

Employment & Safety Alert

Managing safety obligations towards contractors

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The High Court Decision in *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14.

A recent decision of the High Court highlights how important it is for employers, principals and head contractors to conduct risk assessments and determine whether it is reasonably practicable to provide a safe system of work for a contractor's employees, including instruction, training and supervision.

The case related to the obligations imposed by the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**) to provide, so far as is reasonably practicable, a workplace that is without risk to health or safety.

Baiada Poultry Pty Ltd (**Baiada**) engaged contractors, DMP Poultech Pty Ltd (**DMP**) and Azzopardi Haulage Pty Ltd (**Azzopardi**), to round up and transport chickens from farms to Baiada's processing plant.

An unlicensed forklift driver engaged by DMP was using a forklift to load crates onto Azzopardi's trailer. Mr Azzopardi was assisting the driver to dislodge a module that had become stuck. The driver moved the module, causing another module to fall on Mr Azzopardi. Mr Azzopardi died as a result of his injuries.

Baiada was prosecuted for breaches of the OHS Act and found guilty at first instance because it had control of the workplace and had failed to implement a safe system of work, including appropriate instruction and supervision of the contractor's employees.

The High Court quashed the original sentence and decision after unanimously finding that the trial judge had erred in failing to expressly direct the jury to consider

whether Baiada had, beyond reasonable doubt, done all that was reasonably practicable to provide a workplace that is without risk to health or safety.

In particular, the High Court found that '*demonstration that some step could have been taken does not, without more, demonstrate that to fail to take that step was a breach of the obligations so far as reasonably practicable to provide and maintain a safe working environment*'. The High Court ordered a new trial.

The Baiada case highlights a number of important issues for the management of contractor safety under both the Victorian OHS Act and the new Work Health and Safety laws (**WHS laws**) now operating in NSW, Queensland, ACT and NT.

Key issues in contractor safety management

1. The primary duty of care in respect of contractors under the new WHS laws is not reliant on the existence of control.
2. What does '*reasonably practicable*' mean?
3. How is '*control*' relevant to ensuring health and safety?

1. The primary duty of care in respect of contractors under the new WHS laws is not reliant on the existence of control

Unlike the current OHS Act in Victoria, the new WHS laws provide that a person conducting a business or undertaking (**PCBU**) has a primary duty of care in respect of workers (including contractors and employees of contractors), regardless of whether or not the PCBU has actual control over the contractors.

Baiada was found to have a 'right to control' its contractors and therefore, under the OHS Act, a duty to ensure the health and safety of its contractors (so far as is reasonably practicable).

Under the new WHS laws, the existence of the primary duty is not contingent upon a PCBU having control over its contractors. Instead, the new WHS laws provide that a PCBU has a primary duty (of care) when it engages a contractor either directly or indirectly or when it can influence or direct the work activities of the contractor. Importantly, the primary duty to ensure contractor safety is not conditional upon having 'actual control' over the contractors work.

However, under the new WHS laws (just like the OHS Act) the primary duty is qualified by the words, 'so far as is reasonably practicable'.

2. What does 'reasonably practicable' mean?

In determining what steps (i.e. risk control measures) are 'reasonably practicable' to ensure health and safety, the PCBU (under both the new WHS laws and the OHS Act) should take into account and weigh up all relevant matters including:

- the likelihood of a hazard or risk occurring;
- the degree of harm which may result;
- what the person knows or ought reasonably to know about the hazard or risk and ways of eliminating the risk; and
- the availability of suitable ways to eliminate or minimise the risk.

The WHS laws also provide that any cost associated with implementing available risk control measures is a relevant factor in determining what is 'reasonably practicable'. In some cases, a PCBU may not be required to implement an available control if the cost of implementing that control is 'grossly disproportionate to the risk'.

3. How is control over the contractor relevant to ensuring health and safety?

Whilst the definition of 'reasonably practicable' does not include any reference to the word 'control', the nature and extent of the PCBU's actual control over its workers (including contractors) is relevant to the question of what is 'reasonably practicable' for the PCBU to do to ensure the health and safety of contractors.

In the High Court case, Baiada says that all it needed to do to discharge its (non-delegable) duty was to rely on the contractors. Here, Baiada says it had no actual control

(as opposed to a right to control) over its contractor's work, and that it was sufficient (to discharge its duty) to simply rely on its contractors.

In its reasons for decision, the High Court says that the prosecution must do more than simply demonstrate that Baiada had a right to control its contractors and must go further and prove that it was reasonably practicable for Baiada to take further steps to ensure the health and safety of its contractors.

Reliance on the contractor's experience and expertise

Central to Baiada's case is the question 'when can a PCBU (or employer under the OHS Act) simply rely upon the skill, experience and expertise of its contractors to discharge its primary duty (to do all that is reasonably practicable to ensure the health and safety of its contractors)?'

Factors relevant to this question include:

- the nature and extent of the PCBU's **actual control** over the work being performed by the contractor;
- the extent of the PCBU's own knowledge and expertise over the work being performed;
- the PCBU's knowledge and understanding of the contractor's level of specialist experience, skill and expertise; and
- the PCBU's satisfaction that its contractor's safety management systems (**SMS**) are adequate to ensure health and safety.

In some cases, it will be appropriate to conclude that a risk to workers can be adequately controlled by merely ensuring that an appropriately experienced and skilled specialist contractor has been engaged to perform the work. In other words, it may be appropriate to rely on the competency of the contractor to carry out the work safely. In other cases, it will be necessary to ensure that an adequate SMS is in place and that contractors and their employees are properly inducted into that system by receiving proper instruction and training and are then subject to adequate supervision.

The greater the level of actual control over the contractor's work activities, the greater will be the active steps that the PCBU must take to ensure health and safety.

How does this affect your business?

The High Court says it is possible for a PCBU to discharge its duty of care by relying upon its contractor. The critical

question for business is: can simple reliance on the contractor be enough, and if so, when and in what circumstances will it be enough, to discharge the primary duty of care under the new WHS laws?

The management of risks to health and safety in relation to contractors requires careful consideration and planning.

The nature and extent of the contractor's knowledge, skill and expertise in relation to its work and the workplace are relevant to the steps that need to be taken by the PCBU to ensure 'so far as is reasonably practicable' the contractor's health and safety. At the same time, the nature and extent of the PCBU's knowledge and expertise, and actual control over its contractor's work, will also be significant in determining what steps it should itself take to ensure contractor safety.

PCBU's should ensure (so far as is reasonably practicable) that an adequate SMS is implemented to ensure contractor health and safety. In some cases, the PCBU need only satisfy itself that its contractors have implemented their own SMS. In other cases, it will be reasonable for the PCBU to become more actively involved to ensure its contractors comply with an adequate SMS and this may include the following (non-exhaustive list of) actions:

- instructing, training and supervising contractors and their employees;
- verifying and monitoring contractor compliance with WHS laws;
- ensuring written contractual obligations are in place requiring the contractor to comply with its duties and obligations under WHS laws;
- receiving reports from the contractor in respect of incidents or any workplace changes that may impact upon the integrity of the contractor's risk control measures; and
- arranging for an independent audit to be undertaken of the contractor's compliance with WHS laws.

How much control do you have and exercise over your contractors?

For more information about the management of contractor health and safety, please contact one of our Employment & Safety partners.

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