

*Insight* aims to provide useful information, links and tips in the areas of Risk Management, Work Health and Safety, Business Continuity Management, and other areas relating to management systems and corporate governance.

## Exploring WHS Duties for Construction clients and contractors

Interpreting WHS legislation can be a bit like choosing which of the latest blockbuster movies to see. That is, the more people you ask, the more conflicting opinions you tend to receive. As such, it is highly recommended to seek specialist legal advice when it comes to such matters.

One issue receiving increasing attention in QRMC's client base recently relates to the level of WHS governance that should be undertaken with contractors, and what are the related duties imposed on organisations who engage specialist contractors to undertake work. Typically, there is much to interpret, as can be seen by reviewing some of the key points in the legislation:

- **Section 19** of the Queensland WHS Act states that all persons conducting a business or undertaking (PCBU) have a primary duty of care to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.
- **Section 16** of the Act states that more than one person can concurrently have the same duty and that where more than 1 person has a duty for the same matter, each person must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.
- **Section 17** of the Act states that a duty imposed on a person to ensure health and safety requires the person—
  - (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
  - (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

So, where a PCBU (in this case, let's call them the "primary PCBU") has engaged another PCBU (we'll call them the "contractor") to perform a scope of



works, Sections 19, 16 and 17 apply such that all parties have a duty to ensure the health and safety of persons is not put at risk from the works, and health and safety risks are to be eliminated or minimised so far as is reasonably practicable. But which party has a duty for what? Section 16 provides guidance that each PCBU must discharge their duty *to the extent to which each has the capacity to influence and control the matter*. What does this mean?

There are many factors that impact a PCBU's capacity to influence and control the matter. But what even is the "matter"? The "matter" can be anything – an event, a hazard, a risk, a risk control, consultation, entry and exit to a worksite, access to WHS information, rosters, opening and closing times, and so on. Regardless of the nature of the matter, as a rule, the greater the control the PCBU has over a matter, the greater their ability is to influence it; and therefore, the greater their obligation to discharge the duty to ensure (so far as is reasonably practicable) that the health and safety of other persons is not put at risk.

Let's explore an example to tease this out. A hypothetical electricity authority (the "primary PCBU") has engaged a specialist contractor (the "contractor") to perform excavation work within an enclosed and secure High Voltage Electrical Substation. When it comes to managing the electrical risks associated with the works, the electricity authority who owns and operates the Substation has a far greater capacity to influence and control the electrical risks. Conversely, the contractor who specialises in earthworks excavation

via its specialised equipment and trained plant operators has a far greater capacity to influence and control the excavation risks. Both PCBUs still have duties to ensure health and safety, and through consultation, cooperation and coordination and also the management of risks to so far as is reasonably practicable, each party could demonstrate the execution of these duties.

So, what are the arrangements when a "primary PCBU" engages a Principal Contractor? Which duties sit with whom, and how is a 'reasonably practicable approach' to the monitoring and review of contractor WHS performance determined?

Firstly, where the cost of Construction Work is greater than \$250,000, the work becomes a defined Construction Project under the WHS Legislation. And where there is a Construction Project, there is a Principal Contractor (PC). A PCBU (in this case, the "primary PCBU") that commissions a Construction Project is the PC for the project, unless that PCBU engages another PCBU (the "contractor") as the PC and authorises that PCBU to have management or control of the workplace, and to discharge the duties of a PC. In these circumstances, the second PCBU is the PC for the Construction Project. Importantly, for understanding who has management and control of the workplace, only one PCBU can be the PC at any specific time.

Despite not having management and control of the workplace, the "primary PCBU" (the PCBU who commissions a Construction Project), is still a PCBU for the purposes of the legislation, and still has the WHS duties of a PCBU to ensure the health and safety of persons as a result of the work being carried out (see Section 16 of the Act) – so far as is reasonably practicable.

One activity that many "primary PCBUs" in this situation use to demonstrate as part of their 'reasonably practicable' duties, is to ensure the regular review and monitoring of WHS at the

workplace / worksite. Typically, this is undertaken via conducting WHS Inspections to ensure the Principal Contractor is meeting their duties to manage risks associated with the work being carried out. This can range from the "primary PCBU" conducting the WHS Inspections itself, engaging a 3<sup>rd</sup> party to conduct these, or holding the PC accountable for completing their own WHS Inspections, with the "primary PCBU" reviewing the outcomes of these to ensure WHS issues and non-compliances that are identified are being actioned appropriately and in a timely manner. By the "primary PCBU" having skin in the game, this is one way they can demonstrate meeting their duties under Sections 16, 17 and 19 of the Act.

But how frequently should a "primary PCBU" conduct WHS Inspections where their contractors are working, or how often should a client review their contractor's WHS performance? What does *reasonably practicable* look like in this instance? Again, there is no one size fits all and a risk-based approach is reasonable and appropriate. The higher the risk of the work to cause a serious injury, the more frequently a "primary PCBU" should be reviewing their contractor's WHS performance. The less experienced the contractor, the more frequently a "primary PCBU" should be ensuring WHS Inspections are being completed. The more WHS incidents a contractor is having, the more frequently a "primary PCBU" should be ensuring WHS Inspections are being completed and reviewing the contractor's overall performance. Last and certainly not least, a "primary PCBU's" risk tolerance position will also heavily influence their approach to the governance of their contractor's WHS performance.

And at the end of all that, in recognition of the potential complexity of each individual case, we'll repeat the reminder that organisations should seek specialist legal advice for their individual circumstances.

Please [contact QRMC](#) for more information.