Engaging Expert Contractors: The Work Health and Safety Obligations of the Business or Undertaking

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Abstract

This article examines the legal principles governing the statutory work health and safety general duties of principals who engage expert contractors to carry out work beyond the expertise of the principal. The article examines recent case law in which superior courts accepted the principal's argument that the engagement of the expert contractor was sufficient to discharge the principal's statutory work health and safety general duty. It then reframes the debate within the principles of systematic work health and safety management, and key provisions in the harmonised Work Health and Safety Acts - the primary duty of care; the key underpinning principles; the positive and proactive officer's duty; and the horizontal duty of consultation, co-operation and co-ordination. It argues that it is likely that courts examining the issue of the principal's work health and safety obligations under the harmonised Work Health and Safety Acts will require principals to do more to actively manage the work of expert contractors to ensure the health and safety of all workers and others potentially affected by the work.

Introduction

The courts have made it clear that an employer's statutory general duties under work health and safety (WHS) legislation are non-delegable.[1] In 2012, however, the High Court in *Baiada Poultry Pty Ltd v The Queen*[2] (*Baiada*) considered an argument that an employer could discharge its duty of care under the Occupational Health and Safety Act 2004 (Vic) (OHSA(Vic)) by relying on the expertise of independent contractors it had engaged. While this case was decided largely on a procedural point, in passing the High Court accepted that where an employer did not have the expertise required to carry out a work activity it was, at least in some circumstances, not reasonably practicable to discharge its duty of care by doing anything more than engaging an expert independent contractor to

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1 See the discussion below at XX.

2 (2012) 246 CLR 92.

carry out the work. This reasoning is consistent with a series of Western Australian Supreme Court decisions interpreting the provisions of the Occupational Safety and Health Act 1984 (WA) (OSHA(WA)). The first part of this article critically analyses the High Court and Western Australian decisions, in the context of case law declaring that the employer's duty is non-delegable.

The second half of the paper reframes these issues within preventive WHS principles. It argues that in the cases analysed the courts lose sight of the preventive, proactive nature of Australian WHS law which aims to constitute arrangements for self-regulation in organisations so that they will act responsibly and comply with their obligations as an ongoing state of affairs.[3] Such an approach requires systematic management of WHS. Instead, because the cases analysed arise from prosecution proceedings that examine 'incidents' ex post, they replicate the thinking found in common law negligence cases where the inquiry is on who is responsible for an incident that has taken place. From 2012-13, the issue has become more complex with the enactment in all Australian jurisdictions — apart from Victoria and Western Australia — of Work Health and Safety Acts (WHS Acts) that adopt the Model Work Health and Safety Bill (Model Bill), accepted by the Workplace Relations Ministers Council in 2009. The WHS Acts impose a primary general duty upon a 'person who conducts a business or undertaking' (PCBU) rather than upon an 'employer', and the duty is owed to 'workers' engaged, or caused to be engaged by the PCBU; and to workers whose work activities are influenced or directed by the PCBU. A 'worker' is defined in s 7 as a person who 'carries out work in any capacity' for a PCBU. The WHS Acts make it clear that the general duties are not transferable or delegable. Further s 46 of the WHS Acts provides that 'if more than one person has the same duty concurrently under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.'

The second half of this paper also considers whether these, and other, features of the WHS Acts affect whether a PCBU can rely on the expertise of independent contractors and others in order to discharge its primary duty of care.

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[3] Johnstone R and Jones N, 'Constitutive regulation of the firm: OHS, dismissal, discrimination and sexual harassment' in Arup C et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Workplace Relationships*, The Federation Press, Sydney, 2006, 483-502.

How an Employer May Discharge Its General Duty by Engaging an Expert Contractor

The cases

An employer may require the services of an independent contractor to perform work requiring expertise that the employer does not have, and cannot be expected to have. For example, if a firm decides to build a new building, or to install complex new plant, the firm cannot be expected to train its own employees to carry out all of the required tasks, nor to employ expert employees to do and supervise the work, particularly if the building or installation is a 'one off' activity. In these circumstances, it is reasonable for the firm to engage expert independent contractors to ensure that the work is done to a high standard. Indeed, it might be foolish to carry out the work without engaging external expertise, because failure to engage expertise might expose the firm's employees and others to high levels of risk. The crucial point is that while the firm may devolve tasks to ensure the efficient and safe performance of work, it cannot absolve itself of responsibility for its WHS obligations.[4] Lord Hoffman in the UK House of Lords decision *R v Associated Octel Co Ltd* [5] (*Octel*) put it very well when he stated that it is self-evident 'that a person conducting his own undertaking is free to decide how he will do so' but must[6]

> do so in a way which, subject to reasonable practicability, does not create risks to people's health and safety. If, therefore, the person engages an independent contractor to do work which forms part of the conduct of the person's undertaking, he must stipulate for whatever conditions are needed to avoid those risks and are reasonably practicable. He cannot, having omitted to do so, say that he was not in a position to exercise any control.

Lord Hoffman went on to state that the firm must protect its employees and others 'not merely from the physical state of the premises … but also from the inadequacy of the arrangements which the [firm] makes with the contractors for how they will do the work.'[7] The firm must ensure that the principal contractor is properly selected, and needs to manage the principal contractor, as far as is reasonably practicable, via the contract,

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[4] See the discussion in the next section of this article, below.
[5] [1996] 4 All ER 846 at 850.
[6] Ibid, at 850-1.
[7] Ibid, at 851.

instruments showing how compliance should occur, and supervision and monitoring, to ensure compliance with the firm's WHS obligations.

As this discussion suggests, the firm's *relative* lack of expertise to carry out the task outsourced to a contractor is relevant not only to (i) its ability to carry out the work activity to the requisite standard, but also to (ii) its ability to ensure, so far as is reasonably practicable, the WHS of all persons involved in or affected by the activity. As the *Octel* case suggests, if the firm outsources work to experts, it still has to ensure, as far as is reasonably practicable, the WHS of workers and all persons affected by the work activities. The firm may well be challenged to understand the nature of the work and the hazards involved, which will make ensuring WHS a difficult task. This article explores the firm's responsibilities for WHS in these difficult circumstances.

In the past seven years five key decisions have been handed down by the High Court and the Supreme Court of Western Australia on the extent of the employer's statutory standard of care in circumstances where the employer engages an expert contractor to carry out work for which the employer lacks expertise. Ironically, these cases have involved the Victorian and Western Australian WHS statutes – the two statutes yet to be harmonised. The OHSA (Vic) requires an employer to, 'so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health'. Section 19 of the OSHA(WA) provides that an 'employer shall, so far as is practicable, provide and maintain a working environment in which the employees of the employer … are not exposed to hazards'.

The five cases have arisen from three scenarios, which illustrate the WHS issues when firms engage expert independent contractors. In each case the court accepted a firm's argument that it had engaged a contractor to carry out particular activities because the contractor had expertise that the firm did not have, and that engaging the expert contractor was sufficient to discharge the firm's statutory WHS general duty.

The first two cases are the Western Australian Supreme Court, Court of Appeal decisions in *Reilly v Devcon Australia Pty Ltd*[8] *(Devcon)* and *Tobiassen v Reilly*[9] (*Tobiassen*) which arose

[8] (2008) 36 WAR 492.
[9] (2009) 178 IR 213.

out of a single incident. Devcon Australia Pty Ltd (Devcon) engaged Kefo Steel Erection & Fabrication Pty Ltd (Kefo) to provide all necessary labour for the supervision and erection of structural steel and concrete tilted panels for a construction project. A company related to Devcon, Glenpoint Nominees Pty Ltd (Glenpoint), paid the invoices arising from the engagement of the labour and the materials. While Mr Kelsh (a rigger and the director of Kefo) and another employee of Kefo were installing purlins to rafters, the rafter upon which they were sitting and which had not been adequately secured, moved and fell, causing other rafters and panels to fall on and fatally injure Mr Kelsh. Devcon and Glenpoint were prosecuted for breaching s 19 of the OSHA (WA), allegedly because they both failed to ensure adequate lateral constraint of the steel roof beams.[10] Section 19(4)[11] of the OSHA (WA) deems independent contractors to be employees in some circumstances for the purposes of the employer's duty to employees.

Tobiassen was appointed by Devcon as a registered builder.[12] The contract specified that Tobiassen was 'engaged to actively manage, schedule and supervise the building work' to ensure all tradespeople carried out their work in sequence, and to control the quality of materials and workmanship. Tobiassen expressly undertook that the building work would be completed in accordance with the plans and specifications. He was prosecuted under the self-employed person's duty in s 21 of the OSHA (WA), the duty on a person constructing a building (s 23)(3)(a)), and the duty on a person in control of a workplace (s 22), amongst other provisions. A common element of these three charges was the allegation that Tobiassen could have taken practicable measures to prevent the collapse of the rafters and the concrete panels.

In the proceedings against Devcon, Murray J in the Supreme Court agreed with the Magistrate's decision at first instance to reject the prosecution's argument that Mr Kelsh was a deemed employee of Devcon's under s 19(4) of the OSHA(WA) – thus neither Devcon nor Glenpoint were the employer of Mr Kelsh. Murray J then considered whether, if he was wrong and Mr Kelsh was an employee of Devcon, Devcon had contravened the employer's duty in s 19. Murray J held that Devcon was entitled to 'do

[10] Note that it may not have helped the prosecution that the alleged offence was framed in terms of the physical work environment rather than the failure to provide and maintain systems of work that did not expose employees to hazards.
[11] Repealed in 2005 and replaced with a similar provision in s 24D.
[12] As required by the Builders' Registration Act 1939 (WA).

no more than rely on the known expertise of Kefo'[13] to discharge the s 19 duty imposed upon Devcon to do what was reasonably practicable to eliminate the hazard. The Court of Appeal in *Devcon* subsequently upheld Murray J's decision.

In the proceedings against Tobiassen, the Court of Appeal overruled Heenan J in the Supreme Court, and upheld the Magistrate's decision that Tobiassen was an employee of Devcon; that the work undertaken by Kefo was not work in which Tobiassen was engaged; that Tobiassen was not a person constructing a building; and that Tobiassen did not have control of the workplace. Crucially, the Court of Appeal followed its decision in *Devcon*, restating that an employer was entitled to do no more than rely on the expertise of the independent contractor to discharge the duty to do what was reasonably practicable.

Two other cases, *Laing O'Rourke (BMC) Pty Ltd v Kirwin*[14] (*Laing O'Rourke*) and *Kirwin v The Pilbara Infrastructure Pty Ltd*[15] (*Pilbara Infrastructure*), also arose out of a single incident. In March 2007 Cyclone George hit a camp site in a cyclonic wind region in the Pilbara, at which prefabricated huts (dongas) had been constructed. Several dongas were detached, damaged or completely destroyed, causing two deaths and multiple cases of serious injury to employees and a contractor. There was expert evidence that the dongas would have provided sufficient protection if they had been correctly tied down and installed according to safety standards.

Laing O'Rourke was engaged by the Pilbara Infrastructure Pty Ltd (TPI) (a wholly owned subsidiary of Fortescue Metals Group Limited (FMG)) to carry out track and bridge work in the construction of a railway line. TPI engaged Spotless Services Australia Ltd to conduct a tender for the installation of the dongas to accommodate workers on the project, including Laing O'Rourke workers. The tender document had erroneously stated that the site was located within a non-cyclonic wind region. Spotless Services withdrew from conducting the tender, after which TPI directly engaged NT Link for the installation of the dongas. NT Link represented that it had significant expertise and experience in the supply and installation of transportable buildings in cyclonic regions, and the magistrate 'expressed the view that TPI and FMG had procured the services of

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13 *Reilly v Devcon Australia Pty Ltd* [2007] WASC 106 (*Reilly v Devcon*) at [50] (and see also [45] and [49]).
14 [2011] WASCA 117.
15 [2012] WASC 99.

apparently well qualified and experienced experts to design and identify the suitable specifications for the buildings'.[16] FMG contracted with an engineering firm, Worley Parsons Services Pty Ltd, for engineering, procurement, construction and management services for the project. FMG and Worley Parsons formed a management group to coordinate the management of the project. FMG, through Worley Parsons, engaged Lawry, an engineer with considerable experience, to supervise, inspect and assess the quality of the installation work. NT Link applied for and was granted a building licence by the Shire of East Pilbara, which did not pick up the mistake in the wind region specification.

TPI, FMG and Laing O'Rourke, were each prosecuted for contraventions of the OSHA(WA). TPI faced 12 charges under s 19(1) for failing to provide and maintain adequate safety procedures in the event of a cyclone and for failing to provide a safe refuge in the event of a cyclone; and five charges for failing to maintain premises occupied by employees able to withstand cyclones.[17] In the same proceedings, FMG faced one charge under s 19(1) for failing to provide and maintain adequate safety procedures in the event of a cyclone. The prosecutor argued that TPI and FMG failed to ensure that the dongas were built according to relevant load specifications by engaging the services of an appropriately qualified engineer specifically to ensure that this had been done.

Laing O'Rourke had not in any way been associated with the construction of the dongas, but in separate proceedings it was prosecuted with two charges under s 19(1),[18] each charge alleging that the dongas had not been constructed to meet the appropriate wind load standards. In *Laing O'Rourke*, the prosecutor argued successfully before the Western Australian Supreme Court (on appeal against a decision by a Magistrate not to convict Laing O'Rourke) that the employer's general duty required Laing O'Rourke to enquire and investigate for itself, including by taking engineering advice if necessary, whether the dongas had been properly designed and built to withstand the effect of the kind of cyclone that eventuated in March 2007.

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[16] Ibid at [85].
[17] Ss 23G and H of the OSHA(WA).
[18] And, inter alia, s 23D, which deems contractors and their employees and sub-contractors in some circumstances to be employees of the engaging employer.

The Court of Appeal in the appeal in *Laing O'Rourke*, and Hall J in the Supreme Court in *Pilbara Infrastructure* (in dismissing an appeal against the Magistrate's decision not to convict), respectively applied the same principles, including the *Devcon* decision, to the use of contractors. They held that whilst Laing O'Rourke, TPI and FMG could not contract out of their duties, they could perform those duties by ensuring that appropriately experienced and qualified experts were retained to deal with matters beyond their competence and expertise, provided the task reasonably appeared to have been carefully and safely performed by the contractor.

In the fifth case, *Baiada,*[19] the company, Baiada Poultry Pty Ltd (Baiada), conducted a business of processing chickens. Baiada engaged the independent contractor DMP Poultech P/L (DMP) to round up chickens, load them into crates, stack the crates into a series of steel modules, and load modules onto a trailer using a forklift truck. Baiada also engaged another independent contractor, Azzopardi Haulage Pty Ltd (Azzopardi), to drive the trailer to Baiada's processing plant. An employee of DMP, who was not licensed to drive a forklift, without supervision used a forklift to move a module on a trailer, which resulted in another module falling and fatally injuring an employee of Azzopardi. Baiada was prosecuted for a contravention of the employer's general duty in s 21(1) of the OHSA(Vic) (together with s 21(3), which deems independent contractors to be employees in some circumstances for the purposes of the employer's general duty.)

WorkSafe Victoria alleged that Baiada should have, but had not:

- provided an adequate system of work that was to be followed at grower farms or broiler sheds;
- ensured that the forklift was operated by a properly trained employee; and
- identified and eliminated or controlled the risks associated with the system of unloading and loading live birds for transport at night.

Baiada argued that to discharge its WHS obligations it was 'entitled' to 'rely on' competent and experienced sub-contractors to carry out work that Baiada could not do itself, because Baiada did not have control over the use and operation of the forklift, and 'a practicable method' for Baiada to perform its s 21 duty was to rely on sub-contractors. The High Court seemed to accept, in principle, that Baiada could, in some circumstances, rely on its expert contractors, but its decision turned on a procedural issue. The High

[19] *Baiada*, above n 2.

Court found that it was not open to the Court of Appeal to conclude from the record of the trial that the charge laid against Baiada was proved beyond reasonable doubt, and the Court of Appeal could not be satisfied that no substantial miscarriage of justice had actually occurred. The High Court ordered a retrial.[20]

In conclusion, in each of the cases discussed in this section, a firm argued that it had engaged a contractor to carry out particular activities to provide expertise that the firm did not have; and then argued that the engagement of the expert contractor was sufficient to discharge the firm's statutory WHS general duty. In each of these cases, the court accepted this argument.

Back to first principles: How is the absolute duty to be discharged?

Can these decisions be reconciled with the generally accepted principles that the employer's duty is non-delegable, that the employer is personally, not vicariously, liable under its duty to employees and non-employees,[21] and that duty holders cannot contract out of their statutory WHS obligations?[22] While a corporate employer can only conduct its activities through human agents, such as its directors, managers, supervisors, employees and contractors,[23] in principle, an employer cannot argue that it has discharged its duty by relying on the activities of its employees, officers and agents, and it cannot exculpate itself by showing that 'it did all it could', and that the responsibility lay with the omissions or inadequate actions of an officer, employee, independent contractor, or other agent of the corporation. In *Kirk v Industrial Relations Commission of NSW*[24] the majority of the High Court summed up the position as follows:

> The obligation upon the employer is expressed in terms personal to that employer. It is the employer who must ensure the health, safety and welfare of employees at work. The obligation is the kind of non-delegable duty spoken of in *Kondis v State Transport Authority*.

The courts have now made it clear that the so-called '*Tesco* principle' does not apply to the duties under the WHS statutes.[25] In *Tesco Supermarkets Ltd v Nattrass*[26] (*Tesco*) the House

[20] For a critique of *Baiada*, see K Wheelright, 'Baida Poultry: Employers, Independent Contractors and Reasonable Practicability in Workplace Safety' (2012) 18 *Employment Law Bulletin* 35.

[21] See, for example, *Octel*, above n 5, and the cases to be discussed in this section.

[22] See *Inspector Melissa Chaston v Sacco Builders Pty Ltd* [2008] NSWIRComm 152, at [37].

[23] *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255.

[24] (2010) 239 CLR 531 at [10].

[25] For an early case in which the *Tesco* principle was applied to Australian work health and safety legislation, see *Collins v State Rail Authority of New South Wales* (1986) 5 NSWLR 209.

of Lords decided that to comply with provisions in the Trade Descriptions Act 1968 (UK) Tesco Supermarkets Ltd could appoint someone within the corporation to discharge the duties imposed by the Act as long as the company took all reasonable precautions and exercised all due diligence to satisfy the statutory defence set out in the Act. The case is also authority for the principle that where an offence requires evidence of the *mens rea* of a corporation, there must be an act or omission performed by someone with the authority to act as the corporation – the board of directors, the managing director or a person to whom a function of the board has been delegated.

In *R v British Steel plc*[27] (*British Steel*) the UK Court of Appeal held that the *Tesco* principle did not apply to WHS offences. It held that an employer defending a general duty prosecution under s 3(1) of the Health and Safety at Work etc Act 1974 (UK) could not argue that the company at the level of its directing mind had taken all reasonable care, and that the fatality had occurred because the worker had disobeyed instructions, and/or the incident resulted from the fault of a supervisor because, according to Steyn LJ, this interpretation 'would drive a juggernaut through the legislative scheme' and 'would emasculate the legislation.[28]

In a very influential commentary on *British Steel*,[29] Professor Sir John Smith explained the position as follows:

> Where a statutory duty to do something is imposed on a particular person (here, an 'employer') and he does not do it, he commits the *actus reus* of an offence. It may be that he has failed to fulfil his duty because his employee or agent has failed to carry out his duties properly but this is not a case of vicarious liability. If the employer is held liable, it is because he, personally, has failed to do what the law requires him to do and he is personally, not vicariously, liable. *There is no need to find someone – in the case of a company, the 'brains' and not merely the 'hands' – for whose acts the person with the duty can be held liable. The duty on the company in this case was 'to ensure' – ie. to make certain – that persons are not exposed to risk. They did not make certain. It does not matter how*; they were in breach of their statutory duty and, in the absence of any requirement of *mens rea*, that is the end of the matter.[30]

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[26] [1972] AC 153.

[27] [1995] 1 WLR 1356,

[28] *British Steel*, above n 27, at 1362-3.

[29] Smith, J, 'Health and Safety at Work' [1995] *Crim LR* 654, 655. This passage was endorsed in *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78 (*Gateway Foodmarkets*); *R v Nelson Group Services Ltd (Maintenance)* [1998] 4 All ER 331 (CA) (*Nelson*); *Attorney-General's Reference (No.2 of 1999)* [2000] QB 796 at 812; *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (*Linework*); *R v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181 (*CICG*) at [25] and *ABC Developmental Learning Centres Pty Ltd v Wallace* [2007] VSCA 138 at [12]-[17].

[30] Emphasis added.

This approach was adopted, and the Australian position clarified,[31] by the Supreme Court of Victoria, Court of Appeal in *CICG*,[32] in the context of sentencing an employer convicted of an offence against s 21 of the *Occupational Health and Safety Act 1985* (Vic). In its submission in mitigation of penalty, Commercial Industrial Construction Group (CICG) accepted that the 'failures' of its site manager 'are the failures of the company'[33] 'no matter how unfair some might think that is'. CICG sought some mitigation in penalty because of the 'unfairness' of this attribution, and for not raising what, it claimed, might be a 'healthy debate as to whether [the supervisor] was or was not the company'. The Court of Appeal was quick to point out[34] that 'these submissions all proceed from a false premise. No question of attribution arose – or could have arisen – in this proceeding.'

The Court of Appeal confirmed that the *Tesco* attribution principle did not apply to the Australian WHS legislation. The Court of Appeal stated that:

> 24 The legislative regime for workplace safety is quite different from that which was in issue in *Tesco*. Breach of s.21(1) of the 1985 Act did not depend on proof of *mens rea*. … Notwithstanding the [reasonable] practicability qualification, the liability is properly to be regarded as absolute, since there is no room for a defence of honest and reasonable mistake. Unlike the position in *Tesco*, there is no 'due diligence' defence, nor is it a defence to show that the breach was 'due to the act or default of another person'.

It then affirmed the view in *British Steel* that a worker will only be exposed to risk if the WHS system has broken down, and that it is immaterial 'at what level in the hierarchy of employees that breakdown has taken place.'[35]

The Victorian Court of Appeal in *CICG* also endorsed a slightly different approach to get to the same result.[36] Following Lord Hoffman in *Meridian Global Funds Management Asia Limited v Securities Commission*,[37] it accepted that the question of whether the application of a statutory provision to a company involves rules of attribution − and, if so, what form those rules should take − is a question of construction of the relevant statute. It concluded that 'on the proper construction' of the employer's general duty 'no rules of attribution are called for', [38] and that 'the only question is whether the employer company

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[31] CICG, above n 29, at [25].
[32] CICG, above n 29.
[33] Ibid at [20].
[34] Ibid at [22].
[35] Ibid [25]. See also *Gateway Foodmarkets* , above n 29; and see also *Linework*, above n 29 , per Tipping J, at 649-50.
[36] This approach was taken by the majority in the New Zealand Court of Appeal in *Linework,* above n 29.
[37] [1995] 2 AC 500, especially 506-7 and 511.
[38] *CICG*, above n 29, at [30].

has done everything that it was (reasonably) practicable to do to ensure the safety of its employees.'[39]

The Victorian Court of Appeal concluded[40] that a court in a WHS prosecution must decide – by examining the evidence of the supervisor's and employees' acts or omissions, and the resultant serious risks to which employees were exposed – whether the company has done everything reasonably practicable to ensure the WHS of employees. If a reasonably practicable measure was not taken, then the company has failed to discharge its general duty of care – regardless of whether the failure was due to the act or omission of a senior officer, a branch officer, manager or by a junior employee.

I conclude this section by noting that it is well accepted that an employer must discharge its duty irrespective of a duty imposed on other parties, for example a contractor or an employee, in the same situation. In particular, the courts have consistently stated that employers cannot attempt to exculpate themselves from liability for contraventions of the general duty provisions by arguing that the contravention was due to the inadvertence, negligence or disobedience of employees, including the injured employee.[41]

Can an employer 'rely on' the appointment of expert independent contractors to discharge the employer's general duty?

The discussion in the previous section suggests that, at first blush, the employer's general duty is non-delegable, and that the employer is personally responsible for providing and maintaining a safe system of work in order to discharge its general duty obligations, and for the failures of employees and agents to carry out the safe system of work established by the employer. The key issue, however, is whether the company has done everything reasonably practicable to ensure the WHS of its employees or others. Where the employer does not have the expertise to carry out an activity, the safest approach may be to employ new employees, or engage independent contractors, with the requisite expertise. If the former approach is taken, the only issue would be whether it was reasonably practicable for the employer to establish a safe system of work for the activity

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39 *CICG*, above n 29, at [30].

40 *CICG*, above n 29, at [23].

41 See, for example, *R v Australian Char Pty Ltd* (1996) 64 IR 387; *Holmes v RE Spence & Co Pty Ltd* (1993) 5 VIR 119; *Tenix Defence Pty Ltd v Maccarone* [2003] WASCA 165, at [45]; *Ferraloro v Preston Timber Ltd* (1982) 42 ALR 627; *Rail Infrastructure Corporation v Inspector Page* [2008] NSWIRComm 169. See further Tooma, M, *Tooma's Annotated Occupational Health and Safety Act 2000 (NSW)*, Thomson Reuters, 2009 at 49-50.

in question, and to supervise the expert employee and ensure that the expert employee followed the employer's safe system of work.[42]

The decisions in *Baiada*, *Laing O'Rourke*, *Pilbara Infrastructure*, *Devcon* and *Tobiassen*, discussed above, would appear to take a different approach when the employer engages contractors with expertise or experience that the employer lacks. These cases suggest that while WHS responsibilities cannot be delegated, they can be allocated, and may be influenced by the notion that where contractors are engaged they are 'external' to the engaging company, rather than 'internal' as is the case of the employees in the *CICG* and *Linework* decisions. Complex issues arise, however, when expert contractors are engaged. For example, in the Victorian Supreme Court, Court of Appeal in the Baiada litigation Nettle JA examined the two key lines of cases in *Devcon*[43]and the Court of Appeal of England and Wales decision in *R v Associated Octel Co Ltd,*[44] which were followed in *R v ACR Roofing Pty Ltd,*[45] and considered that they had set out common principles:

> Both recognize that, in the scheme of things, an employer does not ordinarily have control over the way in which a competent or expert contractor does the work which the contractor is engaged to perform. Equally, both allow that there are cases where an independent contractor is susceptible to direction in some respects. Additionally, *Associated Octel* is clear, and *Reilly v Devcon* does not gainsay, that a contractor may be susceptible to direction regarding the safety measures to be observed while work is performed. Whether it is reasonably practicable for an employer to exercise such a power of direction is then a question of fact and degree.[46]

This part of the article examines the way in which the decisions in *Baiada*, *Laing O'Rourke*, *Pilbara Infrastructure*, *Devcon* and *Tobiassen* address these complex issues and summarises the legal principles emerging from these cases.

(a) The issue of the expertise of independent contractors is part of the 'reasonably practicable' calculus

The High Court in *Baiada* confirmed that the prosecution must prove beyond reasonable doubt that the principal's engagement of the expert contractor(s) was not sufficient to

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42 See *Nelson*, above n 29. See also *Gateway Foodmarkets Ltd,* above n 29, at 84

43 *Devcon,* above n 7, at [34]–[35].

44 [1994] 4 All ER 1051 at 1063.

45 (2004) 11 VR 187 at 213.

46 Nettle JA in *Baiada Poultry Pty Ltd v The Queen* [2011] VSCA 23 (18 February 2011) (*Baiada Poultry Pty Ltd*) at [19].

discharge the principal's duty to do all that was reasonably practicable to provide and maintain a safe work environment.[47] The majority of the High Court stated[48] that:

> The words "reasonably practicable" indicate that the duty does not require an employer to take every *possible* step that could be taken. The steps that are to be taken in performance of the duty are those that are reasonably practicable for the employer to take to achieve the identified end of providing and maintaining a safe working environment. Bare demonstration that a step could have been taken and that, if taken, it might have had some effect on the safety of a working environment does not, without more, demonstrate that an employer has broken the duty.

The High Court stated that the court did not just have to consider what steps Baiada *could have taken* to secure compliance but

> also whether Baiada's obligation "so far as is reasonably practicable" to provide and maintain a safe working environment *obliged it*: (a) to give safety instructions to its (apparently skilled and experienced) subcontractors; (b) to check whether its instructions were followed; (c) to take some steps to require compliance with its instructions; or (d) to do some combination of these things or even something altogether different.[49]

More specifically, the majority of the High Court[50] queried the the majority of the Victorian Supreme Court, Court of Appeal's finding about the reasonable practicability of the measures that Baiada could have taken to address the hazard. The majority of the Court of Appeal had held that there had not been a substantial miscarriage of justice due to the trial judge's failure to instruct the jury that the prosecution must prove beyond reasonable doubt that the principal's engagement of the expert contractor(s) was not sufficient to discharge the principal's duty to do all that was reasonably practicable to provide and maintain a safe work environment.[51] It concluded that'[i]t was entirely practicable for [Baiada] to [direct] the contractors to put loading and unloading safety measures in place and to check whether those safety measures were being observed from time to time', and pointed to four considerations that supported this conclusion:

1. neither DMP nor Azzopardi had specialist expertise in loading or unloading that Baiada lacked;
2. the risk of death or injury when a forklift was being used and the need to take precautions were obvious;
3. the necessary precautions were commonsense measures well known to Baiada and throughout the industry; and

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[47] Baiada above n 2, particularly at [1]. See also Hall J in *Pilbara Infrastructure* , above n 15, at [75].
[48] *Baiada* above n 1 at [15].
[49] Ibid at [33].
[50] Ibid at [37].
[51] S 568(1) Crimes Act 1958.

4. the cost of issuing safety instructions was minimal compared with the gravity of the risk of harm.[52]

The High Court doubted that the first of these considerations bore upon whether it was practicable for Baiada to give instructions to its subcontractors or to check whether its instructions were being observed. It also noted that no consideration was given to how or at what cost the process of 'checking' compliance with safety instructions could or would be undertaken or to the likelihood of the risk eventuating. The High Court reasoned that the four considerations listed by the majority of the Court of Appeal did not *require* the conclusion that not taking the identified steps was a breach of Baiada's duty:[53] the evidence *permitted* the jury to conclude beyond reasonable doubt that it was reasonably practicable for Baiada to take steps to ensure compliance with instructions of that kind, but did not *compel* that conclusion.[54] Thus the High Court held that it was not open to the Court of Appeal to conclude from the record of the trial that the charge was proved beyond reasonable doubt.

In conclusion, the issue of the expertise of contractors is to be considered as *one* of the considerations in the 'reasonable practicable' calculus. However, as discussed in the next section, expertise of the contractor only becomes significant if it is expertise that the principal (the employer) is not expected to have. On this the courts have adopted an objective test in order to determine the type of knowledge to be expected of a principal.

(b) 'Reasonably practicable' and the knowledge expected of the principal (the employer)

As *CICG* noted, the general duties in the current Australian WHS statutes are all 'absolute' duties, qualified by the expression 'so far as is reasonably practicable'. While this would appear to be oxymoronic, it means that the prosecution does not need to establish that the duty holder knew that its act was wrongful, and that to discharge the absolute duty, the duty holder is only required to take 'reasonably practicable' measures. What is 'reasonably practicable' is defined in s 18 of the WHS Acts, s 20(2) of the OHSA (Vic), and s 3 of the OSHA (WA).

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[52] *Baiada Poultry Pty Ltd,* above n 46*,* at [63].
[53] *Baiada*, above n 1 at [38].
[54] Ibid at [36].

The courts[55] have interpreted the expression 'so far as is reasonably practicable' to impose an 'objective' test: what would a reasonable person in the position of the employer know about the hazard and risks, and how would they 'weigh up' the risks and the practicability and cost of eliminating, or reducing, them? A measure is only *not* reasonably practicable if there is a 'gross disproportion' between the two sides: that is, the 'time, trouble and cost' of removing the risk is 'grossly disproportionate' to the level of risk.

The statutory definitions of 'reasonably practicable' have largely codified the judicial definition, but with subtle differences. For example, the OHSA (Vic), which applied in *Baiada*, defines 'reasonably practicable' as having regard to 'the following matters':

> (a) the likelihood of the hazard or risk concerned eventuating;
> (b) the degree of harm that would result if the hazard or risk eventuated;
> (c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
> (d) the availability and suitability of ways to eliminate or reduce the hazard or risk;
> (e) the cost of eliminating or reducing the hazard or risk.

Section 3 of the OSHA (WA) provides that in the general duties, '"practicable" means "reasonably practicable"' and then defines 'reasonably practicable' in terms similar to s 20(2) of the OHSA(Vic).

While these statutory formula draw on the same 'matters' as are found in the judicial definition of 'reasonably practicable', the language is different. Notably, the definitions omit the 'grossly disproportionate' test and do not *explicitly* require the courts to 'weigh up' the factors. As Murray JA observed in *Laing O'Rourke*, the objective 'state of knowledge' of the risk and gravity of injury and the means of mitigating the risk 'is that possessed by persons generally who are engaged in the relevant field of activity and not merely the actual knowledge in fact possessed by a specific employer in the particular circumstances.'[56]

A crucial issue in the expert contractor cases introduced above is precisely what is the knowledge possessed by persons 'generally engaged in the relevant field of activity'? Is it the best knowledge available within the industry as a whole; or is it what a person

[55] See *Edwards v National Coal Board* [1949] 1 KB 704 at 712.
[56] *Laing O'Rourke*, above n 14, at [33].

performing the same kind of work as the employer, principal or contractor ought to know? If, as argued by Heenan J in *Reilly v Tobiassen,*[57] the former is the test, then the standard of care imposed upon the employer or principal is very high, and the employer or principal would have to gain the requisite knowledge by research or training, by employing an employee with expertise, or by seeking the advice of experts. If it is the latter, then it is arguable that an employer or principal is able to discharge its duty simply by engaging an expert independent contractor, without itself building up its knowledge base. This was the view preferred by the Western Australian Court of Appeal[58] when it overruled Heenan J's decision in *Reilly v Tobiassen.*

At first instance in the prosecution of Tobiassen, the Magistrate ruled that 'while a professional engineer would have known of the risks associated with a lack of lateral restraint and how to deal with them, those were not matters of which [Tobiassen] was aware and they were not matters of which a registered builder would reasonably have been expected to be aware.'[59] Accordingly the Magistrate determined that it was not practicable for Tobiassen to have ensured the adequate lateral restraint of the rafters.

Heenan J disagreed and held that the fact that the risks were not known to Tobiassen, and that they were not matters which a registered builder would be expected to know, was not to the point. Heenan J said that it was sufficient that 'there is an objective state of knowledge within the industry which exposes the hazard and suggests a means of coping with it'.[60] The general duties required persons on whom the duties were cast 'to acquaint themselves with the objective state of knowledge within the industry and … to take advice from experts and others to supplement his or her own appreciation of the situation'. Heenan J noted[61] that Dawson, Toohey and Gaudron JJ in *Chugg v Pacific Dunlop Ltd*[62] observed that 'in many instances the questions of practicability do not involve special knowledge', but simply common sense. Heenan J justified his broad view as being:

> consistent with the policy of the Act which, in my view, is intended to achieve a situation that if, objectively speaking, there is known within an industry that there are hazards of a

[57] [2008] WASC 6.
[58] *Tobiassen,* above n 9.
[59] *Reilly v Tobiassen* above n 57 at [21].
[60] Ibid at [121].
[61] Ibid at [118].
[62] (1990) 170 CLR 249 at 260.

> particular kind which may be injurious to the health and welfare of persons on worksites, and that there are means available of avoiding or reducing those hazards, then, having regard to factors such as the degree of risk, the means of removing or mitigating the risk and the availability, suitability and the cost of the means to reduce the risk, the decision about practicability will then be taken in a balanced and objective fashion.[63]

Heenan J argued that his view was 'entirely consistent with the legislative policy to bring work safety standards into compliance with objective safety criteria known to industry as a whole.'[64] Heenan J reasoned that this standard was not too onerous because it meant simply that an employer, self-employed person or employee bearing a general duty under the Act:

> will be a person who is informed and cognisant of the objective standards of dealing with hazards existing within the industry in which he or she may be working, even though this may require that person to seek advice from experts or others better informed than himself or herself so as to become acquainted with that objective standard. [65]

Accordingly, Heenan J found that the fact that the relevant knowledge existed within the building industry was sufficient, even if it was confined to qualified engineers, and regardless of the fact that it would not be known to persons in the position of the appellant.[66]

This reasoning seems compelling. The implication is that if a duty holder does not him/ herself have the relevant knowledge they will need to advice from experts or others who are well informed. However, the Court of Appeal in *Devcon,* and then in the appeal against Heenan J's decision in *Tobiassen*, took the contrary position, and held that neither Devcon or Tobiassen was required *to inform themselves* of the means necessary to ensure there was adequate lateral restraint of the steel beams erected by Kefo.

In *Devcon*, the Court of Appeal dealt with the issue of the 'state of knowledge' on its way to holding that it was not reasonably practicable for Devcon to do more than rely on the expertise of the independent contractors. The Court of Appeal accepted that the 'state of knowledge' expected of Devcon was to be determined objectively, and stated that a crucial issue was 'who might ordinarily be expected to have that knowledge':[67] 'it would be a relevant consideration that the expert knowledge required to avoid the hazard fell

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63 *Reilly v Tobiassen* above n 56 at [119]. See also [120].
64 Ibid at [123]
65 Ibid at [123]
66 *Tobiassen* above n 9 at [49].
67 At para 60. See *Pilbara Infrastructure*, above n 15, at [98]-[101].

within the province of the specialist contractor which had been engaged to do the work that gave rise to the hazard and outside that of the … employer.' The Court referred to the Western Australian Supreme Court case of *Morrison v De Bono*[68] where Le Miere J said that to succeed in a conviction under the OSHA(WA) the prosecutor 'must prove either that the defendant actually knew of the risk of injury or harm to health occurring or that *a reasonable person in the position of the defendant* [our italics] would have appreciated or foreseen the risk ... of the injury or harm to health occurring'.

In *Tobiassen*[69] the Court of Appeal took a similar approach and concluded that the erection of concrete panels, the fixing of rafters, the particular hazard that led to the accident and the means of eliminating it were all matters falling outside the expertise of Tobiassen, but were matters that Tobiassen reasonably believed were within the expertise of the contractors.

Of course, if the principal acquires knowledge about the issues, then this will affect the measures that will be reasonably practicable for them to take. For example, in *Pilbara Infrastructure* [70] Hall J stated that if a principal is alerted to a particular risk or issue by a specialist contractor then there may be further steps that it is reasonably practicable for them to take.

(c) Acquiring expert knowledge or relying on experts to carry out the work?

The Western Australian Court of Appeal in *Devcon* considered whether an employer lacking the requisite expertise to carry out an activity was required to acquire the expertise (as suggested by Heenan J in *Reilley v Tobiassen),* or whether the employer could fulfil its duty by engaging an expert independent contractor. It preferred the latter view, and endorsed 'what was said by Steytler J in *Hamersley Iron*'[71] about the employer's general duty in s 9(1)(a) of the Mines Safety and Inspection Act 1994 (WA), which resembled the s 19 duty in the OSHA(WA). According to the Court of Appeal in *Devcon*, in *Hamersley Iron,* Steytler J held that:

> if the obligation to provide a safe workplace requires an employer to call upon expertise that it lacks, then it should do so. However, he added that, if the employer had relied upon a

68 *Morrison v De Bono* (2005) 147 IR 454 at [22].
69 Above n 9.
70 Above n 15 at [136].
71 *Hamersley Iron Pty Ltd v Robertson* (Unreported, WASC, Library No 980573, 2 October 1998).

> specialist contractor to perform a task which demonstrably fell within its area of expertise and outside that of the employer, and if the task reasonably appears to the employer … to have been carefully and safely performed by the specialist contractor, it would ordinarily be difficult to conclude that the employer had breached the duty put upon it by the Act.[72]

The Court of Appeal in *Devcon* agreed with this construction, arguing that a 'construction imposing a greater burden on an employer of the kind there under consideration would be unreasonable and unsupported by the language of the section, read in its context'.[73] The Court of Appeal did not accept the argument put by the prosecutor in *Devcon* that the court's construction of the general duty and reasonably practicable, outlined above, would contravene the non-delegability principle because the employer sought to discharge the duty by relying on the person to whom the duty was owed.[74]

Similarly, in *Pilbara Infrastructure* Hall J argued that 'an employer or principal faced with a task beyond its area of expertise'[75] (or knowledge and ability)[76] cannot 'relieve itself of any responsibility'[77] under the WHS legislation by contracting out or delegating their duties. [78] His honour emphasised that the duty remained 'a personal one', [79] but that it could be discharged by 'ensuring that relevant expertise is brought to bear on the task'[80] and 'ensuring that an appropriately experienced and qualified person was retained to deal with matters beyond their own knowledge and ability'.[81] 'What is required in any particular case would depend upon the facts of the case'.

Exactly what the courts require of an employer engaging an expert contractor is examined in the next section.

(d) When can an employer discharge its duty by relying on expert independent contractors?

It is clear from the previous discussion that:

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72 *Devcon* above n 8, at [64]
73 Ibid at [65].
74 Ibid at [69].
75 *Pilbara Infrastructure* , above n 14, at [102].
76 Ibid at [180].
77 Ibid at [102].
78 Ibid at [180].
79 Ibid at [102].
80 Ibid at [102].
81 Ibid at 180].

> In some circumstances the engagement of independent contractors may be the only reasonably practicable way of ensuring and maintaining a safe working environment.[82]

What then are the circumstances in which the courts will find that the only reasonably practicable way to ensure a safe working environment is to engage an expert contractor? The most helpful principles are those articulated by Hall J in *Pilbara Infrastructure*:[83]

> … if the obligation to provide a safe work place requires an employer to call upon expertise that it lacks then it should do so. …[I]f an employer relied upon a specialist contractor to perform a task which demonstrably fell within the contractor's area of expertise and outside that of the employer, and if the task reasonably appears to the employer to have been carefully and safely performed by the contractor, it would ordinarily be difficult to conclude that the employer had breached the statutory duty. …[I]n circumstances of that kind it would not ordinarily be practicable for the employer to do more.[84]

Further,

> It is unlikely to be enough for a person to merely assume that someone else will attend to safety requirements, but if such an assumption is based upon inquiries made, assurances given, a reasonable belief as to the skills of those responsible for construction and a reasonable belief that regulatory approval has been obtained for the buildings, it may be wellfounded.[85]

The cases outlined in this first part of the article clearly show that the courts have decided that in some circumstances an employer can discharge its statutory general duty of care by engaging an expert independent contractor to carry out work for which the employer lacks expertise. In *Baiada*, the High Court accepted that it was for the prosecution to prove that the employer should have taken reasonably practicable measures beyond simply engaging the expert independent contractor in order to ensure the safest work environment.

The second part of this article considers what an employer should do when it lacks the expertise to carry out a specialised task, but reframes the issues within the principles of systematic WHS management.

Preventing Harm through Systematic Work Health and Safety Management

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[82] Heydon J in *Baiada,* above n 1, at [65]; and see also [70].
[83] *Pilbara Infrastructure*, above n 15, at [99]), and relying on the decision of Steytler J in *Hamersley Iron*, above n 71, which was endorsed in *Devcon,* above n 8. See also *Tobiassen* above n 9 at [65].
[84] *Pilbara Infrastructure* , above n 15, at [99]
[85] Ibid at [108].

What should employers do?

In each of the decisions in the first part of this article the issues were framed by focusing on an incident that had occurred and analysing who, under the circumstances, was responsible for the incident: that is, who should be blamed for what actually happened? In each decision the courts appear to make a series of moves that reduced the liability of the principal.

First, the courts appear uncritically to conflate expertise required to carry out the work with expertise required to ensure WHS. The assumption appears to be that if an employer does not have the expertise to carry out the work, it does not have the expertise to ensure that the work is performed safely and without risks to health by a contractor. Equally the courts appear to assume that an independent contractor who has expertise to carry out particular work will also have expertise in performing that work safely and without risks to health.

Second, the courts seem to consider it unduly burdensome for an employer to seek out knowledge and to develop expertise so as at least to know enough about the task undertaken by the expert contractor to ensure the development of a safe system and methods for performing that expert work, and to supervise the WHS aspects of that work.

Third, the courts do not distinguish two kinds of expert contractor situations:

> (a) where the principal and the contractor work in the same industry, but the contractor has specialist knowledge or expertise that the principal does not have – for example, where the principal is a construction company and the expert contractor has particular expertise in a specialist process (for example, tilt-up construction); and
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> (b) where the principal and the expert contractor work in completely different industries, and the principal engages the contractor to perform a 'one off' task – for example, the principal is a prospecting company and engages the contractor to construct a donga in a remote location.

Fourth, the courts appear not to distinguish between situations in which the principal or client engages the expert contractor to perform work that is clearly isolated and

quarantined from other activities (for example, the situation posed by Heydon J in *Baiada* where a householder engages an electrician to carry out specialist work),[86] as distinct from a principal engaging a contractor to carry out work in the course of conducting its business, and where there may be a number of interdependent actors – for example, the work of the chicken handling and transporting contractors in *Baiada,* or the work of the specialist tilt-up and building supervision contractors in *Devcon* and *Tobiassen.*

A situation where a householder who knows nothing about electrical work engages an expert electrician to perform a discrete task has very little in common with a situation where a chicken processing firm regularly engages a series of contractors to carry out work which is part and parcel of the chicken processing firm's business, with which the firm is familiar, and which requires co-ordination between the contractors to ensure that the work is carried out safely. In the first scenario, as Heydon J in the *Baiada* case observed, the electrician would justifiably be annoyed if the householder sought to oversee the work.[87] In the second scenario, the principal understands the operation, and is in a position to require the contractors to co-ordinate their operations and to co-operate to ensure that they are carried out safely.

Fifth, the courts seem to caricature the gap between the independent contractor's expertise and the principal's expertise. For example, in *Baiada* Baiada and the independent contractors both operated in the same industry as repeat players, and indeed, both were involved in the same work. The High Court appeared only to be interested in the expertise and experience of the contractors (and appeared to exaggerate the skills and expertise involved), and seemed to ignore that the work the contractors carried out was in fact work that Baiada itself carried out. In short, it was difficult to see how Baiada lacked expertise in the contractors' work.

This caricature of the difference in expertise partly arises because of the final factor: that the courts reached their conclusions without considering what is required to comply, on an ongoing basis, with the positive, proactive duties in Australian WHS law. Compliance with such continuing obligations requires self-regulation in organisations; that is,

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[86] *Baiada,* above n 2, at [65].

[87] In any event, it is unlikely that the householder will be regarded to be an employer or self-employed person, or a person conducting a business or undertaking and thus owing the primary duty in the WHS Acts: *Explanatory Memorandum — Model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2 December 2010, pars 24 and 25; Safe Work Australia, *Interpretive Guidelines—Model Work Health and Safety Act: The Meaning of 'person conducting a business or undertaking'* (2011), 3-4.

accepting responsibility, building capacity and institutionalising arrangements to ensure compliance as an ongoing state of affairs.[88] It is an approach that is compatible with and supported by systematic WHS management.[89]

All conscientious employers – whether large or small – should have knowledge of the principles of systematic WHS management.[90] What do these principles tell us about the way in which an employer should approach the task of ensuring that work carried out by expert contractors is performed, as far as is reasonably practicable, safely and without risks to health? A key point to note is that they require the firm to have arrangements to address WHS for contractors, sub-contractors, agency and other precarious workers. Liz Bluff[91] has recently summarised the other elements – or principles and practices – as including:

- management commitment and leadership in planning, resourcing, supporting and reviewing the implementation of WHS measures;
- integrating WHS management into other decision-making and activities, so that WHS resources and processes are distributed throughout the organisation;
- taking a planned and order-seeking approach to WHS management by developing and implementing programs and action plans; reviewing their progress and effectiveness; and allocating responsibilities to, and supporting, managers, supervisors and workers;
- using experiential learning and other forms of training to build managers', supervisors' and workers' WHS knowledge and skills appropriate to their work roles and responsibilities;

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88 Johnstone and Jones, above n 3; Parker C, *The Open Corporation. Effective Self-Regulation and Democracy,* Cambridge University Press, Cambridge, 2002, pp ix-x, 27, 43-61.

89 This does not imply complex management systems but rather methodical and organised effort to manage health and safety.

90 Indeed, work health and safety regulators in each jurisdiction have approved codes of practice on WHS management: see, for example, Safe Work Australia, Model Code of Practice *How to Manage Work Health and Safety Risks* , 2011.

91 R Johnstone, E Bluff and A Clayton, *Work Health and Safety Law and Policy*, 3 ed, Thompson Reuters, 2012, 28-31.

- facilitating open and constructive communication about WHS matters among managers, supervisors and workers, and enabling active participation by all to enable positive, proactive problem solving about WHS;

- proactively managing WHS risks by identifying potential hazards; considering the severity and likelihood of harm from exposure to hazards; eliminating or minimising exposure to hazards; and continually reviewing risk control measures to ensure that they are implemented, effective and maintained;

- documenting arrangements to manage WHS to ensure they are communicated to, and implemented by, managers, supervisors and workers;

- monitoring and reviewing WHS management to confirm strengths, identify and address weaknesses, and continuously improve these arrangements; and

- acknowledging that a wide range of contextual factors within and outside organisations — including organisational 'culture'; power inequalities; business priorities; market pressures; and informal and formal communication and decision-making processes — impede or improve decision-making and action on WHS.

What does this mean for employers lacking the expertise to carry out key activities as part of its business? These principles of systematic WHS management suggest that it is unlikely that it will be enough simply to engage an expert contractor, and 'leave them to it.' The employer must consider the broad WHS issues in the proposed work,[92] including whether the job requires specialist skills, expertise or resources, or a particular level of experience, that the employer does not have. If specialist skills, expertise, experience or resources are absent, the employer must ensure that one of its employees has, or acquires as far as is reasonably practicable, knowledge about the work process and how to ensure that it is conducted safely and without risks to health. Australian WHS regulators have produced a wide range of codes of practice and guidance material, and if any of these cover the work to be carried out, at least one manager or supervisor must know and understand the WHS principles and procedures in the document.

[92] Ministry of Business, Innovation and Employment, New Zealand, *Health and Safety in Contracting Situations*, undated, 11, 17-18.

If the safest way of carrying out the work requires an expert independent contractor to be engaged, in selecting the contractor (whether by tender or other means) the employer must ensure that 'safety is as critical a factor as the contract price or duration.'[93] The employer must ensure, in advance, that the WHS standards for the work are determined, develop a WHS plan for managing the project, and provide information to the contractor or potential contractors on the WHS issues involved in the proposed work.[94] The employer must then exercise due diligence in assessing and appointing the contractor to ensure that the contractor has the required competence, expertise, resources and experience to carry out the particular work safely, and without risks to health. This will require the employer to assess contractors' technical and WHS management competence.[95] The contractor must provide documentation about how they will perform the work safely, maintain agreed standards, systems and processes established earlier in the contracting process, and other relevant matters.[96]

The employer must discuss the arrangements for ensuring WHS with the chosen contractor, and provide the contractor with all known information that might be relevant to the hazards associated with the contract.[97] It must also ensure that the contractor takes an effective, systematic approach to managing WHS in their work procedures. Crucially, the employer must require the contractor to identify the risks involved in the work the contractor is performing, and to specify how the risks will be controlled. Compliance with WHS requirements should be a pre-condition of the award of any contract.[98]

The contract between the employer and the independent contractor should clearly set out the obligations of the contractor in WHS matters. For example, it should specify the contractor's specialist area of expertise; the contractor's responsibility to ensure WHS for their operations; and the reliance that the principal is placing on the contractor in WHS matters within that area of expertise. The arrangements for addressing the health and safety aspects of the work should be incorporated into the contract, including details of

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93 *Central Cranes Limited v Ministry of Business, Innovation and Employment* [1997] 3 NZLR 694.
94 Ministry of Business, Innovation and Employment , above n 92, 13, 18-19.
95 Ibid 13, 19, 29-32. For example, a pre-tender questionnaire can be used to determine how well contractors manage health and safety generally and for specific hazards.
96 Ibid 14, 18-19.
97 Ibid 14.
98 Ibid 29.

lines of communication, responsibilities, accountability, safe systems of work, safe work method statements and so on.[99]

The employer must also consider:

- whether there are any WHS directions that are reasonably practicable for it to issue to contractors?; and
- how, and to what extent, the employer can reasonably supervise, throughout the duration of the contract, the work, and/or monitor contractor compliance with the agreed standards and controls, the contractor's WHS procedures and with WHS obligations.

As far as is reasonably practicable, the employer must:

- require reports from the contractor about incidents or any workplace changes that may impact upon the integrity of the contractor's risk control measures;
- act immediately and proactively on identified breaches, incidents or identified unsafe practices, taking necessary steps if the employer observes unsafe practices on site visits, and meeting with the contractor to resolve issues; and
- periodically review its systematic management of WHS, including how it is overseeing the work of expert contractors.

In some circumstances the best the employer can do may be to simply engage an expert contractor with the requisite WHS competence to do the job, and 'leave them to it' – particularly where the principal has no expertise in the activity, and the task is an isolated and quarantined 'one off' task, where there is little risk to third parties: for example, a householder engaging an expert electrician for a discrete task.

But where a principal engages an expert contractor for a one off task that might affect the WHS of the principal's employees or third parties, and the principal works in the industry, it would not be sufficient for the principal to engage the expert contractor and 'leave them to it'. The principal has a duty to ensure that the contractor has the requisite expertise and experience; to require the contractor to show how it will ensure the WHS

[99] Ibid 14, 33-39.

of itself and others; and to ensure that the contractor implements its WHS arrangements.[100]

The impact of the harmonised work health and safety statutes

No doubt it will be argued that some of these proposals go beyond what the courts have required employers to do when engaging expert independent contractors. It is likely, however, that if the courts were to re-examine the issue in the context of the harmonised WHS Acts, and framed by the principles of effective WHS management, the courts might well find some or all of these proposals to be 'reasonably practicable'. This part of the article examines key provisions of the harmonised WHS Acts that support this reading of a firm's obligations when it engages expert independent contractors.

Before examining these provisions, I note that the Workplace Relations Ministers' Council (WRMC) rejected a recommendation of the *National Review of Occupational Health and Safety Laws* that might have had a significant bearing on the discharge of the PCBU's duty where expert independent contractors were engaged. Some of the Australian WHS statutes have required duty holders to obtain competent advice in order to fulfil the employer's legislative responsibilities.[101] Most notably, s 22(2)(b) of the OHSA (Vic) requires an employer to 'employ or engage persons who are suitably qualified in relation to occupational health and safety to provide advice to the employer concerning the health and safety of employees at the workplace'. Part 8 of the Workplace Health and Safety Act 1995 (Qld) made provision for WHS officers (WHSOs) with a WHS advisory role in medium sized and larger organisations (30 or more employees). The National Review[102] recommended that the model WHS Act should include an equivalent of this Victorian provision, and for the appointment of WHSOs. Rather surprisingly, this recommendation was one of the very few rejected by the WRMC,[103] on the rather spurious ground (see the discussion of the non-delegability of duties above, and the principles in the WHS Acts below) that 'an unintended consequence could be that

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[100] See Model Code of Practice *How to Manage Work Health and Safety Risks*, above n 89, at p 6.

[101] Eg, reg 16 of the Occupational Health and Safety Regulation 2001 (NSW). The Occupational Health, Safety and Welfare Act 1986 (SA) and the Workplace Health and Safety Act 1995 (Tas) required employers to appoint 'responsible officers'.

[102] *National Review into Model Occupational Health and Safety Laws Second Report to the Workplace Relations Minister's Council January 2009*, Australian Government, 2009, ch 32, rec 139.

[103] Workplace Relations Ministers' Council, *WRMC Response to Recommendations of the National Review into Model OHS Laws,* 2009, p 37.

persons conducting a business or undertaking would be encouraged to delegate their responsibilities'.

There are four key provisions of the harmonised WHS Acts that support the approach to managing the WHS of expert independent contractors outlined in the previous section: the primary duty of care; the key underpinning principles; the positive and proactive officer's duty; and the horizontal duty of consultation, co-operation and co-ordination.

(a) The primary duty in section 19

The primary duty of care in the harmonised WHS Acts is important because it differs significantly from the approach taken to the employer's general duty in the OHSA(Vic) and OSHA(WA) discussed earlier in this article. It recasts the duty as being owed by 'a person conducting a business or undertaking' (PCBU), rather than an employer, and owed to all kinds of 'workers', including contractors and sub-contractors. A PCBU is 'a broad concept used to capture all types of modern working arrangements.'[104] The phrase 'business or undertaking' is 'intended to be read broadly and covers businesses and undertakings conducted by persons including employers, principal contractors, head contractors, franchisors and the Crown,'[105] as well as self-employed persons.[106] The courts in the past have taken a broad approach to interpreting an 'undertaking'[107] and more than one person may be conducting an undertaking in any one situation.[108]

Section 19(1) provides that the PCBU must, as far as is reasonably practicable ensure the WHS of all workers engaged or caused to be engaged, or whose activities are influenced or directed, by the PCBU. A 'worker' is defined very broadly in s 7 to be a person carrying out 'work in any capacity' for a PCBU, 'including work as ... (b) a contractor or sub-contractor; (c) an employee of a contractor or sub-contractor. …'

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[104] Safe Work Australia, *Interpretative Guidelines—Model Work Health and Safety Act: The Meaning of 'person conducting a business or undertaking'*, Safe Work Australia, Canberra, 2011.

[105] Ibid, para 23.

[106] WHS Acts s 19(5) and note.

[107] See *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268; *Inspector Alwyn Piggott v CSR Emoleum Services Pty Ltd* [2003] NSWIRComm 282 at para [226]; *Octel*, above n 5.

[108] See *WorkCover Authority of New South Wales v Techniskill-Namutoni Pty Ltd* [1995] NSWIRComm 127 at [8]; *R v Mara* [1987] 1 WLR 87.

Section 19(2) further provides that the PCBU's duty is also owed, so far as is reasonably practicable, to all 'others' (that is, persons who are not 'workers' engaged etc by the PCBU) 'put at risk' from work carried out as part of the PCBU's business or undertaking.

The definition of 'reasonably practicable' in s 18 strongly resembles the definition of 'reasonably practicable' in s 20(2) of the OHSA(Vic), except that it

- explicitly requires 'all relevant matters', including the listed matters, to be 'weighed up';
- quarantines 'cost' by requiring the duty holder first to consider the extent of the risk and the available ways of controlling the risk before considering cost, and
- specifies that a measure is only not reasonably practicable if the 'cost is grossly disproportionate to the risk'.

An important point is that, because s 19 recasts the employer's general duty to employees as a duty owed by a PCBU to all workers engaged, directed, or influenced by it, there is reduced scope to conceive of contractors as 'external' to the business or undertaking, and and a clearer basis for arguing that all contractors should be properly supervised by the PCBU.

Although the WHS Acts do not expressly require a PCBU to take a systematic approach to managing WHS, the courts have in the past interpreted the general duties as requiring a risk management approach.[109] Clearly in determining what is 'reasonably practicable' a PCBU must follow a process that strongly resembles the risk management process.[110] Further, sub-s 19(3)(a)-(g) of the WHS Acts encompass some of the elements of an effective and systematic approach to managing WHS, although they clearly do not constitute a comprehensive approach. Thus ss 19(1), 19(2) and 19(3)(a)-(e) envisage the proactive management of WHS risks; and the PCBU's duty in s 19(3)(f) to provide information, training, instruction or supervision is concerned with building knowledge and skills. The PCBU also has obligations, separate from the primary duty, to ensure worker consultation and participation in Part 5 of the Acts.[111]

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[109] See, for example, *WorkCover Authority of NSW (Inspector Egan) v Atco Controls Pty* Ltd (1998) 82 IR 80 at 85. For further examples, see E Bluff and R Johnstone, 'The Relationship Between "Reasonably Practicable" and Risk Management Regulation' (2005) 18 AJLL 197, 212-219.
[110] See Bluff and Johnstone, Ibid.
[111] See Johnstone, Bluff and Clayton (2012) above 91 at 312-3.

Crucially, the primary duty provisions clearly see an independent contractor as part of the PCBU's business as a 'worker', and there is no need for the 'deemed employee' provisions found in both the OHSA (Vic) and the OSHA (WA). These deeming provisions require the court to consider whether the employer or principal had 'control' of the work of the independent contractor, and this focus on 'control' in determining whether Tobiassen, Kelsh and Azzapardi were 'employees' preoccupied the courts in *Devcon*, *Tobiassen* and in *Baiada*, and might well have influenced their reasoning about the 'reasonable practicability' of the employer or principal managing the WHS of the independent contractor.

(b) Principles in WHSAs (Pt 2, Div 1, subdiv 1)

The harmonised WHS Acts contain a series of 'principles' that apply to all the duties in the WHS Acts, including the primary duty in s 19. These 'principles' codify and reinforce principles that were developed by the courts in cases involved the pre-harmonisation statutes.[112] Where there are multiple primary duty holders, s 14 of the WHS Acts specifies that 'a duty cannot be transferred to another person'. This is reinforced by s 272 which renders void 'a term of any agreement or contract' to the extent that it 'purports to exclude, limit or modify the operation' of the Act or any duty owed under the Act or 'to transfer to another person any duty owed' under the Act. In short, ss 14 and 272 codify and emphasise the non-delegability or transferability of the duties in the Acts.

The WHS Acts also clarify that a person can have more than one duty by virtue of being in more than one class of duty holder.[113] More than one person can concurrently have the same duty and in those instances each person must fully discharge the duty to the extent to which the person has the capacity to influence and control[114] the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.[115]

(c) The Officers' duty

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112 See further R Johnstone, *Occupational Health and Safety Law and Policy*, 2 ed, Thompson Law Book, Sydney, 2004, 232-3 and 301-2.
113 S 15.
114 See *Explanatory Memorandum*, above n 87, [66].
115 Ss 16(1)-(3).

Another provision in the WHS Acts that is significantly different from the provisions in the pre-harmonised statutes is the officer's duty in s 27. While the pre-harmonised Acts that did contain officer's duties generally included 'accessorial' duties (outlining circumstances in which an officer could also be liable for an offence committed by the corporation) or imputed duties (where the officer would also be liable for the offence unless the officer could satisfy specified defences), s 27(1) provides that an officer 'must exercise due diligence to ensure' that the PCBU' complies with' a duty or obligation that the PCBU has under the Act. Sub-s 27(4) provides that an officer may be convicted or found guilty of a s 27(1) offence whether or not the PCBU 'has been convicted or found guilty of an offence under this Act….'

In other words, the duty is positive and proactive in that all officers must exercise due diligence to ensure that the PCBU complies with its duties, and if any officer does not exercise due diligence, he or she breaches s 27(1), even if other officers have exercised due diligence and even if the PCBU complies with all of its duties. Because the duty is a positive and proactive duty, inspectors can enforce the duty by issuing improvement notices or infringement notices. Exercising due diligence is also compatible with a systematic approach to WHS management.

Section 27(5) provides that '***due diligence*** includes taking reasonable steps:

> (a) to acquire and keep up-to-date knowledge of work health and safety matters; and
>
> (b) to gain an understanding of the nature of the operations of the business or undertaking of the [PCBU] and generally of the hazards and risks associated with those operations; and
>
> (c) to ensure that the [PCBU] has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
>
> (d) to ensure that the [PCBU] has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
>
> (e) to ensure that the [PCBU] has, and implements, processes for complying with any duty or obligation of the [PCBU] under this Act; and
>
> …
>
> (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

What are 'reasonable steps', and do they require the officer to seek knowledge of or get advice about the operation of the business, the WHS hazards and the methods to remove or minimise the risks posed by those hazards? Middleton J in *Australian Securities*

and Investments Commission v Healey and others (Healey)[116] recently examined the meaning of 'reasonable steps' in a case about a failure by directors to secure a company's compliance with its accounting records obligations as required by the Corporations Act 2001. Middleton J made it clear that the officer is part of the mechanisms and procedures by which the firm complies with its obligations,[117] and cannot 'simply put the discharge of those functions in the hands of apparently competent and reliable persons'.[118] The standard of 'all reasonable steps' is 'determined objectively by reference to the particular circumstances of the case'.[119] Middleton J confirmed that an officer does not have to do everything him- or herself, and may rely on information and specialist advice from others,[120] and on the expertise of others — but emphasised that reliance without exercising independent judgment is not enough to satisfy the duty. Officers 'are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company.'[121] In the WHS Acts, this is made clear by the detail of s 27(5).

In short, an officer can only argue that reliance on advice or information from others represents 'reasonable steps' if:

- the officer is satisfied of the competence of the person on whom they rely; and
- the officer is aware that there are processes in place to ensure that the information or advice of the person on whom the reliance is made is properly informed; and
- the information or advice is read and considered by the officer, rather than simply relying on the conclusions or recommendations.

Assuming that the courts will take the same approach with s 27 of the WHS Acts, it is clear that the officers of a PCBU cannot simply passively 'rely on' the expertise of an independent contractor, but must 'at a minimum, … take a diligent and intelligent interest in the information either available to them or which they might appropriately demand from the executives or other employees and agents of the company'[122] in addressing each of the elements of 'due diligence' in s 27(5).

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116 [2011] FCA 717.
117 *Healey*, above n 116, at [141]-[142].
118 Ibid at [142].
119 Ibid at [143], and see [162].
120 Ibid at [143].
121 Ibid at [166].
122 Ibid at [162]. See also [203].

(d) Duty of horizontal consultation, co-operation and co-ordination (s 46)

The WHS Acts impose an obligation on all duty holders to consult, co-operate and coordinate their activities to ensure WHS. Section 46 provides that

> If more than one person has a duty in respect of the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

The Model Code of Practice: *Work Health and Safety Consultation, Co-operation and Co-ordination* explains that the duty is important because it helps 'address any gaps in managing health and safety risks' that may arise 'when there is a lack of understanding of how the activities of each person may add to the hazards and risks' to others; 'duty holders assume that someone else is taking care of the health and safety matter'; and/or 'the person who takes action is not the best person to do so.'[123]

What does this duty entail? What is reasonably practicable to do to consult, co-operate and coordinate activities with other duty holders 'will depend on the circumstances, including the nature of the work and the extent of interaction'. [124] The first step is for all duty holders to identify, from the start of the project — for example, during the planning of work[125] — who the other duty holders are that they need to consult, co-operate and co-ordinate activities with',[126] and then commence consultation, co-operation and co-ordinating activities with those duty holders.[127]

> The objective of consultation is to make sure everyone associated with the work has a shared understanding of what the risks are, which workers are affected and how the risks will be controlled. …. This consultation will determine which health and safety duties are shared and what each person needs to do to co-operate and co-ordinate activities with each other to comply with their health and safety duty.[128]

Co-operation and co-ordination with other duty holders 'should be an ongoing process' throughout the time duty holders 'are involved in the same work and share the same

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123 Safe Work Australia, Model Code of Practice: *Work Health and Safety Consultation, Co-operation and Co-ordination*, 2011, at p 4.
124 Ibid 17
125 Ibid 19.
126 Ibid 18.
127 Ibid 18.
128 Ibid 19.

duty.'[129] Depending on the circumstances, duty holders can control risks not necessarily by taking action themselves, 'but *making sure* that another person is doing so.'[130]

In conclusion, the s 46 obligation strongly suggests that simply relying on an expert contractor is not sufficient to discharge the PCBU's duty. At the minimum, there needs to be ongoing consultation, co-operation and co-ordination, and the PCBU has to ensure that the contractor is taking the necessary control measures.

Conclusion

This article has examined the rather vexed issue of what is, and should be, required of a firm that engages an expert independent contractor to carry out activities that the firm itself cannot perform because of lack of in-house expertise. If the courts are going to take the approach applied in the Western Australian cases discussed in this article, then the non-transferability of the general duties will be significantly undermined, particularly if the courts exaggerate the expertise of the contractor, and overstate the ignorance of the firm.

The article does not challenge the proposition that engaging an expert independent contractor may well be the safest way of carrying out an activity. Rather it argues that the issue is the extent to which the firm has responsibility to manage and supervise the activities of the independent contractor in order to ensure that the work is done as safely and without risks to health as is reasonably practicable in the circumstances.

The article argues that the Western Australian Supreme Court in four of the cases analysed – *Devcon*, *Tobiassen*, *Laing O'Rourke*, and *Pilbara Infrastructure* – too readily accepted that an employer can discharge its general duty by engaging an independent contractor, without any further supervisory responsibilities. This view was apparently endorsed by the High Court in *Baiada*, although only expressly in the judgment of Heydon J, which itself was *obiter* on this point.

The article argues that the approach of the Western Australian cases encourages a firm to maintain their ignorance of the health and safety issues arising from activities outsourced to expert independent contractors, rather than requiring the firm to understand the process as much as is reasonably practicable, and to integrate the independent contractor

[129] Ibid 19.
[130] Ibid 18. Emphasis added.

and its activities into the firm's systematic management of WHS. It would be difficult for any PCBU nowadays to argue that it should not have knowledge of the requirements of systematic WHS management. At the very least, a small firm engaging an independent contractor can require the contractor to explain its approach managing health and safety in the activity, and report to the firm on progress, and on incidents.

The article concludes by arguing that certain provisions of the harmonised WHS Acts – particularly the positive and proactive officer's duty, coupled with the PCBU duty and the obligation to consult, co-operate and co-ordinate – support this call for a broader obligation on the firm to manage the health and safety of activities carried out by expert independent contractors. Indeed, the responsibilities of a duty holder are well summarised by the Model Code of Practice *How to Manage Work Health and Safety Risks*

> Never assume that someone else is taking care of a health and safety matter. Find out who is doing what and work together with the other duty holder in a co-operative and co-ordinated way so that all risks are eliminated or minimised so far as is reasonably practicable.
>
> When entering into contracts you should communicate your safety requirements and policies, review the job to be undertaken, discuss any safety issues that may arise and how they will be dealt with. Remember that you cannot transfer your responsibilities to another person.[131]

This requires a PCBU to do more than simply engage an expert contractor and 'leave it to them.' Effective health and safety management demands that the courts require firms to acquire as much knowledge as is reasonably practicable about work that is undertaken by an expert independent contractor. Firms should, at the very least, meta-regulate the health and safety performance of the independent contractor, by requiring the contractor to explain how it will ensure that the work is done safely, and to report regularly on how it is implementing its proposed health and safety plans and processes.

In conclusion, there is an urgent need for a new code of practice to address this issue of the firm's WHS duties when an expert independent contractor is engaged. The code should ensure that PCBUs:

- take a systematic approach to WHS management of *all aspects* of the business or undertaking;

[131] Model Code of Practice *How to Manage Work Health and Safety Risks*, above n 90, at p 6.

- do not allow WHS management to be fragmented when contractors are engaged; and
- know how to manage contractors with technical expertise that the PCBU does not have.