

New Work Health and Safety (WHS) Laws - Significant changes to principal contractor arrangements in Queensland

From 1 January 2012, the *Work Health and Safety Act 2011* (Qld) (**WHS Act**) and the *Work Health and Safety Regulation 2011* (Qld) (**WHS Regulation**) will make significant changes to how work health and safety (WHS) is managed in practice in Queensland. For construction, the most dramatic changes will reflect:

- the end of a principal contractor (**PC**) acting as a safety shield for the client that appoints them;
- the introduction of an express duty on all construction industry participants to consult, cooperate and coordinate construction activities; and
- changes to worker consultation.

Other key changes include an express requirement to ensure there is a safe work method statement (**SWMS**) for high risk construction work (**HRCW**), the removal of the reverse onus, changes in officer liability and tougher penalty regime.

Key changes for Construction in Queensland

Changes to PC arrangements - Bringing the client back into the fold

In a significant shift in Queensland, appointing a PC from 1 January 2012 will *not* shield a client from WHS responsibility. Instead, as we discuss below, the PCBU that commissions a PC ("client" is not a term used in the WHS Act) will have an express duty to consult, cooperate and coordinate construction work activities with the PC and others.

Until the law changes on 1 January 2012, a client can commission a PC to manage construction work with a value of more than \$80,000, and by lodging the necessary form, give the PC primary responsibility for WHS. In stark contrast, from 1 January 2012:

- a PC can be appointed for construction work with a value of \$250,000 or more; and
- the appointment of a PC does not, of itself, automatically relieve the client of any WHS responsibility.

Under transitional provisions, PC appointments made before 1 January 2012 will continue to have effect and alleviate some of a client's WHS obligations if the value of the construction work is at least \$250,000 but not otherwise. Clients appointing a PC for construction work with a value of between \$80,000 and \$250,000 will not be shielded from WHS responsibility. Prudent PCBUs - and clients - will revisit their existing arrangements now.

Changes for clients - Duty to consult, cooperate and coordinate

Construction typically involves different PCBUs (eg a client, designer/s, contractor/s, subcontractor/s, specialist sub-contractors, labour hire, etc). Under the new laws, each PCBU with a duty in relation to the same work must, so far as is reasonably practicable, consult, cooperate and coordinate activities with all other persons.¹ For example:

- a PCBU must, so far as is reasonably practicable, consult with a designer about eliminating WHS risks associated with the design;² and
- the designer of a structure must give the commissioning PCBU a written report identifying hazards relevant to the design.³

To fulfil this critical WHS duty, at the very least a PCBU that appoints a PC must, so far as is reasonably practicable, consult, cooperate and coordinate regularly with the PC and the designer/s it appoints, about all of these matters and to check that they, in turn, are consulting, cooperating and coordinating all of their construction-related (and all other) activities with all others involved. In this context also, prudent PCBUs - and clients - will revisit their existing arrangements now.

The nature and extent of consultation with workers

A PCBU must consult with workers who are directly affected (or likely to be) by a matter regarding WHS.⁴ Workers includes contractors, sub-contractors, labour hire, and the individuals they engage,⁵ and consultation includes giving affected "workers" a genuine opportunity to express views and be involved in the decision-making process.

Other changes for WHS in construction

Express duty to ensure there is a SWMS for high risk construction work

From 1 January 2012 a PCBU in construction has an express duty to manage WHS risks associated with the carrying out of construction work, in the first instance by eliminating those risks.⁶

¹ Section 46 of the WHS Act.

² Regulation 294 of the WHS Regulations.

³ Regulation 295 of the WHS Regulations.

⁴ Section 47 of the WHS Act.

⁵ Section 7 of the WHS Act.

Paul Muscat, Tel 07 3853 8811
pmuscat@herbertgeer.com.au

Andrew Cardell-Ree, Tel 07 3853 8822
acardell-ree@herbertgeer.com.au

From 1 January 2012 a PCBU that includes the carrying out of HRCW (which is defined broadly) also has express duties to:

- ensure that a SWMS is prepared prior to HRCW commencing, check that the HRCW is carried out according to the SWMS and stop the job if it is not;⁷
- ensure that the workplace is secured from unauthorised access, if the person has management or control of a workplace;⁸ and
- ensure that a designer of a structure provides a design report identifying WHS hazards and risks associated with the design, and to demand a design report if one is not volunteered.

Removing the reverse onus

Up to 1 January 2012, on being charged with a WHS breach, a PCBU is guilty until the PCBU proves its innocence. In a welcome change, from 1 January 2012 the onus will shift to the prosecutor. The change will have its primary impact at trial, and will not reduce the need to adopt a proactive, preventative risk management focus, to eliminate the risk of harm. Without clear evidence of how the duty holder is meeting that duty, day by day in practice, the prosecutor may have little difficulty meeting its onus.

Officer Liability

The WHS Act imposes a positive duty on all officers of a PCBU to exercise due diligence at all times to ensure that the PCBU complies with the requirements of the WHS Act.⁹ To discharge this duty, appropriate processes and systems will need to be in place to ensure that the PCBU – and each officer – complies with the new laws. Examples include:

- ensuring the PCBU has access to information regarding risks, incidents and hazards; and
- ensuring adequate resources are available to the PCBU to assist in fulfilling their duties.

Prudent PCBUs and officers will revisit their obligations - and how well their existing systems and processes are operating now - on or before the changes take effect from 1 January 2012.

Increased penalty range

The WHS increases the current maximum penalty from \$1 million to:

- \$1.5 million for a failure to comply with a WHS duty if the failure exposes an individual to a risk of death or serious injury or illness (a Category 2 offence); and
- \$3 million for a failure to comply with a WHS duty if the failure exposes an individual to a risk of death or serious injury or illness and the person is reckless as to that risk (a Category 1 offence).

The structure of the maximum penalties reinforces the need to take proactive, preventative steps, so far as reasonably practicable, to ensure the WHS of every person affected by the conduct of the business or undertaking, by saving the higher penalty range to instances where preventative action is missing.

What do you need to do now?

Now is the time to consider:

- reviewing and amending your agreements to ensure that they reflect the new duties, including to engage in active consultation, cooperation and coordination with all other dutyholders and consult actively with all “workers”, and to provide and obtain design reports identifying hazards;
- reviewing and updating your WHS procedures to reflect these practices and ensure compliance with the legislation;
- identifying practical steps that you will need to adopt implemented to help PCBUs and officers meet your duties; and
- providing information sessions to your officers, employees and “workers” regarding the new duties and what is expected.

Please call us if we can assist with educating your officers or reviewing your processes and how they operate in practice.

For further information or assistance please contact:

Paul Muscat

Partner

Projects & Construction

pmuscat@herbertgeer.com.au

07 3853 8811

Andrew Cardell-Ree

Special Counsel

Employment, Workplace Relations & Safety

acardell-ree@herbertgeer.com.au

07 3853 8822

⁶ Regulation 35 of the WHS Regulations.

⁷ Regulations 299 and 300 of the Regulations.

⁸ Regulation 298 of the WHS Regulations.

⁹ Section 27 of the WHS Act.

Paul Muscat, Tel 07 3853 8811

pmuscat@herbertgeer.com.au

Andrew Cardell-Ree, Tel 07 3853 8822

acardell-ree@herbertgeer.com.au