

OHS IN CONTRACTOR MANAGEMENT

A guide for employers



Australian Government

Comcare

PUTTING YOU *FIRST*

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GUIDANCE ON OHS IN CONTRACTOR MANAGEMENT IN THE COMCARE SCHEME

Where employers engage contractors to perform work, effective contract management is essential to ensuring that they meet their OHS duties both to the contractors and to others such as employees and third parties. As an employer, you should be aware of issues which may affect your obligations including:

- > how a contractor is engaged and under what circumstances
- > who the contractor is
- > where the contractor is working
- > whether you or the contractor controls the site or the type of work and manner in which it is carried out.

A systematic approach which integrates health and safety requirements into contract management will prevent injury and assist to fulfil health and safety obligations.

This guidance aims to help you understand the importance of contract management to achieve positive OHS outcomes. The guide suggests key points to consider before, during and after engaging a contract provider and contractor. It also encourages you to manage OHS through the contract to ensure positive workplace safety outcomes. It is not meant to be an exhaustive resource on contractor management.

For the purpose of this guidance, a reference to a 'contract supervisor' may be a reference to a manager, an HR practitioner, an OHS practitioner or an employee with specific responsibilities to oversee or monitor the performance of the contract.

THIS GUIDANCE: WHAT'S IN IT AND HOW CAN IT HELP?

This guide provides a starting point for reviewing your organisation's approach to managing contractors and contract providers. It identifies some specific issues that you, as an employer, should consider at each stage of engaging and managing a contract.

The approach set out in this guide seeks to help you improve health and safety outcomes by providing plain English guidance with practical examples that will help you:

- > identify contractors who are owed duties under the Occupational Health and Safety Act 1991 (the Act)
- > clarify your OHS duty of care obligations to contractors
- > clarify control issues
- > improve the communication you have with contractors
- > get the selection of contractors right
- > get contractors on site
- > manage contractors on site
- > evaluate health and safety outcomes.

By using this guide effectively, you can expect the following benefits:

- > improved understanding of OHS obligations in relation to contractors
- > improved understanding of the effectiveness of your organisation's contract management systems and procedures
- > a more productive and safe working environment for contractors, employees and third parties
- > access to further resources that may be useful in designing support tools, policies and procedures for your organisation
- > improved workplace safety culture.

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CONTRACTORS: WHO IS A CONTRACTOR?

The definition of 'contractor' under the Act

The term 'contractor' is defined by the Act and as such, common law understandings do not apply. A contractor under the Act might be a Commonwealth contractor, a Commonwealth authority contractor or a non-Commonwealth licensee contractor (see section 9A of the Act). To be a contractor under the Act, a person must:

- 1) be a natural person (who is not an employee as defined in section 9 of the Act). A natural person is a human being and not a company.
- 2) perform work on Commonwealth, or non-Commonwealth licensee premises. Commonwealth and non-Commonwealth licensee premises are those owned or occupied by the Commonwealth, a Commonwealth authority or a non-Commonwealth licensee. A person will only be a contractor if they perform work on these premises on at least one occasion.
- 3) perform the work in connection with a contract between the Commonwealth, a Commonwealth authority or a non-Commonwealth licensee and that person or another person.

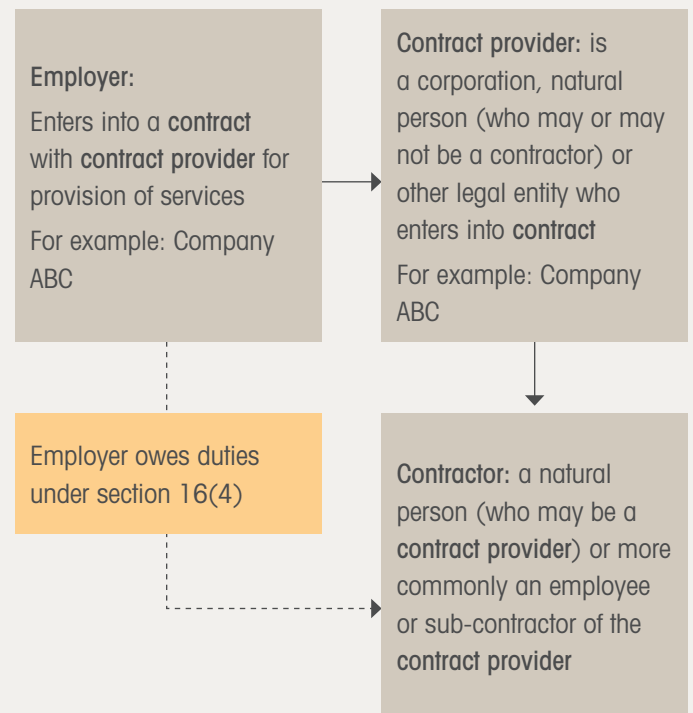
The work performed by a contractor must be performed in connection with a contract (or arrangement) between the contractor themselves or another person (often the contractor's employer), whether a natural person or company.

Under the Act, the term 'contract' is broadly defined and includes 'any arrangement or understanding'. A contract need not be in writing and may also include a subcontract.

The contract under which work is performed must also be in connection with an undertaking being carried on by the Commonwealth, a Commonwealth authority or a non-Commonwealth licensee. While 'undertaking' is not defined in the Act, it is generally accepted to mean an activity, or something done in the course of carrying on a business or enterprise.

A contractor under the Act might therefore be a subcontractor, a volunteer, a work experience student, a labour hire worker, a specialist engaged to perform a discrete piece of work, or someone who works on a more permanent basis in your organisation.

There is an important distinction to be made between the contractor (being a natural person) and the contract provider (the natural person's employer).



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SELECTION: GETTING YOUR SELECTION RIGHT

Getting the selection of your contract provider right will assist in meeting your organisations OHS obligations and ensuring positive safety outcomes.

This stage should be used as a screening process which enables both parties to identify expectations and establish working relationships.

We suggest you take the following steps in the selection process:

- > set out appropriate health and safety requirements and management arrangements in tender specification documents
- > ensure a systematic approach to evaluating tenderer OHS capabilities and resources is in place
- > incorporate health and safety requirements into contractual documents, as well as details about how they need to be monitored
- > identify high risk activities involved in the service provision under the contract
- > assess the potential impact contractor activities place on your employees or members of the public
- > make the contract provider aware of high risk activities
- > check the contract provider can supply contractors who are competent and qualified to conduct the activities to be undertaken
- > ensure the contract provider has an OHS management system in place that is individualised for the site and type of job required
- > ensure the contract provider's OHS management system is tailored to appropriately meet OHS compliance for the type of activities to be undertaken
- > design a process to evaluate the contract provider's performance.

ENGAGEMENT: GETTING CONTRACTORS ON SITE

To help meet your obligations as an employer, you should ensure that contractors are aware of your specific OHS requirements. You should also make sure contractors are appropriately inducted to work sites. Even if a contractor you engage frequently works in the Commonwealth OHS jurisdiction, your organisation will have individualised systems and procedures for managing its unique operational OHS risks.

Including OHS requirements in a contract is important but these should be reinforced when contractors come on site. You can do this by having a contractor-specific induction process. Some items that might be covered in an induction process are:

- > contact points (supervisors, first aid officers, HSRs etc.)
- > specific hazard and incident reporting requirements
- > emergency procedures
- > specific work practices
- > access and exit requirements and arrangements
- > relevant policies (for example, health and safety management arrangements or HSMAs).

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MANAGEMENT: MONITORING CONTRACTORS

To assist you in meeting your OHS obligations as an employer, you should monitor contractors' safety compliance after you engage them. You should ensure you are familiar with specific contract requirements and you are made aware of any issues on-site that impact on your employer's OHS obligations. You could do this by requiring a contractor to promptly notify you of any incidents.

The contract should provide the framework for managing contractors. All parties should be provided with a copy of the contract as well as summary documents that provide an overview of the contractor's responsibilities.

It is important to have a competent contract supervisor to ensure that you are able to effectively oversee the terms of the contract, including those relating to OHS. Providing the contract supervisor with any necessary information, training and resources to manage the contract will help you meet your OHS obligations. This might include a range of supporting material to assist in the management of contractors, such as checklists and decision-making flowcharts. These materials should be aligned with the contract itself and linked to the accountabilities defined in the contract. Knowing who is accountable for what and by when should be clearly defined in the contract. Make sure these accountabilities are regularly monitored and reviewed as a priority using established reporting processes.

In most circumstances you, as the employer, will owe contractors duties under the Act. Contractors are owed duties in relation to matters over which the employer has, or would usually be expected to have control. Where this is the case, contractors should be treated and supervised in the same way as employees. Where an employer owes a duty of care to contractors under the Act, this duty is non-delegable and cannot be overridden by terms in the contract to the contrary.



CONSULTATION AND REPRESENTATION: CONTRACTOR MANAGEMENT

Contractors or sub-contractors can be represented by a person or persons, including Health and Safety Representatives (HSRs), in respect to health and safety issues. However, such representation is not considered formal representation for the purposes of the Act, but a local arrangement between the employer, contractor and employees. Where the person representing the contractors or sub-contractors on health and safety is an HSR under the Act, they are not exercising their powers under the Act, but are fulfilling a role provided for by the local arrangement. Issues that may be raised by contractors may also be issues that affect employees in the Designated Work Group, and in the latter instance, the HSR would be exercising their HSR powers.

Comcare supports the active involvement of contractors in health and safety issues on sites controlled by employers under the Commonwealth OHS legislation. It is good practice for work sites where employers under the Commonwealth OHS legislation work with employers under state and territory OHS legislation to establish mechanisms for co-operation and communication on health and safety matters. These mechanisms need to be clearly defined and should be communicated to contractors, for example, via induction sessions. The mechanisms should allow for contractors input when required.

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CONTROL: WHO HAS CONTROL OVER THE ACTIVITY?

As the employer, you owe duties of care to your contractors, in the same way you owe duties of care to your employees—in relation to matters over which you have control (see section 16(4) of the Act).

Who has control over an activity or matter affecting safety, and what level of control exists, are important to determining the duties you have. Whether an employer has control over a relevant matter will need to be determined taking into account all the circumstances. Control over a particular activity or matter will be indicated by, for example, levels of contractual and practical control. These are likely to be different in every situation.

Before developing a contract, consider specifying the matters you will control or seek to have to control over. Also consider the specialist tasks that will need contractors with specialist expertise. You may wish to maintain control over some aspects of work procedures, but not seek to control the precise manner in which the specialist activity is performed.

CONTRACTUAL CONTROL

Does the contract provide you, as the employer, with a legal right to direct the contractor to perform work or a work activity in a certain manner? If so, and the particular activity or matter creates a risk to health and safety, it is likely that you will be found to have the requisite level of control such that the health and safety duties set out in sections 16(1) and 16(2) of the Act will apply in respect of a contractor.

PRACTICAL CONTROL

Even in the absence of a legal right to direct the contractor (as expressed in the contract), do you as the employer have actual power to direct the contractor to perform work or a work activity in a certain manner? If you give an instruction as to the specific manner in which an activity is to be carried out for example, would it be accepted and acted upon by the contractor? (Note that this is less likely to be the case where the contractor possesses expertise concerning the activity which the employer lacks). If so, it is likely that you will be found to have the requisite level of control over those matters such that the safety duties which apply in respect of employees, will also apply in respect of the contractor.

For example, practical control might exist where contracted cleaners regularly come into an employer's workplace to perform their contracted work. The contract may contain specific times outlining when floors can be wet mopped. However, the cleaners may readily take directions from the employer to mop spills or to cease mopping when there are high levels of foot traffic in areas identified for wet mopping. Because of this practical control over when and where wet mopping is conducted, the risks arising from when and where wet mopping is conducted are likely to be matters the employer has control over. As a result, the health and safety obligations normally owed by the employer to its employees, will also apply in these circumstances, to the contractors.

SPECIALIST CONTRACTORS

Identifying the matters you have, or would usually be expected to have control of, is more difficult when you engage contractors for their specialist skills (for example, competent electricians). This is because there will be elements of the contractor's work that you won't be able to exercise any control over because you don't have the relevant knowledge or expertise. This does not necessarily mean you have no duties or control over those specialist contractors, only that the duties are confined to those matters over which you do retain control.

In the example of an electrician, an employer is unlikely to have the knowledge or skills to direct the electrician about the precise manner in which to perform wiring tasks. Wiring tasks are therefore likely to be under the control of the contractor. However, much of the way the electrician performs their job may be within the employer's capacity to control. Some examples of hazards that may not be specialist in nature, and are therefore likely to fall within the employer's control, may include working at heights, tripping hazards or emergency procedures for evacuating the workplace.

Ideally you and contract provider should specify in the contract the procedures the contractor should follow to ensure the job is done safely.

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COMMUNICATION: WHO, WHAT, WHEN, WHERE AND HOW?

CONSIDERATIONS

Communication is essential to effective contract management. You should ensure clear lines of communication are established between all relevant parties. You should also identify who needs to communicate with whom and when. This will help you, the contract provider and the contractor to meet their OHS obligations. Communication requirements or expectations may also be included in the contract. The following assumes you, the employer, takes on the role as the contract supervisor.

Who you should communicate with

- > Contract provider—to establish relationships and manage the contract.
- > Contractors—to ensure they are aware of what needs to be done.
- > Procurement officers—to ensure you are aware of the specifics in the contract.
- > Managers and employees—to make them aware of new or additional risks in the workplace, new or changed procedures and contact points regarding contractor issues.
- > Comcare—for information, advice and assistance on OHS issues and for notification when incidents occur (refer to Comcare's website for incident notification requirements).

What you should communicate

- > Your expectations regarding the contract should be communicated clearly at the start of the contract and should also be revisited as required.
- > Changes to the work environment, systems and procedures.
- > Hazards and risks—as soon as practicable upon identification
- > Accountability for particular issues such as the provision of personal protective equipment, emergency procedures etc.
- > Contact points (such as supervisors, first aid officers etc.).

When you should communicate

- > Early in the procurement stage—with procurement specialists/advisors to understand what OHS arrangements will or may be required.
- > Upon engagement of contractor provider.
- > Before a contractor begins work.
- > Throughout the delivery of services by a contractor.
- > As soon as you inherit the role of contract supervisor.

Where you should communicate

Regular visits and inspections on-site with the contract provider and contractors—

- to assist in understanding OHS issues so that they can be addressed: and
- to help monitor progress and compliance with contract requirements.

How you should communicate

- > Written communication (for example, by email)—to assist in maintaining records
- > Regular meetings—at nominated points during the contract, or as required
- > Reporting processes—both formal and informal against contract deliverables
- > Conversations—can be file noted if records are required, but are especially good for establishing positive working relationships and provide opportunities for on-site visits
- > As necessary and consistent with organisational policies (for example HSMAs)



**REVIEW: EVALUATE THE
OUTCOMES**

As with any work project, it is important to review the effectiveness of the contract management process at the end of each project undertaken. This will be partly reflected by the contract provider's compliance with predetermined targets set out in the contract. Reviewing at these times is an opportunity to capture useful intelligence in relation to each contractor providers' safety performance which can then be fed into a preferred contract provider list and be of assistance in maintaining and updating that list.

Make sure the post contract completion review includes:

- > safety incident data
- > safety reports for the project as a whole
- > safety issues raised during the project
- > lessons learnt through the process.

FURTHER INFORMATION

You can get further information on contractor management from:

- > Comcare's website—legislation, guidance, FAQs
- > Safe Work Australia—Guidance on OHS in Government Procurement
- > Federal Safety Commissioner—Subcontractor OHS

FURTHER ASSISTANCE

If you have any questions about OHS in the Commonwealth Comcare Scheme, email

OHS.help@comcare.gov.au or call 1300 366 979 and ask for the OHS Helpdesk.

FEEDBACK

What did you think of this publication? Was it useful? Was it missing any information? Does it need some changes?

We welcome your comments! Please email them through to our Work Safety at OHS.help@comcare.gov.au

ACKNOWLEDGEMENT

Comcare would like to thank organisations in the Commonwealth jurisdiction who contributed to the development of this product.

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