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Webinar: Contractor management and regulatory process enhancements

Wednesday 28 February 2024, 1.30pm – 3pm AEDT





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Acknowledgement of Country

Acknowledgement of artist
Healing Hands – Cover artwork by Dion Devow of Darkies Designs





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Housekeeping



The session is being recorded



Camera off



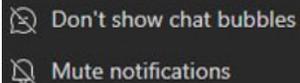
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Teams Chat

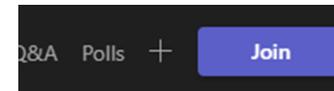
Turn off notifications:

- Click on the three dots '...' (more)
- Then 'settings'
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MS Teams Polls

- The Live Polls will display on your screen as a prompt, or
- Use the banner on the top of your screen to access 'Polls'



- Having difficulties? Reply in the chat



Survey

Access the survey:

- QR Code
- Link
- Email



Comcare National Conference

- The Comcare National Conference will be held on the 20th and 21st of August this year in Canberra.
- The theme, *Collaboration for prevention and change* will explore creating safe and healthy workplaces, and sustainable return to work practices through strong leadership, inspired action, continuous improvement, and future-focused approaches.
- Registrations will begin in late March – stay up to date by subscribing to eNews or on LinkedIn.



Collaboration for prevention and change





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WHS Law Reform Changes

What has changed?



Industrial manslaughter and other work, health and safety reforms

The Fair Work Legislation Amendment (Closing Loopholes) Act 2023 amends the Work Health and Safety Act 2011 (the WHS Act) to strengthen Commonwealth work health and safety offences and penalties by introducing an industrial manslaughter offence, increasing penalties and providing new criminal responsibility provisions for bodies corporate and the Commonwealth. The amendments also establish a Family and Injured Workers Advisory Committee.

What has changed?

The changes amend the WHS Act to strengthen the work health and safety offences and penalties regime by including:

- An industrial manslaughter offence for the Commonwealth work health and safety jurisdiction with penalties of \$18 million for a body corporate and 25 years imprisonment for an individual.
- Significant increases to the Category 1 offence penalties from \$3 million to \$15 million for a body corporate, from \$600,000 to \$3 million for a person conducting a business or undertaking or an officer, and from \$300,000 to \$1.5 million for any other person.
- A 39.03% increase to all other penalties in the WHS Act.
- For those penalties which have increased, an indexing mechanism to annually increase penalties in line with the national consumer price index.
- New criminal responsibility provisions for bodies corporate and the Commonwealth.

The changes also amend the WHS Act to establish a Family and Injured Workers Advisory Committee. The Committee will provide advice to the Minister for Employment and Workplace Relations and Commonwealth work health and safety regulators on the support needs of those affected by a serious workplace incident and help inform the development of relevant policies and strategies.

What will these changes mean?

- The industrial manslaughter offence and higher penalties for breaching work health and safety duties will promote compliance and help make workplaces safer.
- The industrial manslaughter offence will address community concern and apply higher penalties to the most egregious breaches of work health and safety duties, those which cause death.

The recent WHS Law Reform brings significant changes, including the introduction of:

- an industrial manslaughter offence
- substantial penalty increases, and
- the establishment of a Family and Injured Workers Advisory Committee.

For more information on the Closing Loopholes legislation, visit: <https://www.dewr.gov.au/workplace-relations>



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Session overview

Contractor Management

This session will cover:

- Shared duties and monitoring requirements when engaging contractors
- What to expect when an inspector calls following an incident involving contractors

Presenters:

- **Bev Smith** - Senior Director National Operations, Regulatory Operations Group
- **Michael Evans** - Director, Regulatory Operations Group
- **Phil Deveny** - Assistant Director, Regulatory Operations Group

Regulatory Process Enhancements

This session will cover:

- An update on recent enhancements in regulatory processes for targeted and effective assessment and prioritisation of regulatory response

Presenters:

- **Peter Davies** - Director National Operations, Regulatory Operations Group



Contractor Management





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Contractor Management

Why are contractors a continuing priority?

- The continuing health and safety vulnerability of certain categories of workers, including contractors, has been identified as a persistent challenge in the Australian WHS Strategy 2023 – 2033

Why are contractors more vulnerable to increased risk of injury and illness compared to others performing the same work?

- Unfamiliarity with the worksite and safety management system
- Economic Incentives
- Less likely to reporting safety issues
- Communication barriers
- Differences in safety culture





Contractor Management

Recap WHS Duties – WHS Act 2011

Section 7 – Meaning of worker

- 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.

Section 19 – Primary duty of care

- A PCBU must ensure, **so far as is reasonably practicable**, the health and safety of workers who are at work in the business or undertaking

Section 18 – What is reasonably practicable in ensuring health and safety

- Reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters which are set out in the section.

Section 16 – More than 1 person can have a duty

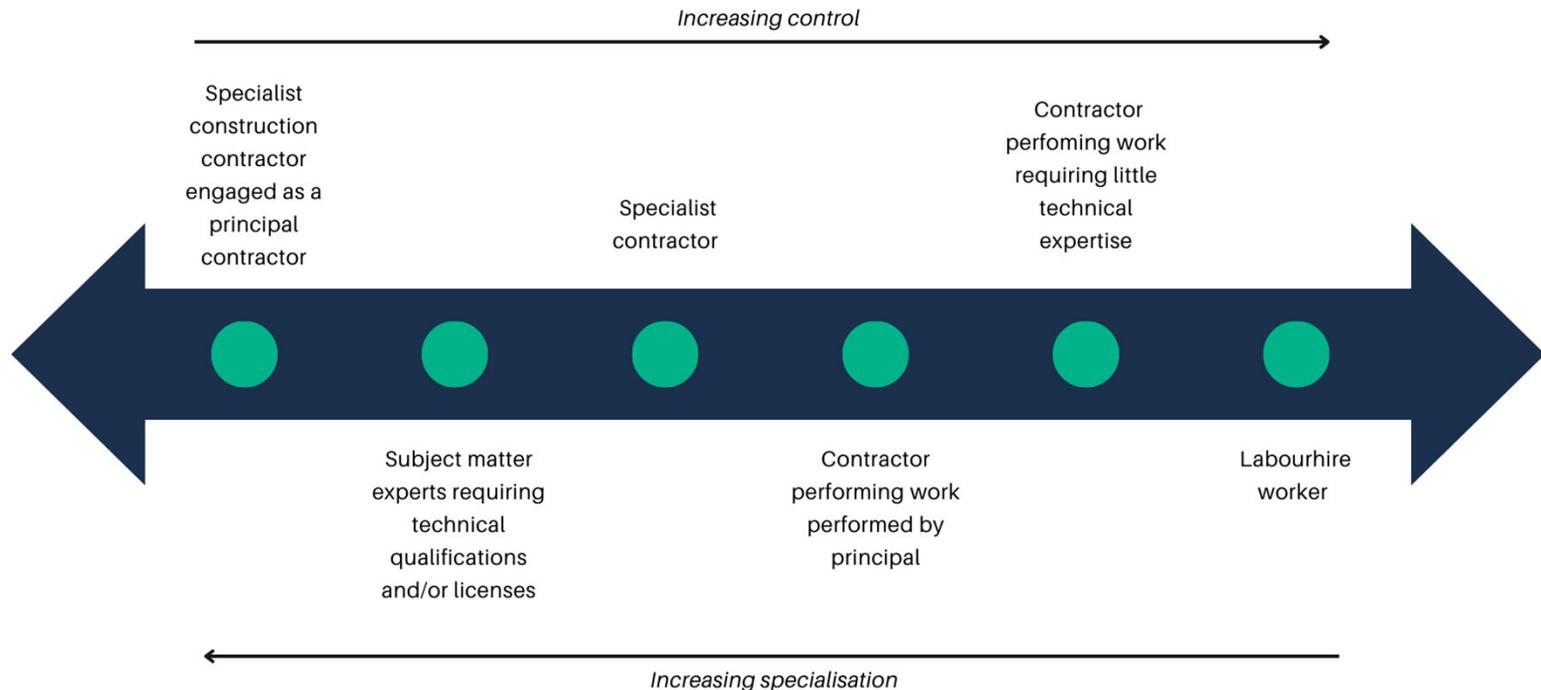
- Each person retains responsibility for their duty and must discharge that duty to the extent they have capacity to **influence and control** that matter or would **have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity**.



Contractor Management

Different types of contractors

CONTRACTOR CONTINUUM





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Case Law Example

Reilly v DEVCON Australia PTY Ltd [2008] WASCA 84 (17 April 2008)

- A sub-contractor Mr Kelsh died as a result of the collapse of a building under construction. Devcon was the contractor in charge of the development on the site. It engaged labour and ordered materials needed for the building process
- Contract purpose: “To provide all necessary labour on-site for the supervision and erection of all structural steel and concrete tilted panels at the site.”
- The courts found Devcon had control over the whole workplace (**general control**), but it was not considered reasonable for them to have the knowledge and skills that a sub-contractor (KEFO) had to carry out specific work (**actual control**)
- Meaning Devcon was not in control of the work that resulted in the fatality and therefore could not have taken further reasonably practicable steps to prevent the incident.





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Case Law Example

SafeWork NSW v McConnell Dowell Constructors (Aust) Pty Limited (No 2) [2020] NSWDC 668 (“the Barangaroo case”)

- A fatality of a sub-contractor occurred at Barangaroo in Sydney in 2017.
- McConnell Dowell Constructors subcontracted out work to Brady Marine for the Barangaroo Ferry Hub.
- Workers were undertaking piling works which involved removing headstocks (large metal beams) and placing them upright on a barge. These headstocks were not secured to the barge and consequently one toppled when hit by a crane, killing a worker.
- McConnell Dowell argued it was entitled to rely on expertise of Brady Marine to manage the risk and asserted only Brady Marine was responsible
- The court rejected the argument and McConnell Dowell Constructors was found guilty and fined 500k.





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Case Law Example

Inspector Chris Henson v ABB Australia Pty Ltd [2005]

- ABB pleaded guilty to a breach of the WHS Act when a labour hire employee fell 3.5m through a void
- The employee sustained serious injuries
- ABB had extensive safety systems and identified the need for all workers to wear harnesses
- The supervising foreman asked the labour employee if they wanted to wear the harness – they declined
- The court found that the foreman of ABB should have required that the labour hire employee wear the harness

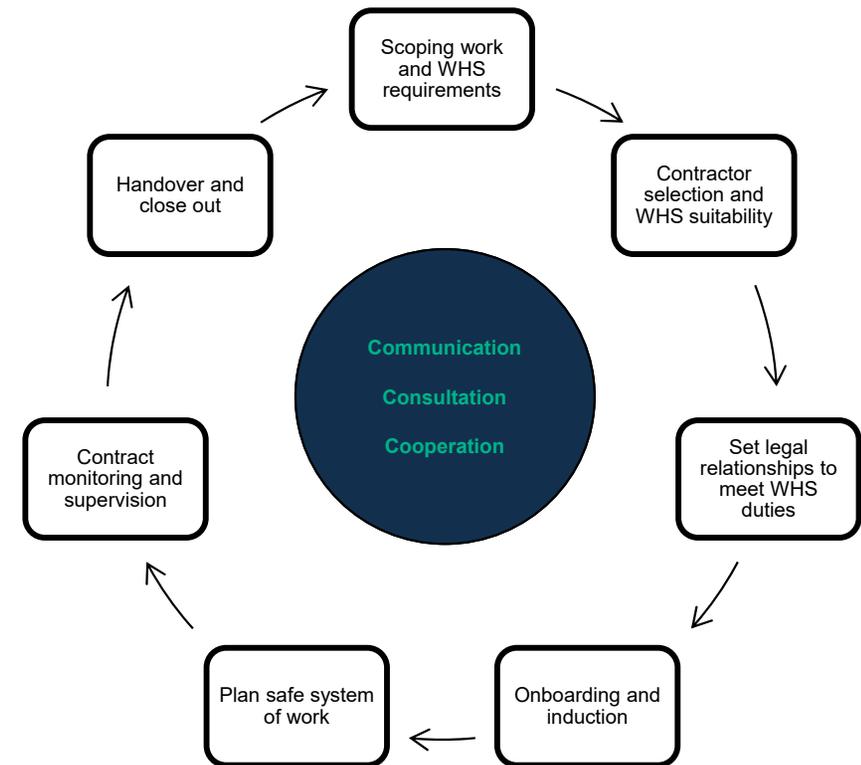




Contractor Management System

Key points:

- Generally, a PCBU will satisfy its WHS obligations to all its workers through the development of a safety management system to which all its workers must comply.
- PCBU's should also establish a contractor safety management system that is aligned with the overarching safety management system and procurement processes.
- A contracting PCBU should consider what it can reasonably practicably do at each stage in the contractor management process to meet WHS duties to its contractors.



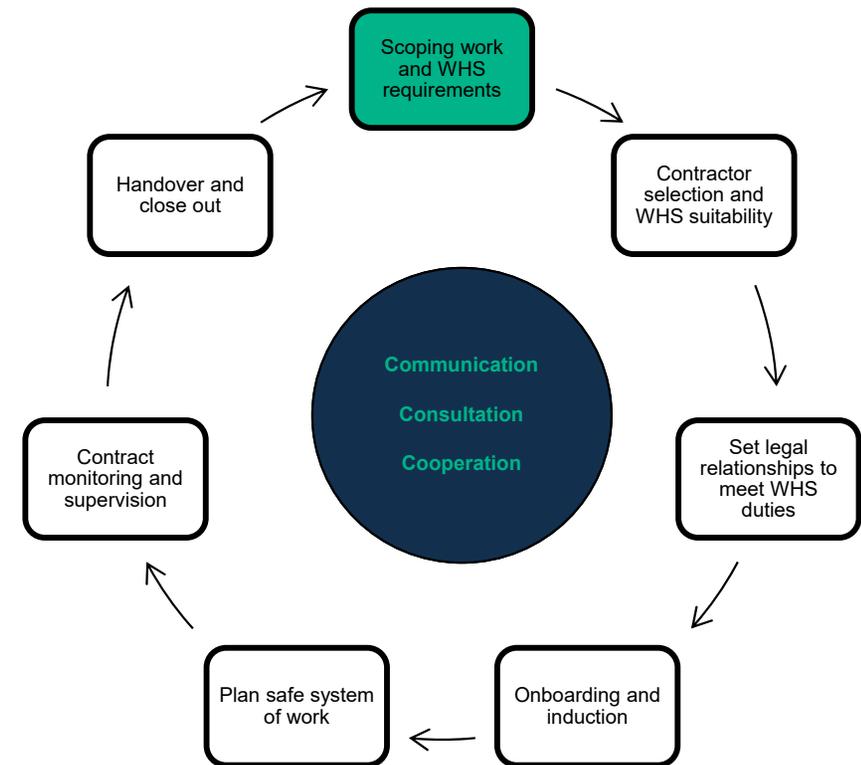


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Scoping work and WHS requirements

Key points:

- Define the work to be done and the environment in which it is done
- Identify the type of contractor support you require
- Identify the risks that may arise in the performance of the work
- Consider if you can you design out some of the risks



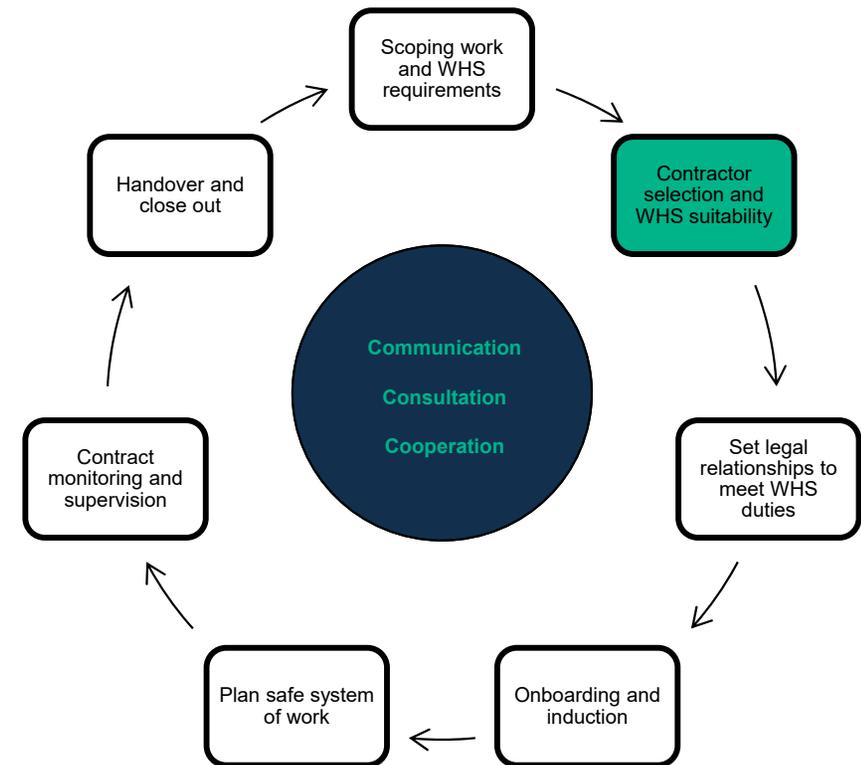


Contractor Management Selection and WHS suitability

Key points:

When selecting a contractor consider:

- Values and systems of the contractor from safety perspective including commitment to WHS compliance
- Safety performance
- Verify qualifications
- Review their WHS policies, procedures and risk assessments to ensure compliance with industry standards
- Has the contractor been vetted for safety (if using a panel)



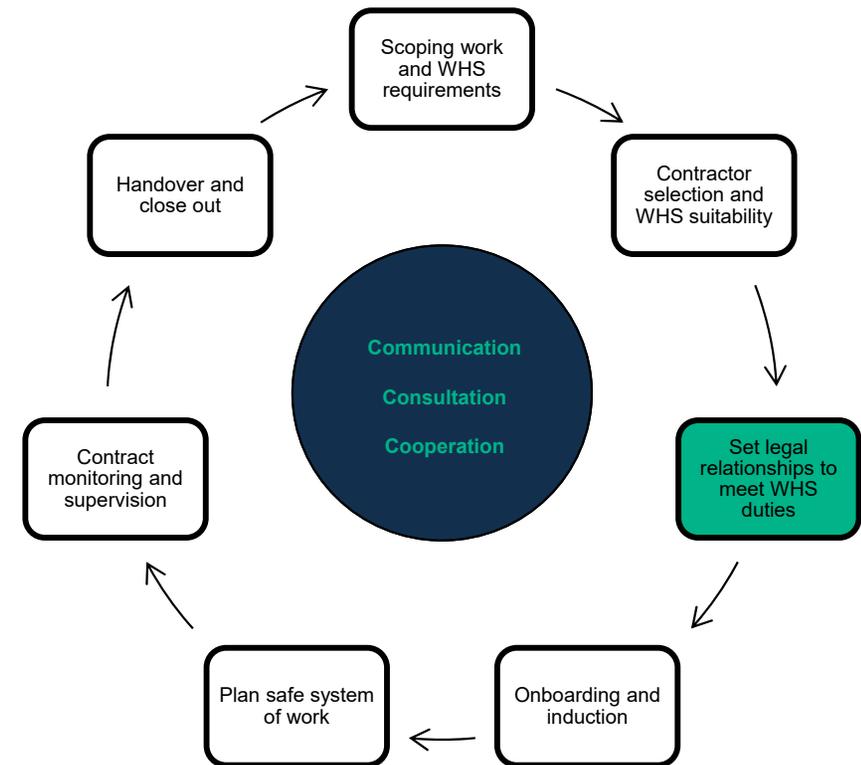


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Set legal relationships to meet duties

Key points:

- WHS duties and responsibilities in the contract
- Specify compliance with WHS laws and regulations
- Reporting and communication channels
- Expectations for incidents and investigations
- WHS performance monitoring and reporting
- WHS issue resolution process
- Consultation with workers and other duty holders
- The level of contractual control





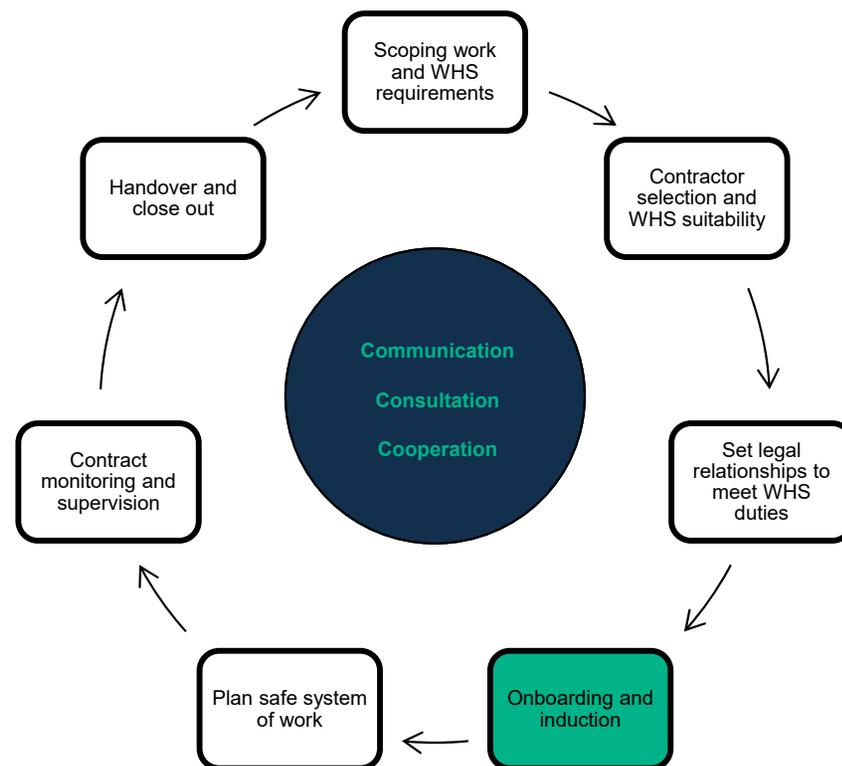
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Onboarding and induction

This should ensure:

- Awareness of safety policies, procedures and site safety rules
- Awareness of safety reporting requirements and emergency evacuation
- Verify all workers on-site have completed appropriate safety training and have documented proof
- Verify competency and certification of workers for specific tasks
- Knowledge of site-specific hazards and how these will interact with risks arising from contracted work.

Importantly induction should be tailored to the audience and ensures information imparted is understood (r.39(3) WHS Regulations)



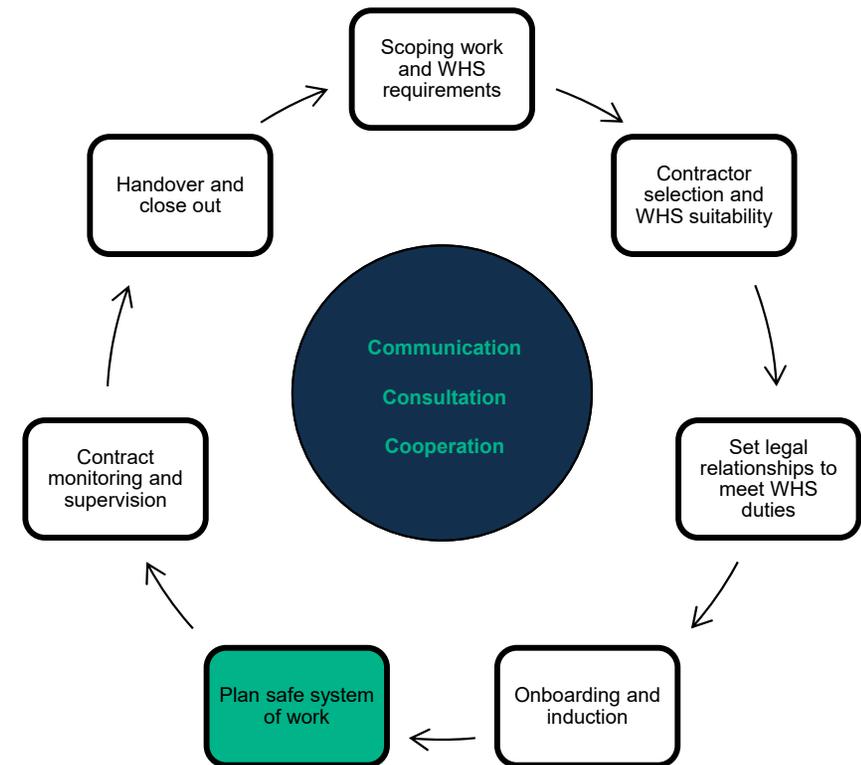


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Planning a safety system of work

Key points:

- Prior to work commencing a contractor must provide a plan for undertaking the work safely
- Good template is a safe work method statement – SWMS
- Plan should be a living document
- Plan should also confirm emergency preparedness of the contractor





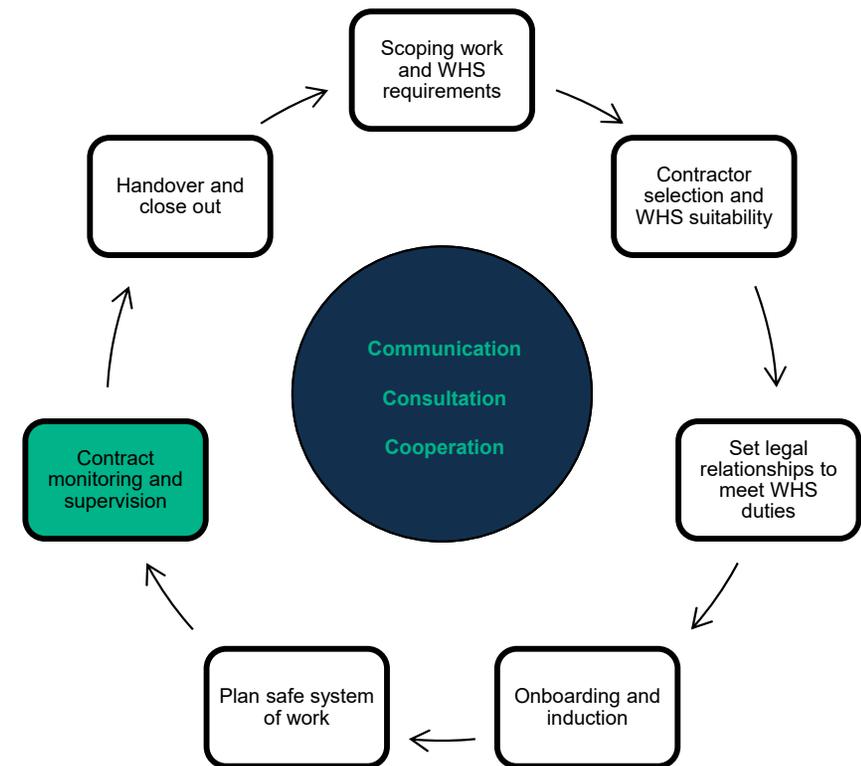
Contractor Management Monitoring and Supervision

Purpose:

Ensures the contractor is conducting work safely by implementing the processes described in their WHS systems and plans, and these remain current and relevant for the work they are actually performing.

It requires:

- Clear process for contractors / sub-contractors to report incidents and near misses
- Regular performance reviews to assess effectiveness of WHS management systems and to update safety procedures
- Risk based supervision
- Systematic approach including audits and inspections should be considered for longer term projects or those with high-risk activities.



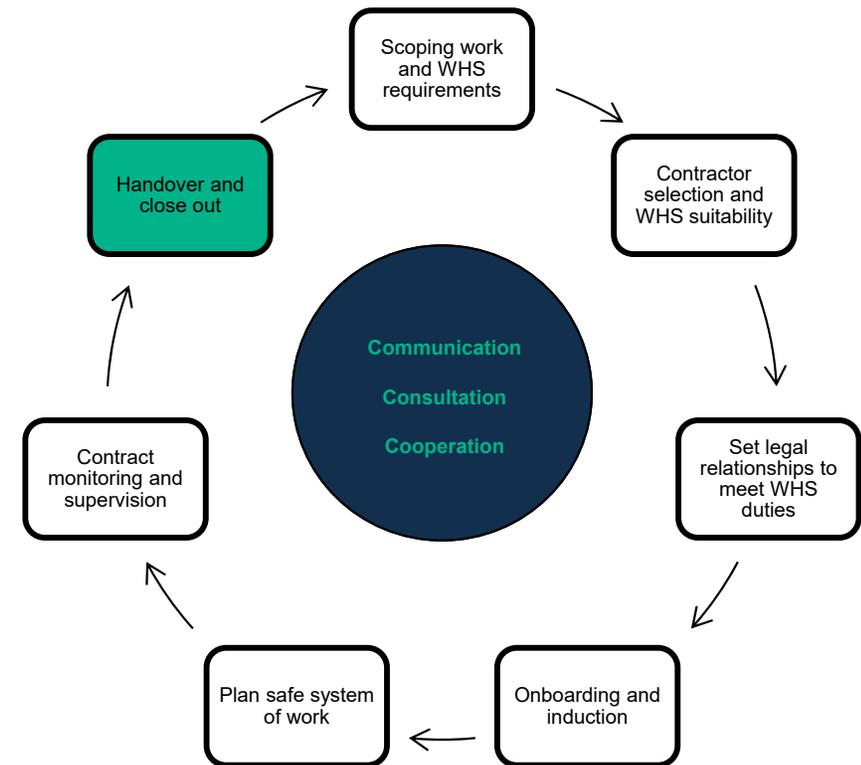


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Handover and closeout

Key points:

- Ensure a through handover process at the end of the activity or project
- Confirm that all safety documentation is provided to relevant parties
- Conduct a final review to capture lessons learned for future projects





Contractor Management

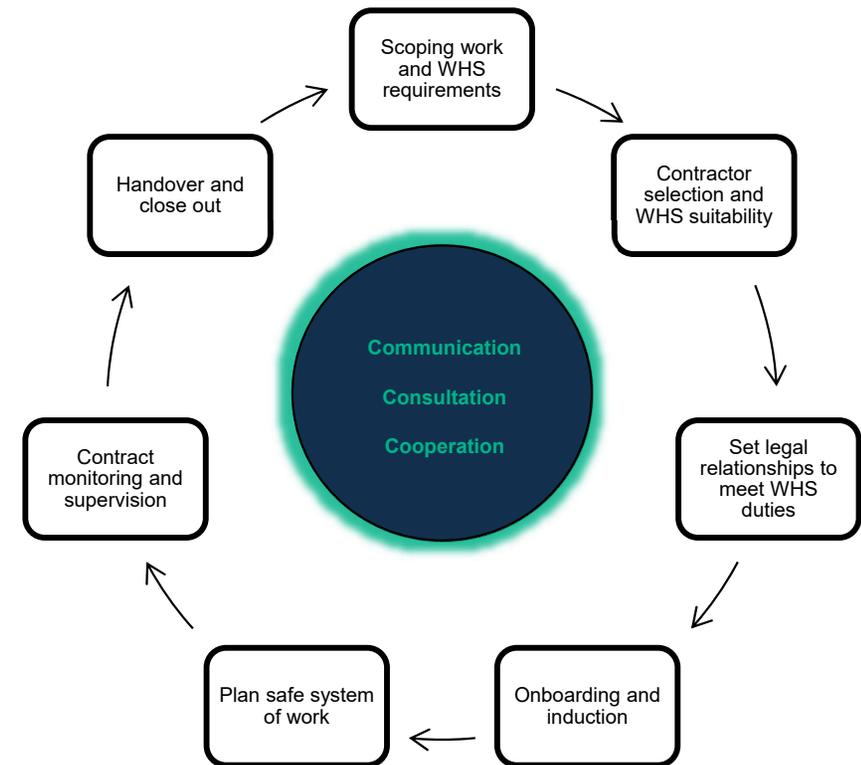
The three C's

The Work Health and Safety Consultation, Cooperation, Coordination Code of Practice:

- “The objective of consultation is to make sure everyone associated with the work has a shared understanding of the what the risks are, which workers are affected and how the risks will be controlled. The exchange of information will allow the duty holders to work together to plan and manage health and safety”.

Practical ways this can be achieved

- Establish clear lines of communication
- Implement regular safety meetings
- Encourage contractors to report safety concerns
- Ensure contractors are embedded in health and safety representation arrangements





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Contractor Management Regulatory Approach

What to expect when an inspector comes calling

Incident notification and inspectorate triage:

- PCBU identification
- Work activity
- Control measures
- Jurisdiction

Inspectorate action:

- PCBU engagement
- Inspection purpose
- Inspection commencement
- Inspection scope



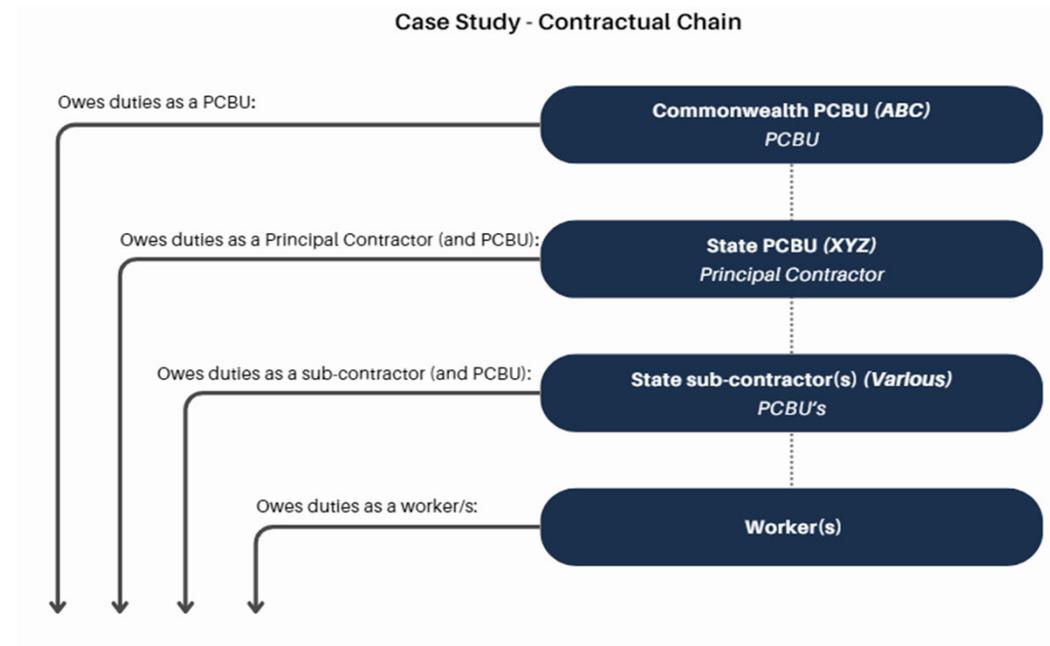


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Case Study Example

Department of ABC:

- ABC (public service department) are constructing an additional office, with XYZ as the the Principal contractor
- XYZ engaged the services of state sub-contractors
- ABC established oversight arrangements of XYZ, including regular meetings and auditing processes
- XYZ is responsible for management of day-to-day WHS matters, including managing sub-contractors
- XYZ obligations include engaging the services of sub-contractors, consulting with PCBUs and workers, investigating WHS incidents and managing WHS risks



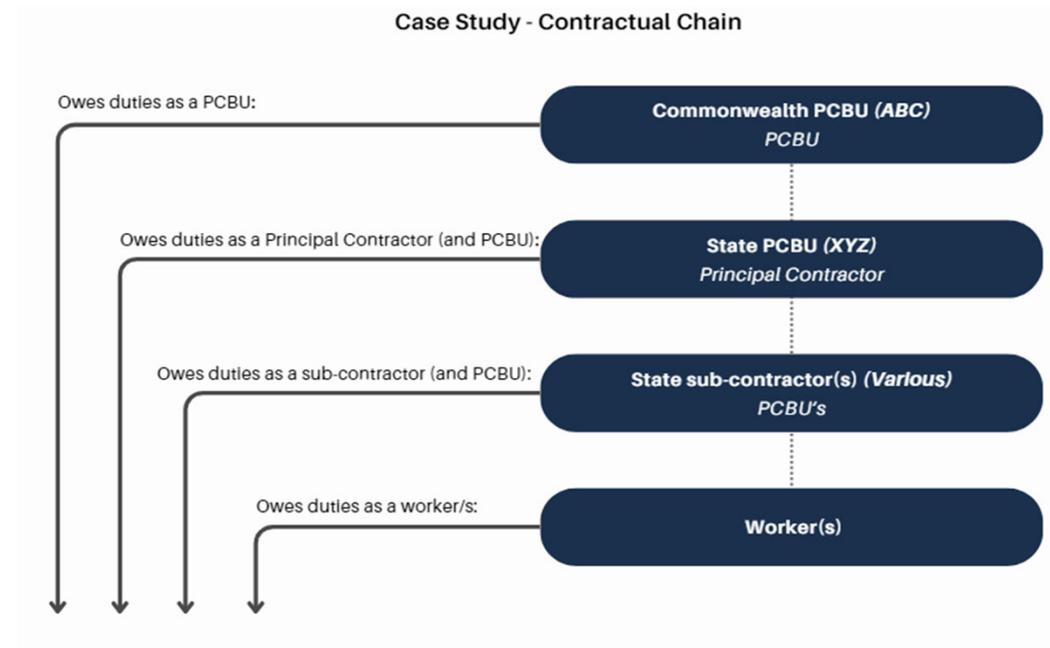


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Case Study Example

Elements Comcare would seek information on:

- Evidence of the tendering/procurement process
- Copy of the contract
- Understanding of WHS management system in place
- Understanding of supervisory, monitoring and oversight arrangements of sub contractors





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Scenario 1

Scenario: The PCBU has the expertise of the tasks, but requires personnel

- Serious incident occurred
- Inspector found there was no WHS documentation
- Competency and safe systems – Checklist for contractors
- Checklist was insufficient
- PCBU did verify the contractors safe work systems or necessary information to ensure risks were eliminated or minimised
- PCBU was found to have an effective onboarding process
- PCBU owed a high level of duty

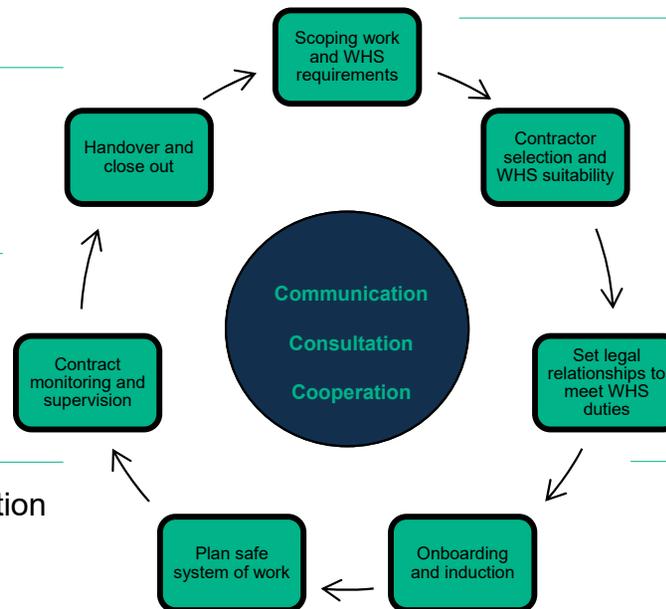


Contractor Management Scenario 1

- Taken proactive actions to address the issue promptly

- Implement regular audit schedule
- Contractual obligations are met
- Contractor survey

- Provide a more detailed information/instruction to the contractor about risks
- Sufficient Risk Assessment and Work Instructions provided by PCBU
- Consult with all parties involved



- End-to-end risk assessment of the task

- Review the contractors safe system of work
- Engaged a contractor with a safe system of work
- Collected WHS documentation prior to commencement

- Clear contract outlining WHS duties

- Implement a more defined process when on boarding



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Scenario 2

Scenario: The PCBU engages expert as they do not have expertise of the task

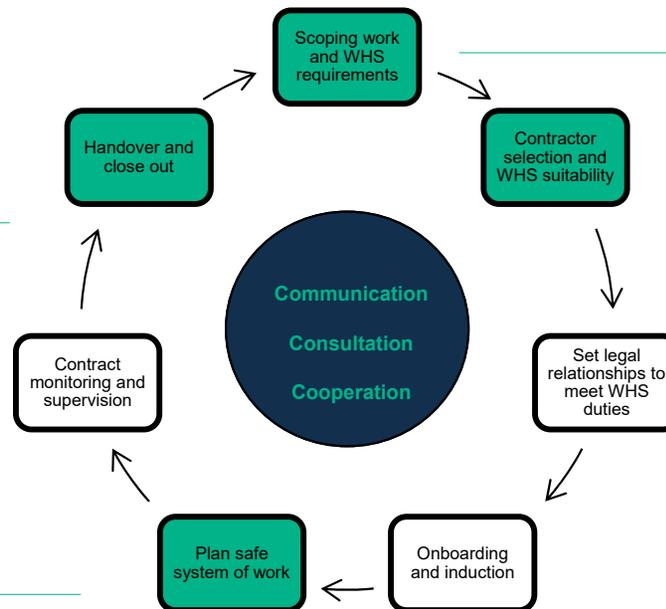
- Engaged subcontractor to move large objects – involving lifting objects up a flight of stairs
- Admin error – failing to include in the work order that items require moving upstairs and a specific plant equipment
- Worker was offered to use a similar plant available onsite
- The plant failed halfway up the stairs and injured the worker
- PCBU consulted with the contractor when onsite
- The PCBU has limited control over the worker deciding to use the plant, but could have made further enquiries before the task began



Contractor Management Scenario 2

- Safety bulletin or communication to workers
- Review the incident

- Request more further WHS information, including the work order



- Defined scope of works to identify plant involved
- Ensure contractor has appropriate resources and processes
- Reviewing the work order



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Contractor Management Summary

Key takeaways:

- A PCBU has a non-transferrable duty to ensure, so far as reasonably practicable, the health and safety of all its workers
- An effective way to ensure a PCBU meets its WHS to all its contractors, is through the establishment of a contractor safety management system
- This is a comprehensive contractor management system – but not every contract arrangement will need this depth of scrutiny.
- What can reasonably practicably be done by a contracting PCBU to manage WHS risks will depend on:
 - The relative expertise of the parties
 - The control you have over the work, both contractual and actual
 - The type of contracting agreement
- As a contracting PCBU you should give careful consideration to each element of the contractor management system



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Enhanced Regulatory Response



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Enhanced Regulatory Response

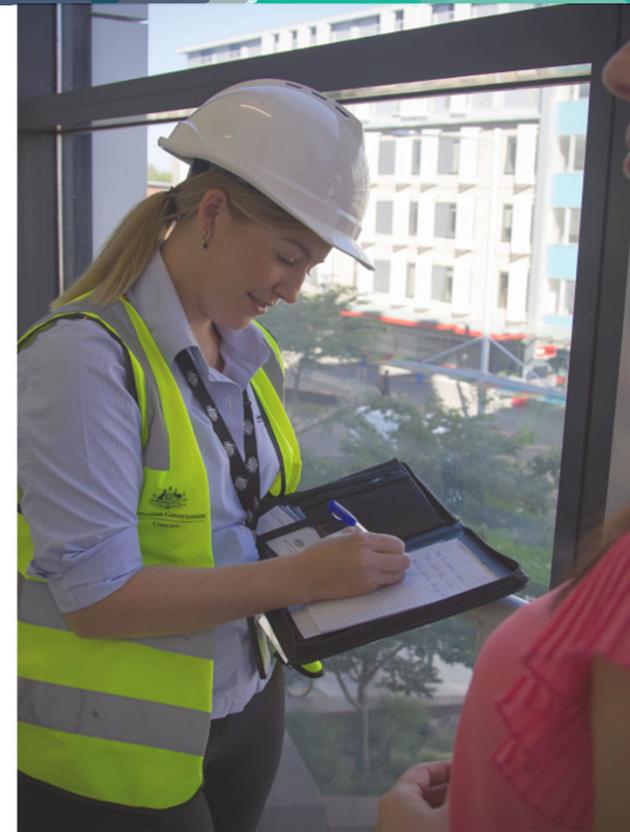
What is changing?

Comcare is reviewing and updating:

- The triaging process for WHS notifications and concerns
- The information requirements for WHS notifications and concern

Future changes

- Changes to WHS notification requirements for psychosocial incidents





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Enhanced Regulatory Response

Triage process review

- **Comcare cannot respond to every WHS notification/concern**
- **Comcare applies a risk-based triage process to prioritise efforts and determine an appropriate response**
- **Comcare is refining this approach to improve regulatory outcomes while minimising impacts on PCBU's**
 - Promote compliance/self-regulation via improved incident response (encourage sound process and responses)
 - Improve detection of non-compliance/opportunities for better practice
 - Reorient to proactive - preventing rather than responding to incidents



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Enhanced Regulatory Response

Triage process review

Overview of the process:

Confirm Comcare has jurisdiction

Prioritise response to:

- Fatalities or matters where death was a reasonably likely outcome (e.g. fall off a three-storey building)

Consider other factors

- previous non-compliances for related matters
- resourcing and controls in place
- whether the event or consequence was unexpected for the PCBU/activity
- the capacity of the PCBU to effectively respond to the matter
- whether the PCBU has now eliminated/controlled the risk to health and safety

Consider whether there is sufficient information to assess the matter



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Enhanced Regulatory Response

Triage process review

Major differences:

- **The approach prioritises regulatory responses where:**
 - There is uncontrolled/undefined risk to health and safety (e.g. incomplete/inadequate response; uncertainty whether risks to health and safety are now controlled)
 - Higher potential for non-compliance (e.g. anticipated controls missing, relates to a previous non-compliance)
 - We have inadequate information to make an informed decision – we will not make assumptions
- **Comcare may contact to clarify situation to inform the decision** – expect limited timeframe, no coercive powers (i.e. focused on what would reasonably be in a complete WHS notification)
- **Inspectors may now resolve matters outside of inspections/investigations**, such as through the provision of ‘information and advice’ or referring matters to PCBUs for consideration



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Enhanced Regulatory Response

WHS notification/concern review

Review:

- The triage process, inclusive of scene release, is dependent upon the information provided in WHS notifications/concerns
- Comcare is refining the guidance and requirements to improve regulatory outcomes while minimising impacts on PCBUs
- Comcare will clarify information requirements for WHS notifications and provide revised and more comprehensive guidance for WHS concerns





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Enhanced Regulatory Response

WHS notification review

Major differences:

- The proposed WHS notification is based on the existing notification, and the intent is to:
 - Clarify WHS notification requirements for notifications: immediate and written
 - Apply a risk-based focus – what risk was released, how was it controlled, why did it occur, is it now controlled
 - Improve the logic flow – the incident, workplace response, controls in place at the time, preliminary assessment of cause, actions taken to prevent recurrence, confirmation that risks are now controlled to the extent practicable
 - Afford an opportunity to provide a reasonable justification for any mandated information that is not provided or a failure to meet required timeframes



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Enhanced Regulatory Response

WHS concern review

Differences:

- The proposed WHS concern approach:

Establishes a dedicated form for submitting a WHS concern (similar to the WHS notification form)

Provides guidance on what is required under each area/question

Reinforces the impacts if the person wishes to remain anonymous

Reinforces the importance of PCBUs having an opportunity to respond to the concern, where practicable



Enhanced Regulatory Response Summary

Summary:

- Comcare is revising its triage process for WHS notifications/concerns
- Comcare is revising the information requirements to support this process and related decisions such as determining scene release
- The approach is risk-based, and will enable Comcare to more efficiently and effectively use its regulatory resources, while reducing impact on PCBU's





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Contractor Management Feedback Survey

Thank you for attending

Please take a moment to complete our short evaluation survey



If you have further questions, you can reach out to Comcare's WHS Helpdesk on

1300 366 979 - WHS.help@comcare.gov.au



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