

Safety in numbers - sharing duties under the Health and Safety at Work Act 2015

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The new Health and Safety at Work Act 2015 (HSWA) is based on the underlying assumption that those who create or work with occupational risks, or can influence or direct them, are best placed to identify and manage those risks. It is intended to change workplace health and safety laws to keep up to date with modern working arrangements, which can contain multiple employers with diverse workforces made up of employees, contractors, subcontractors, volunteers and others.

But one of the changes that appears to have received little media coverage is the new positive obligation on businesses to "consult, cooperate and coordinate" with other businesses about the health and safety duties they will share. The change seeks to address risks to workers arising from modern work environments where a number of businesses and organisations work together or share a common work place. Commonly cited examples of multiple PCBU workplaces include:

- The owner of a multi-tenanted shopping centre, the manager of the shopping centre, each of the businesses operating from shops in the shopping centre and those carrying out ancillary activities such as cleaning, security and shopping trolley collection
- A service station owner, the service station operator (if different from the owner), the mechanic (if running a separate business), the contractor carrying out the supply of gas cylinders to the public at the service station and the operator of an attached fast-food outlet
- The principal contractor on a construction site, sub-contractors engaged by the principal contractor, sub-contractors engaged by the sub-contractors (including self-employed contractors), along with the client engaging the principal contractor and suppliers.

As the number of parties involved increases, so too do the risks to the health and safety of workers – arising from poor communication, and a lack of cooperation and coordination between parties. The HSWA makes it clear that duties imposed on multiple PCBUs in the same workplace are concurrent. More than one PCBU may have the same duty in relation to the same workers, workplace, plant, substance or structure. The change will oblige parties to work together to ensure the health and safety of all workers, or they will risk conviction and penalties.

Consultation, cooperation and coordination

In situations where there are multiple PCBUs with overlapping health and safety duties in a workplace, the HSWA requires these PCBUs to so far as reasonably practicable, to consult, cooperate with, and coordinate activities with other PCBUs where their duties overlap. This is commonly referred to as "*horizontal consultation*."

Horizontal consultation is an important part of the process of achieving safety in a multi-PCBU workplace. It seeks to address any confusion and uncertainty about the scope of a PCBU's duties when multiple PCBUs are working at the same workplace. In particular, the risk that a PCBU will not take responsibility for a health and safety duty, because it is assumed that another PCBU has responsibility or will take action. The HSWA requires each PCBU to discharge their duties, not by necessarily taking any required action itself, but by ensuring that another person or PCBU is doing so. Horizontal consultation involves multiple PCBUs cooperating and coordinating their duties at a workplace, to ensure that duties are effectively discharged without unnecessary duplication.

The HSWA does not define or provide detailed guidance on how PCBUs can meet their duty to consult, coordinate or cooperate. However some guidance can be taken from the Australian, Model Work Health and Safety Act upon which the HSWA is largely based. In particular, Safe Work Australia (WorkSafe New Zealand's Australian equivalent) released a Code of Practice, which provides good practical guidance to assist PCBUs on how they can meet their horizontal consultation obligations.

Consultation

The Code of Practice identifies that the objective of horizontal consultation is to make sure that every PCBU associated with a work

project or workplace has a shared understanding of what the risks are, which workers are affected and how the risks will be controlled. In particular, horizontal consultation will involve an exchange of information that will allow PCBUs to work together to determine which duties are shared and what each person needs to do to cooperate and coordinate activities with other PCBUs. In this respect consultation should include:

- What each PCBU will be doing, how, when and where and what plant or substances may be used
- Which PCBU has control or influence over aspects of the work or the environment in which the work is being undertaken
- Ways in which the activities of each PCBU may affect the work environment
- Ways in which the activities of each PCBU may affect what others do
- Identifying the workers that are or will be involved in the activity and who else may be affected by the activity
- What procedures or arrangements may be in place for the consultation and representation of workers, and for issue resolution
- What information may be needed by another PCBU for health and safety purposes
- What each PCBU knows about the hazards and risks associated with their activity
- Whether the activities of others may introduce or increase hazards or risks
- What each PCBU will be providing for health and safety, particularly for controlling risks
- What further consultation or communication may be required to monitor health and safety or to identify any changes in the work or environment.

Cooperation

The duty on PCBUs to cooperate will require PCBUs to implement arrangements in accordance with any agreements reached during consultation. The duty to cooperate would also include a PCBU refraining from acting in a way that may compromise the health and safety actions of other PCBUs. It also means that, if a PCBU is approached by another PCBU wanting to consult on health and safety matters it should cooperate. Further, a PCBU should communicate and respond to reasonable requests from other PCBUs to assist them in meeting their duty under the HSWA.

Coordination

The Code of Practice indicates that PCBUs are required to work together so that each PCBU can meet their duties without leaving any gaps in health and safety protection for workers. This will require PCBUs to plan and organise activities together and ensure that any measures put in place work effectively together to control any risks. Practically this will involve PCBUs coordinating when and how each control measure is to be implemented and ensuring control measures complement each other.

The duty to coordinate is ongoing. Where work is not effectively coordinated, PCBUs should consult further to determine what should be changed.

Reasonably practicable

The duty to consult, cooperate or coordinate is qualified by what is reasonably practicable in the circumstances. However, 'so far as is reasonably practicable' in this context is not defined in the HSWA and will likely depend on the circumstances, including the nature of the work and the extent of interaction between the PCBUs. For example, two contractors working together may engage in direct discussions and planning as part of their everyday work, whereas the owner of a large shopping centre may need formal mechanisms with the retail businesses, such as written agreements and consultative committees.

Disputes

There may be situations where PCBUs have consulted about a particular health and safety matter in relation to which they both have a duty but do not agree on the appropriate course of action. This could involve disputes about the nature of the risk controls to be implemented or which PCBU should be responsible for implementing the risk control.

In such situations, the HSWA requires the PCBUs to make reasonable efforts to achieve a timely, final and effective resolution of the work healthy and safety issues in dispute.^[10] If it is still not possible to resolve the dispute, the HSWA provides that any PCBU that is party to the dispute can ask the regulator to appoint an inspector to attend the workplace to assist in resolving the dispute. If an inspector is appointed, the inspector may, after providing assistance to the PCBU may decide any issue in dispute.

Non-compliance

It is an offence under the HSWA for a PCBU to fail or refuse to comply with its duty to consult, cooperate or coordinate with other PCBU. An offending PCBU is at risk of a conviction and be liable to a fine not exceeding \$20,000 in the case of an individual PCBU, or for any other PCBU a fine not exceeding \$100,000.

Recommended actions

The duty to consult, cooperate and coordinate is an active duty aimed at increasing communication, information sharing and creating a shared understanding between PCBUs. To best ensure compliance with the HSWA, PCBUs that share a workplace and have overlapping duties with other PCBUs should consider:

- Including in any commercial agreements with other PCBUs an obligation to consult, cooperate and coordinate on safety matters. This will make other parties clearly aware of their obligations and give parties a contractual right to enforce obligations
- Establishing clear lines of communication between all PCBUs to encourage dialogue on workplace health and safety matters
- Identifying workplace hazards and each PCBUs duties or agreed control measures in relation to that hazard in writing. While having a written agreement is not essential, it may help to clarify everyone's expectations
- Keeping a written record of all formal PCBUs communication in the form of meeting minutes and other documentation . Including any significant work health and safety issues that were discussed, agreed actions and any timeframes
- Conducting regular reviews, reporting and auditing of arrangements to ensure they remain effective.

Although the new obligations will likely result in greater compliance costs for businesses, we think they should result in better and safer outcomes for workers.

Cracking the code

The Code of Practice provides a helpful working example of horizontal consultation between multiple PCBUs as set out below.

SHARING THE SAME WORKPLACE: FINANCE COMPANY LEASING PREMISES IN A MULTI-TENANTED OFFICE BLOCK - LIFT MAINTENANCE

IDENTIFY health and safety duties and other duty holders

The finance company has a duty as a person conducting a business or undertaking to ensure the health and safety of its workers and clients visiting its offices.

At the same time, the building owner and property manager have duties as persons with management or control of the building to ensure people can safely enter and exit the building and that the building is safe and without risk to others.

A company contracted to maintain and repair lifts (maintenance contractor) has a duty to ensure that its workers and other persons are not put at risk from work carried out as part of its business.

Each of these duties is subject to what is reasonably practicable.

CONSULT

The finance company consults the property manager to find out what arrangements are in place for the proper maintenance of plant such as air-conditioning systems and lifts.

Before maintenance is to be carried out on the lifts the property manager consults with the maintenance contractor, the tenants and the cleaning contractor so that all duty holders know of the work and what they each need to do to ensure the safety of persons in the building. This includes identifying the best time for the work to be done, how the work area will be barricaded and what information, if any, the finance company will need to give to its workers and clients.

As the work proceeds, the finance company informs the property manager and the maintenance contractor of any concerns or incidents, to enable these to be considered and any changes made.

COOPERATE

The finance company and other tenants cooperate with the maintenance contractor by complying with contractor's safety procedures.

COORDINATE activities

The finance company ensures that its workers and clients do not use the lifts during the maintenance work and that they have another safe means of entry and exit.

The maintenance contractor works with the property manager to schedule maintenance work so that it does not interfere with the safe movement of persons in the building, as far as is reasonably practicable.

This article was written by Sherridan Cook and Mere King for the ISN Magazine (April 2016).

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