client performing the same or similar work.
- 11.5 The model Act should also impose a duty upon on-hired employees to communicate information which has or may affect their health and safety back to their employer as soon as practicably possible to allow for the employer to work in conjunction with the host organisation and the wider workforce to implement effective risk management responses in a timely manner.
- 11.6 There should be a specific provision incorporated into the Act that specifies the obligation of on-hired employees to obey the lawful directions and instructions of an employer and any party controlling the workplace.
- 11.7 The model Act should place obligations upon host organisations and workplace controllers to consult with all workers and employers of workers that may be affected by their decisions in relation to the management of occupational health and safety.
- 11.8 The model Act should place an obligation upon parties receiving or issuing notices under the Act to ensure that employers of on-hired employees are

provided with copies of such notices where they may have an implication for the health or safety of on-hired employees.

- 11.9 RCSA does not support multi-site or multi-employer OHS representatives and would oppose the establishment of such within the model legislation. RCSA does support the establishment of an express right of a representative of a third party employer to obtain information from a workplace controller and host organisation for the purpose of fulfilling relevant duties under the model Act.

Response to Chapter 6: Regulator Functions, Powers & Accountability

12. Question 80

- 12.1 RCSA submits that it is critical for employers to obtain relevant enforcement and prosecution policies to understand the position of the regulator. RCSA supports their publication.

13. Question 81

- 13.1 RCSA submits that it is important for legislation to be as clear and unambiguous as possible and that interpretive documents similar to that under section 12 of the Victorian legislation should be considered. This becomes especially important if on-hired employment is not directly addressed within the model legislation.

14. Question 83

- 14.1 Consistency between the advisory and enforcement function is paramount. RCSA does not support the separation of advisory and enforcement functions as it is more likely to lead to inconsistency between the two arms.

Response to Chapter 7: Compliance & Enforcement

15. Question 90

- 15.1 RCSA supports the inclusion of a hierarchy of enforcement measures as it will promote transparency and great compliance.

16. Question 101

- 16.1 RSCA supports the use of enforceable undertakings as an alternative to prosecution so long as the process for the determination and application of such undertakings are practical and clear.