



South Australian Government

Labour Hire Licensing Bill 2017 (S.A.)

**SEPTEMBER 2017**

**Submission of**

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## Introduction to RCSA

RCSA is the peak body for the recruitment and employment industry in Australia and New Zealand, and represents over 3,000 corporate and individual Members, 157 of which operate in South Australia. Over 60% of Australia's on-hire workers being engaged by RCSA corporate members.

Membership is comprised of businesses which offer services ranging from recruitment and executive search through to staffing and workforce management consulting. RCSA membership also includes individuals that have proudly chosen recruitment and employment services as their profession.

RCSA sets the benchmark for industry standards and provides member value via 4 key channels, including the creation of pathways to professionalism, promoting and protecting the industry, enabling better business and facilitating networking and celebration. All RCSA member businesses, and accredited professionals, agree to abide by the RCSA Code for Professional Conduct. Further information about the RCSA is available from: [www.rdsa.com.au](http://www.rdsa.com.au)

RCSA members assign (on-hire) and place employees and independent contractors within business, government and not-for-profit organisations operating within every industry and State in Australia. They also provide workforce consulting and HR services to improve the productive capacity of Australian business in an ever-changing global economy.

RCSA members, as professional employers and labour market intermediaries, operate in accordance with Australian workplace law and relevant standards. Their knowledge, understanding, interpretation and support of the law is evident in everyday dealings with clients, employees and independent contractors.

All RCSA member organisations and Accredited Professionals agree to abide by the ACCC authorised *RCSA Code for Professional Conduct*.

## RCSA Code for Professional Conduct

RCSA has a Code for Professional Conduct (the Code) which is authorised by the ACCC. In conjunction with the RCSA Constitution and By-Laws, the Code sets the standards for relationships between Members, best practice with clients and candidates and general good order with respect to business management, including compliance. Acceptance of, and adherence to, the Code is a pre-requisite of Membership. The Code is supported by a comprehensive resource and education program and the process is overseen by the Professional Practice Council appointed by the RCSA Board. The Ethics Registrar manages the complaint process and procedures with the support of a volunteer Ethics panel mentored by RCSA's Professional Practice Adviser, Barrister Andrew Wood.

RCSA's objective is to promote the utilisation of the Code and our proposed *Employment Services Industry Code* to achieve self-regulation of the on-hire worker services sector, wherever possible and effective, rather than see the introduction of additional legislative regulation. The *Employment Services Industry Code* (ESIC) would, if approved, become a prescribed industry code under Australian competition law.

A copy of the current *RCSA Code for Professional Conduct* is attached as Attachment 1 and further information is available upon request, including information on the process for resolution and enforcement.

### Correctly Defining 'Labour Hire' is important to interpreting the Bill?

The interpretation and operation of the South Australia Labour Hire Licensing Bill 2017 is complicated by the extremely broad definition of Labour Hire that does not take account of the many "worker supply" arrangements, nor existing occupational licensing arrangements and, that will require detailed regulatory exemption in every sector of the economy and in every corner of South Australia.

The test of whether, "*in the course of carrying on a business*" – any business – "*the person supplies to another person, a worker to do work*" is a flawed test.<sup>1</sup>

The Bill, though apparently drawing from the definitions used in the UK *Gangmasters Licensing Act* does not distinguish between the *supply* of a worker and the *use* of a worker.<sup>2</sup>

That failure leads to an inability to distinguish between labour hire and workforce contracting<sup>3</sup> and to the inexplicable exclusion of building and construction sub-contracting.<sup>4</sup>

There is no development of what it means to *supply* a worker - even assuming that a worker can be equated to something that can be supplied. Instead, there is only an assumption that such a supply happens, when the worker first starts to do work for the person in relation to the supply.<sup>5</sup>

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<sup>1</sup> Clause 7(1).

<sup>2</sup> The Bill appears to borrow the key elements of its definition from ss. 4(2) and (3) of the *Gangmasters Licensing Act 2004* (UK), which focus on the activity of supplying workers. It seems to have missed ss. 4(5), (5) and (6), which focus on the activities of *using* workers, other than in a supply situation, and which are essential for the effective inclusion of agencies that are involved in buffered subcontracting arrangements or the type of tiered or "pyramid" labour supply sub-contracting schemes, which the Fair Work Ombudsman investigated in its Chicken Processing Inquiry.

<sup>3</sup> Wood, A (2016) "*Waddles like a duck, quacks like a duck; but occasionally honks!*", *H.R. & Recruiters Casebook*, March 10, 2016 <https://recruiterscasebook.com/2016/03/10/waddles-like-a-duck-quacks-like-a-duck-but-occasionally-honks/#more-416> accessed 6/6/2017 at 8:53 am.

<sup>4</sup> Clause 7(3)(b).

<sup>5</sup> Clause 9.

The Bill has missed all the workforce logistics operations, where a worker may experience exploitation before ever starting to do work. It has missed the risk of exploitation at sourcing and selection, migration, training, accommodation and during demobilisation of workers.

What the Bill seems really to be trying to get at, is a situation where the supposed provider is materially *involved*, in some way, in the arrangement under which the worker performs work for the benefit of the person to whom she or he is supposedly “supplied”. But the legislation gives no sufficient clue as to what a material involvement actually is. And it does not distinguish between types of involvement that do warrant a licence and other types of involvement that do not.

### Defining Labour Hire and Workforce Services

For the information of the Minister, RCSA has prepared the following descriptions that may assist in better defining the meaning of provider and labour hire services taking into account the many “worker supply” arrangements and common work arrangements.

‘Labour hire’ is an imprecise and commonly misused term. RCSA has not used, nor encouraged, the use of the term for many years and utilises and promotes the term ‘on-hire’ which was incorporated in to Australia’s Modern Awards in 2010.

**The confusion associated with the use of multiple terms to describe on-hire worker services has resulted in confusion as to the method of engagement and the provision of correct entitlements to workers.**

We are opposed to the use of the term ‘labour hire’ for the following reasons.

- The term is imprecise and non-descriptive.
- The term is, almost wholly, used to describe blue collar occupations within industries such as manufacturing, construction, logistics and mining. The term fails to account for the majority of on-hire occupations within industries such as health, business administration, telecommunications, information and communications technology (ICT), professional services, education, finance and hospitality;
- South Australians who found their job through a labour hire firm or employment agency are spread broadly across a number of roles and professional occupations;
- The term has grown, in general use, to describe all forms of outsourced labour service including contracting services and does not account for the true elements of genuine on-hire worker services where a worker is assigned to perform work under the general guidance and instruction of a host organisation.
- The term does not account for the method of engagement adopted i.e. employee or independent contractor.

Workers on-hired to a client to work under the client’s general guidance, instruction and supervision are also referred to as ‘agency workers’, ‘temporary employees’, ‘contractors’ and a range of other titles.

Outlined below is a selection of terms used within different industries and occupations to assist the inquiry to have a more informed discussion.

<b>Industry / Occupation</b>	<b>Common Terms for On-hire Workers</b>
Manufacturing and Logistics	Labour hire worker
Construction and Mining	Labour hire worker
Health	Agency worker
Media and Communications	Agency worker
ICT	Contractor
Professional e.g. engineers, scientists, managers	Contractor
Hospitality	Temp’
Office Support	Temp’
Agriculture and Horticulture	Labour hire worker
Cleaning services	Contractor
Security services	Contractor

RCSA promotes the use of the term on-hire employee for employees and on-hire contractor and individual independent contractors assigned to work for a host organisation. Collectively we describe both forms as on-hire workers. This terminology allows us to be more descriptive. See below for an example of the descriptive terminology we use in discussions with members, their workers and other stakeholders.

<b>Term</b>	<b>Description</b>
On-hire casual employee	The most common form of on-hire employment
On-hire permanent employee	An employee employed on a permanent basis and on-hired to a client or multiple clients performing an average of 38 ordinary hours per week
On-hire part-time employee	An employee employed on a permanent basis and on-hired to a client or multiple clients performing an average of less than 38 ordinary hours per week
On-hire maximum-term employee	An employee employed on a permanent basis for a specified term yet, with the capacity of the employer to end the employment earlier with notice in accordance with the relevant legal instrument.
On-hire contractor (individual)	An individual independent contractor engaged as an individual (sole trader) independent contractor. Under Australian taxation law the hirer (engaging firm) is required to withhold PAYG Withholding tax and submit it to the ATO.

On-hire contractor (incorporated)	An individual independent contractor engaged as an employee of a company which is typically controlled by the same individual as a sole or joint Director. There are examples where the individual will be an employee of a larger, multiple employee, company where the company nominates a key person for the completion of the work on assignment.
On-hire worker	A general term used to describe either an on-hire employee or contractor.
Host organisation	The client receiving the on-hire worker service which is also responsible for providing general guidance, instruction and supervision to the on-hire worker/s.

RCSA submits that the absence of precise and consistent terminology in the workforce services industry is contributing to confusion, especially when we examine exploitation of vulnerable workers by labour contractors within the horticulture and food processing industries.

RCSA has been instrumental in developing and promoting modern terminology and categories of service with a view to improving the capacity of all stakeholders to have an informed and constructive discussion on the special responsibility and contribution of the on-hire worker service provider within Australia.

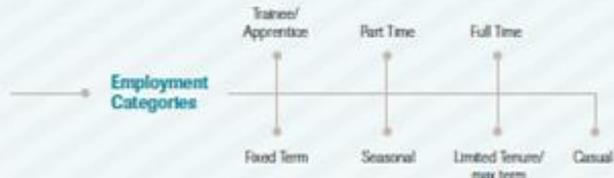
**RCSA submits that a proper examination of the employment services sector must be more precise and requires an unambiguous understanding of the services provided and the providers, particularly in relation to on-hire worker services and contracting.**

The following definitions and categories of service were developed by RCSA to promote a better informed marketplace and a more precise description of on-hire employment services. They can also be found at [RCSA Definitions and Categories of Service](#)

# 1

## On-hire Employee Services

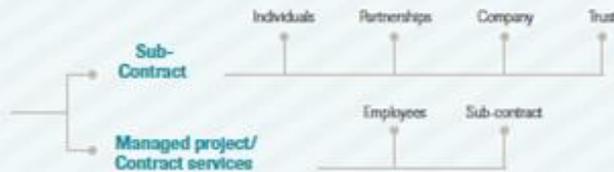
A commercial service where an organisation, in return for an hourly fee, assigns one or more of its employees to perform work for a third party (client) under their general management and instruction.



# 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 the independent contractors and their contract performance.



# 4

## Permanent Placement 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.



## Understanding the Difference between On-Hire Services and Contracting Services

Despite its misuse 'labour hire' in its pure form, is a simple concept which is characterised by individual workers being employed or, in the case of individual independent contractors, engaged by an on-hire firm and then assigned, or on-hired, to a client controlled workplace to perform work on an hour-by-hour basis under that client's general management and instruction.

In return for the on-hire of a worker on an hourly basis the on-hire firm receives a fee from the client which is based upon the number of hours the worker works on assignment for the client or, in the case of on-hire permanent employees, the number of days or weeks worked. The fee structure is typically inclusive of the following components:

- a) an hourly or weekly wage rate;
- b) allowances, penalties and loadings from an industrial instrument (where applicable);
- c) superannuation;
- d) a workers compensation premium loading based upon the relevant insurance premium percentage established by the relevant insurer in that State or Territory;
- e) payroll tax;
- f) a general insurance loading (in some cases); and
- g) margin (to cover operating expenses and profit).

In an on-hire arrangement the client, or service recipient, is commonly described as the 'host' because the client takes responsibility for supervising and directing the on-hire employee much as they would their own directly hired employees. The use of the term 'host', rather than 'principal', as commonly used in typical contracting services, provides a key insight into the difference between an "on-hire" arrangement and typical forms of "contracting".

In an on-hire arrangement the client takes on significantly more responsibility for an on-hire worker given the worker is, in effect, on loan to the client and is not presented in a way where the contractor is responsible for supervising, instructing and directing the performance of the labour and the contracted outcomes. In an on-hire arrangement a worker is on-hired without additional integrated services, property or special know-how. Additional services may be provided to a client however; those services do not fall within the scope of on-hire services, are not integrated with the on-hire services and are effectively ancillary in nature.

**The key indicia of a genuine on-hire arrangement are outlined below.**

- a) A Worker is employed or engaged by the On-hire worker service provider.
- b) The On-hire worker service provider pays the Worker and is responsible for paying work-related costs, fees and charges such as wages, penalties, allowances, public holiday payments, leave payments, workers compensation insurance, superannuation, payroll tax (where applicable) and portable leave entitlements (where applicable).
- c) The Worker is assigned to a client, which is otherwise known as a 'host' (Client/Host), and performs personal labour services (the work) for the host employer on an hour-by-hour basis or, in select circumstances, for a specified term.
- d) The Worker performs the work under the general guidance and instruction of the client or a representative of the client.
- e) The On-hire worker service provider does not directly supervise, instruct nor direct the Worker on an hour-to-hour or day-to-day basis.
- f) In select circumstances, the On-hire worker service provider may, at the request of the Client/Host also assign a team leader on an on-hire basis and that team leader may lead the Worker in relation to defined scopes of work. In circumstances where a team leader is also assigned to a Client/Host that team leader will be directly supervised, instructed and directed by the Client/Host or a representative of the Client/Host.
- g) The On-hire worker service provider does not provide plant, equipment or other work related materials with the Worker, other than personal protective equipment or, in circumstances where the Worker is a tradesperson, worker-owned trade tools. The On-hire worker service provider may provide other services to the Client/Host however, those services are ancillary or complementary in nature rather than being an inherent component of an "on-hire" service.
- h) Rosters for the performance of work are typically prepared by the Client/Host and communicated to the Worker and On-hire worker service provider.
- i) The Client/Host will typically maintain the discretion as to whether additional 'labour' is required.

- j) The On-hire worker service provider does not provide systems of work, management systems, intellectual property, work planning, other non-labour services or property to the Client/Host as an inherent component of the service.
  
- k) The contract between the Client/Host and the On-hire worker service provider provides for the payment of services on the basis of an hourly fee attributable to the performance of work by each Worker assigned to work for the Client/Host on an hourly basis. This may, in select circumstances, extend to weekly fee payment arrangements.
  
- l) The contract between the Client/Host and the On-hire worker service provider would rarely include commercial terms whereby the On-hire worker service provider's fee is contingent upon the completion of a scope of work or delivery of a result.
  
- m) In recognition of the labour-only, and unsupervised, nature of the services, the contract between the Client/Host employer and the On-hire worker service provider typically indemnifies the On-hire worker service provider against liability for the inadequate performance of work by the Worker on assignment.

### **Contracting Services in Contrast**

The key element of Contracting Services, in contrast to on-hire employee services, is that the service provider receives a fee for completing 'a defined scope of work'. This fee is commonly a lump sum or fixed fee, rather than an hourly fee. Implied in this is the commercial risk associated with the completion of that scope of work. Unlike on-hire employee services, where the on-hire worker service provider typically receives a fee based on each hour that an on-hire employee performs work for the client/host on assignment, a Contracting Service Provider payment is conditional upon the completion of scopes of work.

## RCSA Recommends

The Recruitment & Consulting Services Association (RCSA) is pleased to make the following recommendations to the Minister for consideration in review of the South Australia Labour Hire Licensing Bill 2017.

### Introduction

Whilst RCSA remains unconvinced that the model of labour hire licensing recently introduced into Queensland will meet its objectives, RCSA appreciates the intent of the South Australian government to introduce labour hire licensing and is grateful for the opportunity to provide some preliminary observations on the drafting of the *Labour Hire Licensing Bill 2017* (S.A.).

RCSA's observations are set out in summary form, more as points of dialogue than as formal submissions. They highlight concerns about the coverage of the Bill, licensing requirements, conditions and inspectorial powers. They are based on RCSA's considerable knowledge, experience and expertise within the industry and in designing and co-producing, with industry stakeholders, solutions that address the exploitation of workers and unscrupulous business conduct.

### Clause 3 – objects

The Bill will neither protect workers from exploitation nor protect license labour hire businesses from predatory business practices unless the coverage provisions are amended to include forms of “gangmastering” other than labour hire *supply* based on the traditional tripartite model.

As the drafting stands, there is nothing to stop an unscrupulous labour hire provider simply reinventing itself as an unscrupulous workforce contracting provider. We will explain further in dealing with clauses 6 and 7.

### Clause 6 – meaning of labour hire services

Clause 6 sets up an inconsistency between the *sectoral* coverage and the *functional* coverage of the Bill, when regard is had to the objects.

The *sectoral* coverage is very wide and extends to sectors in which there is no evidence and little likelihood of exploitation. There is no utility in such a wide sectoral coverage. It is not the pattern adopted by the UK gangmasters legislation; and it is not what was recommended by Professor Forsyth following the inquiry he led in Victoria.

The *functional* coverage is very narrow and leaves gaps where legitimate labour hire suppliers and workers will continue to be exposed to exploitative and unfair practices. We explain below.

Clause 6 (1) focuses the Bill on *supply* forms of gangmastering.

It does not capture *use* forms of gangmastering, such as workforce contracting (e.g. where a provider undertakes harvest activities, assembles and uses a workforce for that purpose and may place them under the control of an overseer). Use forms of gangmastering are common in horticulture, cleaning and trolley collection.

Neither does it capture *proprietary* forms of gangmastering, such as *profit-a-prendre* schemes (e.g. where a crop owner, who is not necessarily the farmer, sells to a worker the right to go onto a property and pick fruit, which is then sold back to the crop owner as the first step in a buying chain).

UK gangmasters legislation picks up all three types of gangmastering activity. The Queensland Parliament missed the opportunity to do so. The result is that legitimate labour hire providers are not protected against unscrupulous operators of other gangmaster models and will be unable to compete with them. This is a significant gap in the coverage of the Queensland legislation and will result in workers continuing to be exposed to egregious forms of exploitation. The gap is reproduced in the South Australian Bill.

Clause 6(2) attempts to capture “non-traditional” forms of labour hire by providing, for example, that it does not matter whether any contract is entered into between the worker and the provider, or between the provider and the user.

However, it is ineffective because, under clause 7, an individual is only a worker for a person if the individual enters into an arrangement with the person under which the person may supply the individual to do work AND the person is obliged to pay the individual in whole or in part for the work.

It is the *obligation* that causes the difficulty here.

If there is no contract (as per clause 6(2)), what is the nature and the source of the obligation? The question was not satisfactorily answered at any point during the Queensland legislative process.

Payment by a labour hire client for labour hire services received from a labour hire services provider is not in satisfaction of the provider’s obligation to pay its workers.

The result is that the Bill will fail to capture so-called labour contracting chains because the *obligation* to pay for the work necessarily arises from a work wage or work/remuneration bargain. That implies that there must be a contract – despite what clause 6(2) says.

The unintended consequence is that the Bill could capture private employment agents who “supply” candidates and provide payroll or escrow services. In that instance, the obligation to pay is owed to the employer, rather than the worker. For the same reason, it seems likely that the Bill may capture freelancing platforms that source workers and handle payments under escrow arrangements.

But that does not appear to be what is intended when regard is had to the objects. The coverage needs to be fixed.

#### Clause 7 – meaning of *worker*

the requirement that the person be obliged to paid individual under sub-clause 7(1)(b) is problematic for the reasons outlined above.

#### Clause 9 – fit and proper person

RCSA is concerned that sub-clause 9(1)(a) focuses upon the *reputation* of the person rather than upon the *character*.

Reputation may be subjective, a matter of idiosyncratic opinion, undeserved and differ across sectors. For example, a provider may have a good reputation with workers and clients, but a poor reputation with a trade union due to a history of disputes.

Character, the expression used in Queensland legislation, on the other hand is capable of being objectively determined by the Commissioner or a tribunal of appropriate authority.

RCSA acknowledges the value of including competency criteria as per sub-clause 9(1)(e) and (f) but questions how this is to be assessed.

RCSA's own certification program, StaffSure, contains competency criteria and is supported by audit processes designed to test the extent of a certified provider's professional knowledge on certain relevant topics.

#### Clause 10 – license required to provide labour hire services

RCSA notes that the expression, “*except as authorised by a licence*” ties the supply of labour hire services more closely to conditions attaching to the license than would be the case under the Queensland legislation.

The consequence would seem to be that a breach of conditions exposes a person to the custodial and pecuniary penalties set out in the Bill.

RCSA considers that there may be benefit in discussing the additional burden that the provision imposes upon both suppliers and users of labour hire services.

#### Clause 12 - person must not enter into avoidance arrangements

As is the case in Queensland, RCSA remains concerned that, given the breadth of the *sectoral* coverage and gaps in *functional* coverage, it will be difficult for a person to know whether they are entering into such an arrangement.

#### Clause 13 - persons must report avoidance arrangements

RCSA is concerned about the additional burden placed upon users of labour hire services especially having regard to the difficulties already highlighted in respect of clause 12.

#### Clause 14 – application for license

RCSA would be concerned if the application that is to be published on the website were to invite submissions on *reputation* rather than objective evidence as to *character* and suitability.

#### Clause 15 – objection to application

RCSA notes that the range of entities with standing to object to an application is narrower than in Queensland and considers that to be a good thing.

RCSA notes that “designated entities” would include Business South Australia. RCSA enquires whether there may be a case to include an industry association that has a disciplinary jurisdiction with regard to its members' conduct (such as RCSA under its ACCC authorized Code of Conduct).

### Clause 16 - Grant of license

RCSA would question whether any residual discretion should be left to the Commissioner if all criteria for the grant of license are satisfied. That is to say, should clause 16(1) be mandatory?

Leaving the decision subject to a residual discretion begs the question about what factors are to be taken into account and leaves the discretion undirected by legislative guidance. Questions would then arise about whether the discretion was exercised in a way that may be anti-competitive, or exercised or influenced in ways that were designed to advance collateral agenda.

### Clause 17 – conditions of license

The provision needs to be supported by legislative criteria to guide the exercise of the Commissioner's administrative discretion in imposing conditions.

Oddly, whilst the Bill appears to provide for an appeal against *after-imposed* conditions (see clause 38 (1)(b) and its limited application to conditions imposed under clause 17(2)), there seems to be no mechanism for appeal against conditions that are imposed at the time of granting the license.

Similarly, clause 17(4) appears to be restricted in its application to *after-imposed* conditions.

### Clause 30 – authorised officers

RCSA contends strongly that any authorised officer should be a public service officer or employee in order to ensure impartiality and the added protection that such person will be governed by state public sector principles and code of conduct. That would be consistent with the approach adopted in Queensland and would avoid the risk of extending powers of entry and inspection in ways that may be inconsistent with all overlap with the provisions contained in Part 3 –4 of the *Fair Work Act 2009* (C'th).

### Clause 38 – appeals to District Court

As previously noted, there appears to be no mechanism to appeal against conditions imposed on the original grant of a license.

### Clause 42 – exemptions

RCSA considers that the ability to grant exemptions, administratively rather than under regulation, may be a valuable inclusion.

RCSA considers, however, that substantial work may need to be done to set up the process as well as any review or appeal rights to ensure that they are consistent with those contained elsewhere within the legislation.

### Clause 44 – vicarious liability

RCSA considers that there are likely to be substantial justice issues in imposing a custodial sentence in the circumstances outlined in clause 44(1). Such a provision seems likely to attract significant attention from the practicing and academic Bars and from the Law Society in South Australia.

From the perspective of its own members, RCSA considers that clause 44(2) is highly problematic in so far as it may be difficult to determine the identity of those persons who gain pecuniary benefits directly

or indirectly. RCSA appreciates the intent of the provision but considers the criteria for the imposition of criminal sanctions to be vague and ill-defined at present.

Likewise, the defence of “reasonable diligence” will be difficult to interpret and apply. RCSA notes that the provision would appear to reverse the onus of proof.

Given the extent of the primary liabilities that are established by the Bill, there would seem to be little additional value in creating a problematic secondary vicarious liability.

RCSA would be happy to discuss the reasons for its views outlined here and would welcome the further opportunity to do so. Please contact Charles Cameron, RCSA CEO on [ccameron@rdsa.com.au](mailto:ccameron@rdsa.com.au) or tel: (03) 9663 0555.