

Design Obligations of Contractors & Consultants under WHS Legislation

1. Introduction

The Work Health and Safety (WHS) Legislation was proposed to reduce regulatory burdens, protect the health and safety of workers and more specifically workplaces and reduce compliance costs.¹ WHS Legislation has been enacted in seven jurisdictions including the Commonwealth, NSW, QLD, NT, ACT, SA and Tasmania. Victoria has yet to enact the legislation, the *Occupational Health and Safety Act 2004* (VIC), is the governing legislation for that jurisdiction.

For further assistance please refer to our recent Newsletter on WHS Legislation and provisions throughout Commonwealth, NSW, ACT, QLD & Victoria in particular 'Industrial Manslaughter' provisions.

For the purpose of illustration the following commentary concerns the NSW Act. The **enclosed** Schedule identifies the counter-part sections of the Act and Regulation in the other jurisdictions.

2. Duties of Designers

The duties of a designer are found at section 22 of the *Work Health and Safety Act 2011* (NSW) ('WHS Act') and ensures structures are designed to be safe when it is used as a 'workplace' and without risks to health and safety. This includes construction of the structure, its "uses" for purpose for which it is designed, maintenance, repair and eventual demolition.² Bearing in mind the reference to '*a structure that is to be used, or could reasonably be used expected to be used as a workplace*'.

Under section 22(4) and (5) of the WHS Act, the designer is obligated to provide information to anyone who is issued with the design, to which indicates the purpose of the structure, testing results, analysis and any necessary conditions that ensure the structure is designed without risks to health and safety.³

¹ Safe Design Australia, "WHS Legislation", <<https://www.safedesignaustralia.com.au/whs-legislation/>> accessed 26 June 2020. NSW, QLD, ACT, NT and Commonwealth harmonised legislation 1 January 2012; Tasmania and SA harmonised legislation 1 January 2013; Vic and WA harmonisation delayed.

² Ibid.

³ Ibid.

A “designer” will include a PCBU⁴ whose business or undertaking involves any of the following actions:

1. Preparation of sketches, plans or drawings for a structure, including variations to a plan;
2. Implements decision for design changes that may affect health and safety of person who constructs, carries out activities in relation to structure, or who are in vicinity of workplace and may be exposed to the structure.

Designers can include any of the following undertakings, architects, building designers, engineers, surveyors, interior designers, landscape architects, town planners and all other design practitioners contributing or being responsible for any part of the design.⁵

Furthermore, this may also include building service designers such as; ventilation, electrical systems, fire extinguisher installations, formwork designers, falsework, scaffolding and sheet piling. The duty will also extend to structural alteration such as demolition or dismantling work.

The *Work Health and Safety Regulation 2017* (NSW), 295 requires the designer to provide the person conducting business or undertakings (‘PCBU’) with a safety report outlining potential hazards unique to that design that may pose a hazard to people carrying out construction work.⁶

3. Design Clauses in Contract

3.1. Fitness for Purpose Warranties

Examples of this kind of warranty include:

Cl 2.3 Contractor’s Warranties

The Contractor warrants that:

(b) the design of the Works will be:

(i) performed in accordance, and so as to comply, with the Brief; and

(ii) fit for its intended purpose;

And

Quality of material and work

The Contractor shall:

⁴ *Work Health and Safety Act 2011* (NSW), s5; Meaning of “person conducts a business or undertaking” (PCBU).

⁵ Safe Work Australia, ‘*Safe Design*’ Safe Work Australia < <https://www.safeworkaustralia.gov.au/safe-design>>.

⁶ Ibid.

- (a) Use proper and tradesman-like workmanship;
- (b) Carry out WUC using suitable new material of a nature described in the Contract or failing any specific description then of the best quality available which are of merchantable quality and **fit for their intended purpose**; and
- (c) Carry out an complete the WUC in accordance with the Contract Documents so that the Works, when completed, shall be **fit for their intended purpose**.

Relevantly, a workplace cannot be fit for purpose if not a 'safe' workplace given the structures comprising that "space".

3.2. Statutory Requirements

The Contractor typically warrants they will comply with all Statutory Requirements.

Examples of this type of clause includes:

Clause 6.3 'Design Certification'

Without limiting the Contractor's obligations under the Contract or otherwise at law or in equity, the Contractor must, with each submission of Planning Phase Design Documentation and submission of Delivery Phase Design Documentation under and as a condition precedent to Delivery Phase Agreement and Completion, provide the Contract Administrator with:

(a) a certificate in the form of the Contractor Design Certificate which certifies that (to the extent then applicable):

(i) the Planning Phase Design Documentation or the Delivery Phase Design Documentation (as applicable) complies with:

A. all Statutory Requirements (including the WHS Legislation); and

B. the requirements of the Contract; and

(b) a corresponding certificate from each Subcontractor that performs design work forming part of the Contractor's Activities in the form of the Consultant Design Certificate or Subcontractor Design Certificate which certifies that (to the extent then applicable):

(i) all design carried out by that Subcontractor complies with:

A. subject to the subcontract, all Statutory Requirements (including the WHS Legislation); and

B. the requirements of the subcontract; and

(ii) the Works comply or the Stage complies with the design carried out by that Subcontractor,

except to the extent set out in such certificates.

And

AS 4000- 1997 'Contractor's Warranties'

The Contractor warrants for the benefit of the Principal that:

(f) the Works when completed will comply with:

- (i) All requirements of the Contract;*
- (ii) All relevant standards of Standard Associations of Australia or of this Contract, and if more than one the highest such standard; and*
- (iii) All applicable Legislative Requirements.*

Which by the language used sits 'squarely' with the obligation to be discharged and discussed above, namely a designed structure free from risk to the safety of "users" (i.e. occupants).

4. Conclusion

It is a significant 'WHS' issue for any Contractor having discharged the design obligations imposed by the WHS Legislation. Noting the nature of the warranties given are also the basis of the indemnities typical by Contractor to their Principal's.

It is necessary to ensure that all 'design' obligations, including being fully compliant with the WHS obligations as to the design being 'safe' and free from risk are replicated in each 'Consultancy Services Agreement' and in any 'Trade Works Contract'. (Where the trade works include design development or finalisation/certification)

Schedule 1- WHS Legislation Jurisdictional Comparison

NSW	ACT	QLD	CTH	VIC
<p><i>Work Health and Safety Act 2011</i> (NSW) Division 3 Further Duties of persons conducting business or undertakings 22 Duties of persons conducting businesses or undertakings that design plant, substances or structures</p>	<p><i>Work Health and Safety Act 2011</i> (ACT) Division 2.3 Further Duties of persons conducting business or undertakings 22 Duties of persons conducting businesses or undertakings that design plant, substances or structures</p>	<p><i>Work Health and Safety Act 2011</i> (QLD) Division 3 Further Duties of persons conducting business or undertakings 22 Duties of persons conducting businesses or undertakings that design plant, substances or structures</p>	<p><i>Work Health and Safety Act 2011</i> (CTH) Division 3 Further Duties of persons conducting business or undertakings 22 Duties of persons conducting businesses or undertakings that design plant, substances or structures</p>	<p><i>Occupational Health and Safety Act 2004</i> (VIC) 27 Duties of designers of plant & 28 Duties of designers of buildings or structures</p>
<p>(1) <i>This section applies to a person (the designer) who conducts a business or undertaking that designs –</i> (a) <i>plant that is to be used, or could reasonably be expected to be used, as, or at, a workplace, or</i> (b) <i>a substance that is to be used, or could reasonably be expected to be used, at a workplace, or</i> (c) <i>a structure that is to be used, or could reasonably be expected to be used, as, or at, a workplace.</i> (2) <i>The designer must ensure, so far as is reasonably practicable, that the plant, substance or structure is designed to be without risks to the health and safety of persons –</i> (a) <i>who, at a workplace, use the plant, substance or structure for a purpose for which it was designed, or</i></p>	<p>Same Wording as NSW.</p>	<p>Same wording as NSW.</p>	<p>Same wording as NSW.</p>	<p>S27-(1) A person who designs plant who knows, or ought reasonably to know, that the plant is to be used at a workplace must – (a) <i>ensure, so far as is reasonably practicable, that it is designed to be safe and without risks to health if it is used for a purpose for which it was designed; and</i> (b) <i>carry out, or arrange the carrying out, of such testing and examination as may be necessary for the performance of the duty imposed by</i></p>

<p>(b) who handle the substance at a workplace, or (c) who store the plant or substance at a workplace, or (d) who construct the structure at a workplace, or (e) who carry out any reasonably foreseeable activity at a workplace in relation to— (i) the manufacture, assembly or use of the plant for a purpose for which it was designed, or the proper storage, decommissioning, dismantling or disposal of the plant, or (ii) the manufacture or use of the substance for a purpose for which it was designed or the proper handling, storage or disposal of the substance, or (iii) the manufacture, assembly or use of the structure for a purpose for which it was designed or the proper demolition or disposal of the structure, or (f) who are at or in the vicinity of a workplace and who are exposed to the plant, substance or structure at the workplace or whose health or safety may be affected by a use or activity referred to in paragraph (a), (b), (c), (d) or (e).</p> <p>(3) The designer must carry out, or arrange the carrying out of, any calculations, analysis, testing or examination that may be necessary for the performance of the duty imposed by subsection (2).</p> <p>(4) The designer must give adequate information to each person who is provided with the design for the purpose of giving effect to it concerning— (a) each purpose for which the plant, substance or structure was designed, and (b) the results of any calculations, analysis, testing or examination referred to in subsection (3), including, in relation to a substance, any hazardous properties of the substance identified by testing, and (c) any conditions necessary to ensure that the plant, substance or structure is without risks to health and safety when used for a purpose</p>				<p>paragraph (a); and (c) give adequate information to each person to whom the designer gives the design and who is to give effect to it concerning— (i) the purpose or purposes for which the plant was designed; and (ii) the results of any testing or examination referred to in paragraph (b); and (iii) any conditions necessary to ensure that the plant is safe and without risks to health if it is used for a purpose for which it was designed; and (d) on request, give such information to a person who uses or is to use the plant.</p> <p>S28-(1) A person who designs a building or structure or part of a building or structure who knows, or ought reasonably to know, that the building or structure or the part of the building or structure is to be used as a workplace must ensure, so far as is reasonably practicable, that it is designed to be safe and without risks to the health of persons using it as a workplace for a purpose for which it was designed.</p>
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for which it was designed or when carrying out any activity referred to in subsection (2) (a)–(e).

(5) The designer, on request, must, so far as is reasonably practicable, **give current relevant information on the matters referred to in subsection (4)** to a person who carries out, or is to carry out, any of the activities referred to in subsection (2) (a)–(e).

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NSW	ACT	QLD	CTH	VIC
<p>Work Health and Safety Regulation 2017 (NSW) 295 Designer must give safety report to person who commissions design</p>	<p>Work Health and Safety Regulation 2011 (ACT) 295 Designer must give safety report to person who commissions design</p>	<p>Work Health and Safety Regulation 2011 (QLD) 295 Designer must give safety report to person who commissions design</p>	<p>Work Health and Safety Regulation 2011 (CTH) 295 Designer must give safety report to person who commissions design</p>	<p>Occupational Health and Safety Regulations 2017 (VIC) 76 Hazard Identification & 83 Record and Information</p>
<p>(1) The designer of a structure or any part of a structure that is to be constructed must give the person conducting a business or undertaking who commissioned the design a written report that specifies the hazards relating to the design of the structure that, so far as the designer is reasonably aware—</p> <p>(a) create a risk to the health or safety of persons who are to carry out any construction work on the structure or part, and</p> <p>(b) are associated only with the particular design and not with other designs of the same type of structure.</p> <p>(2) If the person conducting a business or undertaking who commissions a construction project did not commission the design of the construction project, the person must take all reasonable steps to obtain a copy of the written report referred to in subclause (1) in relation to that design.</p>	<p>Same as NSW</p>	<p>Same as NSW</p>	<p>Same as NSW</p>	<p>S 76- A designer of plant must, so far as is reasonably practicable, identify all hazards associated with the use of the plant during the design of the plant.</p> <p>S 83- (1) If the design of plant is required to be registered under Part 6.2 (Registration), the designer of that plant must record—</p> <p>(a) the method used to determine the risk control measures for the plant; and</p> <p>(b) the risk control measures that result from the determination.</p> <p>(2) A designer of plant must keep any record made under subregulation (1) available for inspection by the Authority for a period of 7 years after the date of registration of the design of the plant under Part 6.2 (Registration).</p>

NSW	ACT	QLD	CTH	VIC
<p><i>Work Health and Safety Regulation 2017 (NSW)</i> 64 Duty to eliminate or minimise risk</p>	<p><i>Work Health and Safety Regulation 2011 (ACT)</i> 64 Duty to eliminate or minimise risk</p>	<p><i>Work Health and Safety Regulation 2011 (QLD)</i> 64 Duty to eliminate or minimise risk</p>	<p><i>Work Health and Safety Regulation 2011 (CTH)</i> 64 Duty to eliminate or minimise risk</p>	<p><i>Occupational Health and Safety Regulations 2017 (VIC)</i> 51 Designers</p>
<p><i>(1) This clause applies in relation to plant or a structure that includes a space that is, or is intended to be, a confined space.</i> <i>(2) A designer, manufacturer, importer or supplier of the plant or structure, and a person who installs or constructs the plant or structure, must ensure that –</i> <i>(a) the need for any person to enter the space and the risk of a person inadvertently entering the space are eliminated, so far as is reasonably practicable, or</i> <i>(b) if it is not reasonably practicable to eliminate the need to enter the space or the risk of a person inadvertently entering the space –</i> <i>(i) the need or risk is minimised so far as is reasonably practicable, and</i> <i>(ii) the space is designed with a safe means of entry and exit, and</i> <i>(iii) the risk to the health and safety of any person who enters the space is eliminated so far as is reasonably practicable or, if it is not reasonably practicable to eliminate the risk, the risk is minimised so far as is reasonably practicable.</i> <i>Maximum penalty –</i> <i>(a) in the case of an individual – 70 penalty units, or</i> <i>(b) in the case of a body corporate – 345 penalty units.</i></p>	<p>Same as NSW Provision.</p>	<p>Same as NSW Provision.</p>	<p>Same as NSW Provision.</p>	<p><i>A designer of plant that includes, or is intended to include, a confined space must design the plant so that – (a) so far as is reasonably practicable, the need for any person to enter the space is eliminated; or (b) if it is not reasonably practicable to eliminate the need to enter the space – (i) the need to enter is reduced so far as is reasonably practicable; and (ii) so far as is reasonably practicable, any risk associated with the means of entry to and exit from the space is eliminated or, if it is not reasonably practicable to eliminate the risk, reduced so far as is reasonably practicable.</i></p>

