



FAQ Overview:

Welcome to our Frequently Asked Questions (FAQ) document. Here, we aim to address common inquiries received during the registration process and the **Contractor Management and Regulatory Process Enhancements webinar held on 28 February 2024**.

Please note that questions already covered in the webinar have been omitted from this document. If you couldn't find the answer you were looking for during the webinar or registration, you might find it here.

Question 1: What level of detail is required for a Safe Work Method Statement (SWMS)? Is there a different level of detail required as between a generic SWMS and a task specific SWMS?

A Safe Work Method Statement (**SWMS**) is a document that sets out the high-risk construction work activities to be carried out at a workplace, the hazards and risks arising from these activities, and the measures to be put in place to control the risks. The meaning of 'high-risk construction work' in the *Work Health and Safety Regulations 2011* (Cth) is broad.

A SWMS is classed as an administrative control and is used to support higher order controls to eliminate or minimise risks to health and safety, for example engineering controls. A SWMS is generally different from other documents that focus on specific tasks or processes, such as a Job Safety Analysis or a Safe Operating Procedure. A SWMS is not intended to be a procedure—rather it is a tool to help supervisors and workers confirm and monitor the control measures required at the workplace (*Safe work method statement for high-risk construction work information sheet, December 2014*).

A generic SWMS used at different workplaces may not meet the requirements of the WHS laws unless it has first been reviewed to take into account the hazards and risks at the specific workplace and the specific task being performed and amended as necessary.

A broad SWMS can be developed to address hazards relating to "Working at Heights" for example, in unison with a job specific analysis (JSA) to be completed for "Working at Heights – Tree lopping" which is specific to task, if not addressed in the SWMS.

For more information visit:

www.safeworkaustralia.gov.au

[Interactive SWMS tool | Safe Work Australia](#)

[Safe work method statement for high risk construction work - information sheet | Safe Work Australia](#)



Question 2: What exactly is the PCBU approving regarding SWMSs, if it does not have expertise on how to undertake the work? For example, where a contractor is being engaged for electrical work, how can the PCBU know what the electrical risks and controls are if they themselves do not have this expertise?

PCBUs cannot contract out a health and safety duty. However, a PCBU may engage someone with expertise to complete the work, and should ensure that the most suitable contractor is selected for the task. If a third party is being engaged, a PCBU retains duties for all the matters over which the PCBU has influence or control, and must manage these duties through consultation, coordination and cooperation, along with incorporating the expertise of the party engaged.

The role of the person conducting a business or undertaking (PCBU) in such circumstances is to ensure that a SWMS has been developed, distributed, and there are mechanisms in place to ensure that it is understood by all workers involved in the task. PCBUs are entitled to rely on the experience of the specialist contractor, when they do not have specific experience or knowledge of the work or task to be performed.

Consistent with a PCBU's health and safety duty under the WHS Act, the PCBU must review the SWMS, understand what WHS risks exist, and how these risks are to be managed. PCBUs must consider the risks identified in the SWMS and how these risks can be eliminated or minimised to ensure the health and safety of workers and other persons.

All parties should participate in a consultation process that ensures PCBUs, contractors, and workers understand the division of roles and responsibilities with respect to managing hazards and risks relevant to the work activity. Consultation should also cover responsibility for ensuring effectiveness of controls for each identified risk.

In the example referred to above, the PCBU would not be expected to manage the specific electrical hazards and risks associated with the task, as they do not have expertise in this activity. However, they should ensure that a SWMS is in place and that the work is being carried out consistent with it. In addition, the PCBU should also consider if the presence of the electrician or electrical work being carried out presents any hazards or risks to its workers and whether measures should be taken manage risks to health and safety. This might include limiting access to the area the electrician is working in or scheduling works for after hours.

If a contractor is not operating in accordance with the SWMS, the PCBU should consider whether the work should be stopped (see Question 5 below).

For more information visit:

[Safe work method statement for high risk construction work - information sheet | Safe Work Australia](#)



Question 3: Do the shared duties change if the contractor is engaged through a third party? For example, through a property agent?

No. PCBUs (and other duty holders) cannot contract out of their duties or contract them to another party such as a subcontractor, and more than one person can hold the same duty. Each duty holder must discharge that duty to the extent to which they have the capacity to influence and control the matter, such as the factors associated with the workplace, workers, and the work activity. If a third party is used to engage a contractor, the below measures may assist in ensuring that a PCBU discharges its health and safety duties:

- ensure consultation occurs with each PCBU, each contractor or subcontractor, and all workers to identify and confirm roles and responsibilities of all parties regarding WHS matters. Communication and consultation are critical in this instance and ensuring that an effective communication protocol is in place for these matters is essential. Share information about specific hazards and risks that are present in the workplace that the third party may not have considered, such as shift changes, privacy, or aggressive customers.
- implement control measures that are within the PCBU's control or influence to ensure, so far as is reasonably practicable, the health and safety of workers and other persons. PCBUs should consider building WHS into contract management and the work activity. This might include a site induction, pedestrian management, exclusion zones, notification of works, timeframe of works, adjustments to working locations, communication to workers of risks, potential contingencies for loss of services such as power and water. However, each duty holder retains an obligation to discharge their duty to the extent of their influence and control over the matter, and must satisfy themselves that there are safe systems of work in place.
- ensure that you, as the PCBU, are fully aware of the task to be performed by the contractor prior to the contractor carrying out the work. A scope of works can be useful to assist in reviewing and identifying any hazards that may be present in the workplace.

Consultation is required under section 49 of the WHS Act at various times, including:

- (a) when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking;*
- (b) when making decisions about ways to eliminate or minimise those risks;*

For more information visit:

[New fact sheet: WHS Duties in a Contractual Chain | Safe Work Australia](#)

Question 4: Where the contractor manages a workplace within the boundary of a site managed by a Commonwealth PCBU, must the contractor notify both Comcare and also the State and Territory regulator of any WHS incident?

It may be that the contractor is obliged to notify both Comcare and the relevant State or territory regulator.

Section 38 of the WHS Act requires that a PCBU to whom the Commonwealth WHS Act applies must ensure that a notifiable incident that arises out of the conduct of its business or undertaking is



notified to Comcare. This may include where a contractor is involved in the incident. Both the contractor and the PCBU may be independently subject to this requirement, but the PCBU should have arrangements in place to ensure that notification is made and should consult with the contractor about this. The contractor may also be obliged to notify their respective State/Territory WHS or OHS regulator.

A physical boundary or barrier around the contractor's workplace does not affect the requirement to notify Comcare of a notifiable incident under the Commonwealth WHS Act, as the critical matter is whether the incident arose out of the conduct of the business or undertaking.

For example, a contractor is engaged by the Department of Defence, a Commonwealth PCBU, to construct a new building at an Australian Defence Force base. The contractor's worker sustains an injury that constitutes a notifiable incident as defined by the WHS Act. Although the incident occurred in an area temporarily under the physical control of the contractor, it may still be notifiable to both Comcare and the State regulator if the contractor was conducting the work on behalf of the Department of Defence. This is because the incident could be said to have arisen out of the conduct of the Department of Defence's business or undertaking. In such circumstances, the Department of Defence and the contractor should have arrangements in place as to who will notify such incidents to Comcare. A PCBU should have mechanisms in place to satisfy itself that, where a contractor is required by the PCBU to notify Comcare on the PCBU's behalf, it is doing so.

For more information visit:

[Responding to an incident | Comcare](#)

[Incident notification information sheet | Safe Work Australia](#)

Question 5: Is it possible for a PCBU to stop unsafe contractor work practices that pose imminent risks?

Yes, and indeed a PCBU would be required to do so in circumstances where it becomes aware of such practices. If a PCBU recognises that work practices of a contractor pose a risk to the health and safety of workers or other persons, the PCBU should instruct the contractor to stop work until appropriate steps are taken to eliminate or minimise the risks so far as is reasonably practicable. Contracts for work to be carried out by contractors often expressly provide for a PCBU to direct contractors to cease work where it poses health and safety risks to workers or others.

During the webinar a case law example was provided: *SafeWork NSW v McConnell Dowell Constructors (Aust) Pty Ltd (No 2)* [2020] NSWDC 668. This case concerned a workplace fatality which occurred on Sydney Harbour. The defendant, McConnell Dowell Constructors was the principal contractor on behalf of Transport NSW, and subcontracted out work to Brady Marine. Brady Marine was a specialist contractor in marine piling and working on barges. Brady Marine was undertaking piling works and removing headstocks. These headstocks were not secured to the barge and consequently one toppled when it was accidentally hit by a crane, killing a Brady Marine worker.

McConnell Dowell sought to rely on the fact that Brady Marine was specialised in the work, which they argued limited McConnell Dowell's duty to ensure a safe system of work, asserting only Brady Marine was responsible. The Court rejected this, holding that while a PCBU can call upon expertise



which it does not have itself, in this case McConnell Dowell had the same expertise in this specialised marine construction task as Brady Marine. Every McConnell Dowell worker who gave evidence understood ways of eliminating the risk, which was to simply lay the headstocks down. Despite this, McConnell Dowell had not undertaken an adequate risk assessment in relation to storing the headstocks. Furthermore, McConnell Dowell had an obligation under the contract to inspect the worksite daily and a right to stop work at any time on safety grounds, but had not inspected the worksite on the day of the incident, or the day before. The Court concluded that McConnell Dowell should have been aware of the risk arising from the storage of the headstocks and taken steps to eliminate it. McConnell Dowell was found guilty of a breach of section 32 of the WHS Act, and later fined \$500,000.¹

¹ *SafeWork NSW v McConnell Dowell Constructors (Aust) Pty Ltd (No 3)* [2021] NSWDC 105.

Question 6: What are the responsibilities of multi PCBUs as part of contractor management?

A PCBU in a contractual chain has WHS responsibilities to ensure the health and safety of all workers along that chain who are working in, or affected by, the business or undertaking of that PCBU. The extent to which these duties are to be discharged by a given PCBU varies according to its capacity to control and influence the work being undertaken.

A PCBU (and other duty holders) cannot contract out of its obligation to ensure health and safety, even in circumstances where the PCBU has engaged the services or expertise of contractors or subcontractors. Although a PCBU is entitled to rely on a contractor's expertise to manage risks to health and safety where the PCBU does not itself have that expertise, the PCBU remains subject to this duty.

Key points to remember:

- WHS duties are not transferrable.
- WHS duties cannot be contracted out to another party, such as a contractor or subcontractor.
- A person can have more than one duty.
- More than one person can have the same duty at the same time. These are known as concurrent duties. Each person must discharge the duty to the extent they have 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.
- PCBUs must consult, cooperate and coordinate on WHS matters with other duty holders when working as part of a contractual chain.

A PCBU owes duties to all workers, including its own employees and contractors. The definition of a worker is broad, as section 7 of the WHS Act states:



A person is a “worker” if the person carries out work in any capacity for a person conducting a business or undertaking, including work as an employee, a contractor or a sub-contractor or an employee of a contractor or subcontractor.

For more information visit:

[WHS duties in a contractual chain: Factsheet | Safe Work Australia](#)

Question 7: What are Comcare’s recommendations regarding risk assessments conducted by contractors? How should the contractor complete their initial risk assessment to ensure it has a solid understanding of the hazards/risks at the host’s site/workplace?

Risk assessments should be conducted in consultation, cooperation, and coordination with all parties to the relevant work activity, to ensure all risks and hazards are identified, risk assessed, and controlled. This includes PCBUs, contractors, and workers. Each party in a contractual chain will have specific information on the hazards and risks that may affect their workers or other persons.

Consultation regarding risk assessment also provides an opportunity to assess whether multiple hazards interact, thereby potentially raising the risks faced by workers.

Creating the risk assessment collaboratively also allows for the opportunity to assign roles and responsibilities to all parties, clearly defining who and what is responsible for controlling each risk.

For more information visit:

[Model Code of Practice: How to manage work health and safety risks | Safe Work Australia](#)

[Codes of Practice under the WHS Act | Comcare](#)

Question 8: What is a reasonable standard of WHS oversight with regard to the awarding of grant funding? i.e. grant funding is not provided to contractors or service providers doing work for the PCBU, but is funding awarded to operate a business or undertaking by the grantee.

A PCBU must ensure, so far as is reasonably practicable, the health and safety of workers at work and ensure other persons are not put at risk from work carried out as part of the conduct of the business or undertaking. A PCBU may therefore have a duty to ensure that the manner in which it awards funding grants does not create a risk to the health and safety of others.

However, if a funding grant itself is purely to provide money to successful applicants who then use those grants for purposes entirely unrelated to the business or undertaking of the PCBU, and there is no further involvement by the PCBU in the funded project, the PCBU may not have any further duties in respect of those purposes. Where however, there is further involvement or influence over matters the funding is spent on, then it may be that this could be considered to be part of the PCBU’s business or undertaking. In that case, the PCBU should seek advice about the appropriate level of oversight required to satisfy itself that the purposes for which the grant money is used do not create risks to health and safety.



Where funding is provided for a project, it is recommended legal advice is obtained to determine the extent of the grant provider's WHS duties and what is required to be done to ensure those duties are discharged.

About Comcare:

Comcare has several important roles in work health and safety. Comcare is a work health and safety regulator, a scheme manager and an insurer and claims manager.

Comcare's purpose is to promote and enable safe and healthy work. All Comcare courses offer best practice, evidence-based and expert informed guidance on work health and safety.

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