

October 2017

Management of Health and Safety Obligations for Growers who Lease their Orchard

The Health and Safety at Work Act 2015 introduced new obligations on persons conducting a business or undertaking (PCBUs). As an orchard owner, growers are required to consider their obligations under the Act and determine if they are the PCBU. The primary duty of care under the legislation requires a PCBU to ensure, so far as is reasonably practicable, the health and safety of the PCBU's workers (while at work); and other people who are influenced or directed by the PCBU in carrying out work.

In a small number of specific cases, the orchard owner may not be the PCBU and in these cases, they should ensure they have specific health and safety requirements in their lease or management contract. These cases include;

- where bare land is leased to a third party, then the lessee will be the Primary PCBU and all other PCBUs engaged by them are subcontractors to them.
- where an orchard owner contracts an orchard management company to undertake **all activities** associated with the management of the land, production and harvest of fruit then the orchard management company may be the Primary PCBU and all other PCBUs engaged by them are subcontractors to them.

NZKGI have contracted BECA to develop a standard health and safety contract clause that growers can include in their management contracts in situations where they have determined that a third party is the PCBU.

NZKGI takes health & safety seriously as it is a critical aspect for kiwifruit growers. Regardless of being an orchard owner or lessee, growers have a legal and moral duty to consider health & safety on their orchard. Growers seeking to utilise this contract clause are encouraged to speak with their lessee or management company and seek independent legal advice.

If you have any questions regarding this or other health & safety topics, please contact NZKGI via info@nzkgi.org.nz or 0800 232 505.

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Management of Health and Safety Obligations for the Management of Operations on an Orchard by a Primary Contractor (PCBU)

The Person Conducting a Business or Undertaking (PCBU) is responsible for the management and control of the workplace, is referred to as the Primary PCBU as defined in Health and Safety at Work Act 2015 (HSWA), Clause 37.

In cases where bare land is leased to a third party, then the lessee will be the Primary PCBU and all other PCBUs engaged by them are subcontractors to them.

In cases where an orchard owner contracts an orchard management company to undertake all activities associated with the management of the land, production and harvest of fruit then the orchard management company will be the Primary PCBU and all other PCBUs engaged by them are subcontractors to them.

In cases where the orchard owner retains any direct control or involvement in the management of the land, growing or harvesting of fruit, they will be Primary PCBU and all other PCBUs engaged by them are subcontractors to them. This would include where the orchard owner engages orchard management companies or post-harvest providers to provide services. Where other PCBUs, such as orchard management companies, engage subcontractors, they have responsibility for ensuring the health and safety capability, monitoring and managing health and safety performance. The orchard owner (as Primary PCBU, will have obligations to ensure that the orchard management company or any other PCBUs it engages) has adequate health and safety capabilities and processes to effectively manage risks.

The following is a draft clause that orchard owners should consider including in their management or lease contracts where it has been determined that the orchard owner is not the Primary PCBU i.e. where the property is leased or fully managed by a 3rd party.

Health and Safety Management System

The Primary PCBU shall implement and maintain appropriate health and safety risk management processes and systems, as well as physical work practices that ensures the safety of all persons on the Site in accordance with the Health and Safety at Work Act 2015 (HSWA). The management system includes, but is not limited to, the following elements:

- *An appropriate Site Health and Safety Management Plan (HSMP).*
- *Procedures, processes and tools that detail requirements for identifying, assessing and controlling health and safety risks that do or may exist on the Site.*
- *A register of health and safety risks for the Site which includes any identified hazards, the date it was identified, the levels of risk it poses and details of required control measures or requirements.*
- *Processes and practices to report and record hazards, incidents and near misses and the investigation thereof.*
- *Procedures and practices that provide appropriate training for workers to perform their roles safely and maintenance of the training records.*
- *Processes to effectively manage the activities of subcontractors, suppliers and visitors.*
- *Procedures and processes to manage and maintain workplace equipment and plant.*

- *Procedures and processes to manage and maintain workplace chemicals and hazardous substances.*
- *Procedures and processes to ensure effective consultation and cooperation between PCBUs and their workers.*
- *Procedures and processes to manage emergencies and natural disasters.*

The processes, systems and physical work practices are required to be reviewed and maintained by the Primary PCBU as frequently as required to ensure the safety of all persons on the Site. They shall also be reviewed prior to the commencement of a new scope of work not previously identified or contained within the contract. Records of reviews shall be maintained.

Where non-conformances or significant failures to meet these obligations is discovered, the Primary PCBU will be required to maintain oversight and obtain evidence that corrective actions have been developed and implemented.

In the event of a notifiable incident as per HSWA, the Primary PBCU should out of courtesy notify the land owner of the incident.

Subcontractor Management

A subcontractor is a PCBU that is contracted by the Primary PCBU to conduct works on Site. The primary PCBU is responsible for the health and safety all workers on Site and ensuring that the sub-contractors have implemented effective health and safety risk management practices and processes prior to work commencing.

The PCBU shall require all subcontractors to provide information to the primary PCBU detailing how they will control the risks associated with the works they will be conducting.

The primary PCBU is responsible for reviewing and, once deemed acceptable, approving the management processes and plans of subcontractors. All subcontractors will be required to co-ordinate their health and safety management practices and activities with that of the Primary PCBU.

For the avoidance of doubt, control of the workplace by the Primary PCBU includes those parts of the workplace where separate subcontractors will be/ are working.

Health and safety information shall also be reviewed prior to commencement of a new scope of work not previously defined in the Contract. Records of reviews shall be kept within the document.

Assurance and Performance Monitoring

The Primary PCBU is required to conduct regular assurance reviews to ensure the subcontractors it has engaged are meeting all its HSWA obligations, both in terms of appropriate processes and systems, as well as physical work practices. Where non-conformances or significant failures to meet these obligations is discovered, the subcontractor will be required to maintain oversight and obtain evidence that corrective actions have been developed and implemented.