



Experts in Contractor Safety Management

THE 4 PILLARS OF CONTRACTOR SAFETY MANAGEMENT 2020



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Why Manage Contractor Safety

- Prevention of incidents
- Liability/ risk management
- Reputational risk in the event of an incident
- Costs of incidents



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Baiada v The Queen 2012

The **expert** nature of a contractor's work and "possible" lack of knowledge on the part of the Principal Contractor about the risks associated with that work, **the cost and effort of directing an independent contractor and the** nature of a contract between a Principal Contractor and its contractor, which is **one of independence** in all operational aspects of the contractor's work are matters which make it **not reasonably practicable** for a PC to direct an independent contractor in its safety arrangements



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Legal Principles post 2012

- the common law does not impose a duty of care on PC's for independent contractors engaged by them of the same kind which they owe their employees;
- a Principal Contractor owes no stringent or strict common law duty to train subcontractors engaged to work on a site in the way the subcontractor is to perform its speciality work;
- a Principal Contractor who subcontracts work to a competent subcontractor is not subject to an ongoing general law obligation with respect to the safety of the work methods employed by the subcontractor;
- PC's are entitled to rely upon the expertise of competent and experienced contractors;
- the use of expert contractors is a practicable method by which a PC may discharge its H&S obligations; and
- it is not reasonably practicable to require a PC to implement, review or monitor the work methods of independent contractors.



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The Cases

Leighton v Brian Allen Fox High Court 2009

“once an activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the Principal Contractor”.

Kirk v WorkCover NSW - High Court of Australia 2010

“it is absurd to have prosecuted the owner of a farm and its principal on the ground that the principal failed to properly ensure the health, safety and welfare of his manager, who was a man of optimum skill and experience – skill and experience much greater than his own.”

Fortescue Metals - WA Supreme Court 2012

“Whilst the respondents could not delegate or contract out of their duties, they could perform them by ensuring that an appropriately experienced and qualified person was retained to deal with matters beyond their own knowledge and ability.”

Baiada Poultry v R, - High Court of Australia 2012

“just because a Principal has a legal right to issue instructions and it is possible to take that step, this does not establish that it is a step which was reasonably practicable to provide and maintain a safe working environment, even where the Principal has knowledge of the risks and knows of ways to control such risks.”



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The Cases

Karimbla Constructions Supreme Court QLD 2013

"work practices focused too much on the work performed on site and did not pay adequate attention to the dangers presented by the conditions of the site itself".

EPHE Enterprises – Worksafe Victoria – 2017 Control

I am not satisfied that the applicant has control over the way in which the Operators perform their duties, and specifically over maintenance of the Operator's vehicles.

Waco Kwikform 2014 – Taking Control

No continuing duty on Waco duty to prescribe and enforce a safe system of work for dismantling the scaffolding however Waco found liable for incident as it has assumed control of the system of work after issuing SWMS for contractors to follow.

McGlashan v QBE Insurance, 2014 - Duty of Care

where a head contractor engages a subcontractor to perform work, and the subcontractor is subsequently in control of the system of work used, the head contractor will not owe the subcontractor a duty of care in respect of the method of work.

Fairbrother Pty Ltd Coroner Tasmania – 2018

The Coroner accepted that Fairbrother had "effectively 'got the experts in' to do this high-risk work and most if not all of their workers were entitled to rely on that expertise".



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Discuss

- WorkSafe v VicRoads
- The offender contracted with Downer EDI Works Pty Ltd (ACN 008 709 608) (Downer) to complete the re-surfacing at the workplace. Downer engaged a traffic control company to perform the traffic management operations at the site and another company to supply a sweeper truck and driver for the resurfacing works. On 30 November 2011, a traffic management worker was aligning bollards to separate live traffic from the resurfacing works. The sweeper vehicle was operating nearby. There was a risk of death or serious injury as a result of the unsafe operation of the sweeper vehicle at the workplace. VicRoads pleaded guilty



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Discuss

- In March 2016 the Greater Geelong City Council engaged a housing construction company to undertake roofing works on the Lara community hall. A first-year apprentice employed by the company was tasked with assisting with installation of roofing materials at a height above 3 meters. On 23 March 2016, the Greater Geelong City Council failed to identify the risk of a fall from height through skylights prior to the commencement of work on the roof.
- On 30 October 2017 the Greater Geelong City Council entered into an Enforceable Undertaking.



But What Should We Manage?

MATTERS OVER WHICH WE HAVE
CONTROL



What do we mean by control?

- Site
- Operations



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Commercial Relationships

- What is the impact of commercial arrangements?
- lessor
- lessee
- Licenses
- Memorandum of Understanding



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Appointment of Principal Contractors

- **Who is the principal contractor for a construction project?**
 - (1) The owner is the principal contractor of the workplace where the construction project is to be carried out unless the owner—
 - (a) appoints a principal contractor for the construction work performed for or on behalf of the owner; and
 - (b) authorises the principal contractor to manage or control the workplace to the extent necessary to discharge the duties imposed on a principal contractor under this Subdivision.



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Appointment of Principal Contractor

- Can there be more than one principal contractor for a project? No. The intention of the requirement is to make sure that there is one principal contractor (either an individual or a company) responsible for coordinating health and safety for a construction project. If there is more than one owner, the owners should agree on who is to be appointed as the principal contractor.



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Principal Contractor Duties

- Engage contractors
- Coordinate contractors
- manage site safety
- Incident notification
- Site emergency response
- Ensure safe access egress



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PC **NOT** responsible for

- Approving or supervising the safety arrangements of independent contractors.
- Directing contractors in how they undertake their work
- In fact doing so may
 - increase the liability of principal contractors in the event of an incident
 - reduce time spent on safety by focusing on preparation documents
 - Significantly increase costs for both contractors and principals with out any safety benefit and reduce budget for implementation of risk controls.



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Role of Contractors

- Controlling risks arising from their operation
- Ensure their work does not pose a risk to the health and safety of others
- Consult with the employer and others with respect to OHS matters over which the contractor has control
- Immediately notify the employer of any incidents which occur at sites the employer occupies and controls
- Comply with all safety rules and procedures as provided by the employer at sites the employer occupies and controls
- Provide the employer with any information, including training, to ensure the safety of the employer employees and others arising from risks associated with the contractor's work.
- Provide additional first aid response arising from risks associated with the contractor's work.
- Provide additional emergency response arising from risks associated with the contractor's work.
- Confirm competence and management of safety by all specialist sub-contractors and hazards arising from sub-contractor activities.



Who Are Our Contractors?

- Large? Small? Physical? Onsite? Offsite? Administrative? Integrated?



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Contractor Management – 4 Phases

1. Prequalify
2. Onboard
3. Performance Monitoring
4. Performance Review



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PHASE 1 - PRE-QUALIFICATION

- A Principal Contractor is required to demonstrate due diligence when engaging Contractors
- Demonstration of due diligence requires making reasonable enquiries to confirm that contractors have safety arrangements in place.
- This does not extend to collecting, reviewing or supervising implementation of a contractor's safety management system.
- This phase manages liability and establishes roles, separation as between the Principal Contractors and Contractors
- Sets expectations



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SWMS and Contractors

- WorkSafe Victoria 2010 - SWMS is described as “a safety planning tool that identifies the hazards and risks of **high risk construction work** and documents the control measures necessary to manage those risks”.

SWMS are not required to be developed for all and any work being undertaken, and all the steps required to complete a task are not required to be included in SWMS.

This position is adopted by Safe Work Australia and all jurisdictions.



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SWMS AND CONTRACTORS

- The purpose of the development of SWMS is to ensure that **employers**, in consultation with workers **undertaking the** work, have taken the time to consider the risks posed by work being done, identify any high-risk construction work and the specific risks associated with that work and to develop risk control solutions **in the context** of the work being done.
- The very nature of a SWMS is that it must be developed in response to **the** work being done, and the development of generic or prescriptive SWMS will not achieve the intention of the regulations.



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SWMS AND CONTRACTORS

- Contractors undertaking high risk construction work are the **employer** for the purpose of SWMS preparation and have the legal requirement to prepare, implement and monitor implementation of SWMS **NOT** Principal Contractors
- SWMS are **ONLY** required for defined high risk construction work
- Many SWMS are generic and not updated at the time the work is being done defeating their purpose
- Arguably detracts from real time safety management.
- Look up at the job not down at paperwork



High Risk Construction Work

1 - Any work performed in connection with the construction, alteration, conversion, fitting out, commissioning, renovation, refurbishment, decommissioning or demolition of any building or structure, or any similar activity **AND**

2 – 19 high risk tasks – Regulation 322 OHS Regs 2017



Consider - What risks does our business pose to our contractors?
How do we ensure contractor safety?



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PHASE 2 – ONBOARDING

- A Principal Contractor must provide the contractor with information and instruction in respect of risks arising from the PC's operations.
 - Induction
 - Coordination
 - consultation
- This is arguably the most important phase as the information should focus on what the Principal Contractor has control over
 - Hazards posed by PC operations
 - Incident management
 - Minimum safety rules



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PHASE 3 MONITORING

- Only monitor what you are competent to
- Do not assume assuming responsibility for ensuring implementation of the Contractors safety arrangements.
- Raise safety concerns (may include cease work)
- Refer for assistance
- Do not prescribe corrective actions
- Monitoring should be undertaken while work is being done and over the life of the project.
- Note: Principal Contractors do not audit contractors safety management systems



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PHASE 4 – PERFORMANCE REVIEW

- Performance review should identify issues in management of safety by a contractor to inform future engagement or other remedial action.
 - Incident reporting
 - Results from monitoring exercises
 - Reports from the Principal Contractor's employees, the contractor's employees, clients and others
 - Review remediation of identified issues by a contractor in respect of issues raised during a project
 - Cooperation with the Principal Contractor in responding to issues raised
 - Outcomes on real time monitoring



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The Engagement Process

- Contractor invited to prequalify – email sent
- Prequalification approved - email
- Contractors workers inducted – email
- On arrival contractor signs in at reception – must show induction card to confirm currency and identification
- Adhoc monitoring if required
- Review of performance



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- LinkSafe and ContractorSAFE work together to provide the only legal informed information technology solution to manage contractor safety.
- ContractorSAFE is a legal firm specialising in contractor management. They have;
 - Represented clients in challenging Regulatory notices
 - Acted as expert witnesses
 - Are the most experienced law firm in this space
- LinkSafe provide the highest quality IT systems to efficiently manage contractors online to ensure streamlined comprehensive management of contractor data.



Assistance

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