



## *Express law* fast track information for clients

19 September 2007

### Changes affecting building work funded by the Australian Government

This *Express law* outlines how changes to the Commonwealth Procurement Guidelines, Commonwealth OHS legislation, and new model clauses for the Building and Construction OHS Accreditation Scheme and the National Code of Practice for the Construction Industry could affect your project.

#### *Current legislation and policies*

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There are three key regimes affecting the building and construction industry that Commonwealth agencies will need to consider when they are providing funding for building work to be carried out. These are:

- the legislated Building and Construction OHS Accreditation Scheme (the OHS Accreditation Scheme) established under s 35 of the *Building and Construction Industry Improvement Act 2005* (Cth) (the BCII Act) through the *Building and Construction Industry Improvement (Accreditation Scheme) Regulations 2005* (Cth) (the BCII Regulations)
- the policy regime under the National Code of Practice for the Construction Industry (the Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (the Implementation Guidelines), revised September 2005 and reissued June 2006
- the policy regime under the Commonwealth Procurement Guidelines (CPGs), which contain requirements in relation to procurement generally and specific requirements (the Mandatory Procurement Procedures) for procurements that exceed certain financial thresholds, including thresholds that apply to construction projects.

#### *Changes to implement Stage Two of the OHS Accreditation Scheme*

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##### Summary

From 1 October 2007, the application of the OHS Accreditation Scheme is expected to be changed to:

- make OHS accreditation by building contractors a condition which will apply to *indirect* Commonwealth funding of building and construction projects where the Commonwealth contribution is at least \$5 million and at least 50 per cent of the project value, or the Commonwealth contribution is at least \$10 million irrespective of the proportion of funding

- lower the monetary threshold at which the accreditation requirement applies to *directly* funded projects from \$6 million to \$3 million
- provide new model clauses to be included in direct and indirect funding agreements, agreements to lease, contracts, and tender documents, to reflect the application of the OHS Accreditation Scheme.

Indirect funding includes funding provided via grant, funding agreements and similar non-legally-binding vehicles such as memoranda of understanding.

### **Current application of Building and Construction Industry Improvement Act (Stage One)**

Currently, the requirement for a party to a contract with the Commonwealth to be accredited under the OHS Accreditation Scheme is triggered by s 35(4) of the BCII Act, which provides:

The Commonwealth or a Commonwealth authority must not enter into a Commonwealth building contract with a person or persons unless the person, or each of the persons, is an accredited person at the time the contract is entered into. This subsection does not apply to contracts prescribed by the regulations.

Therefore, unless the contract is prescribed by the BCII Regulations, application of Stage One of the OHS Accreditation Scheme is currently triggered where the Commonwealth enters into a 'Commonwealth building contract' (defined as 'a contract under which a person agrees with the Commonwealth to carry out building work or arrange for building work to be carried out').

Contracts that are currently prescribed for the purposes of s 35(4) of the BCII Act, and to which Stage One of the OHS Accreditation Scheme does not therefore apply, are listed under Reg 24(1) of the BCII Regulations and include contracts where:

- the value of the contract is less than \$6 million
- the contract is entered into before March 2006
- the contract for building work is to be carried out outside of Australia, or
- where there is a contract whereby each person who agrees with the Commonwealth to arrange to carry out building work is required to ensure that any person engaged by that person (that is, the person who contracted with the Commonwealth) to carry out the building work is accredited under the OHS Accreditation Scheme and the contract is approved by the Federal Safety Commissioner before it is signed on behalf of the Commonwealth.

*Definition of 'building work':* The definition of 'building work' in s 5 of the BCII Act is broad and includes construction, alteration, extension, restoration, repair, dismantling or demolition of buildings, structures or works that form part of, or are to form part of, the land, irrespective of whether it is permanent or non-permanent work. It also covers installation of works such as heating, lighting, air conditioning, fire protection and communications systems (among others).

## **Application of Building and Construction Industry Improvement Act from commencement of Stage Two**

The Building and Construction Industry Improvement Amendment (OHS) Bill 2007 was passed by the Senate on 13 September 2007. The amendments to the BCII Act will apply as Stage Two of the OHS Accreditation Scheme. The key amendments that are relevant to agencies that are directly or indirectly funding building work are:

*New s 35(4):*

- (4) The Commonwealth or a Commonwealth authority must not fund building work unless:
- (a) contracts for the building work entered into with builders will be entered into with builders who are accredited persons; and
  - (b) at the time of funding, the Commonwealth or the Commonwealth authority, as the case may be, takes appropriate steps to ensure that builders will be accredited persons when they carry out the building work.

This subsection does not apply to building work prescribed by the regulations.

*New s 35(5), which extends to both direct and indirect Commonwealth funding:*

- (5) For the purposes of this section, the Commonwealth or a Commonwealth authority funds building work if it:
- (a) pays for, or otherwise funds or finances, the building work (whether directly or indirectly); or
  - (b) facilitates the carrying out of the building work by entering into, or otherwise funding or financing (whether directly or indirectly), a pre-construction agreement that relates to the building work.

There is no longer a definition of 'Commonwealth building contract'. Instead, there is now a definition for 'builder', which, 'in relation to building work, means a person who carries out any of the building work'. The broad definition of 'building work' in s 5 of the BCII Act remains the same.

Clause 1.22 of the Explanatory Memorandum states that:

... a broad definition of *builder* has been adopted that would on its face extend the accreditation requirement beyond head contractors to persons they contract with. However, the new subsection 35(4) provides for regulations to be made to prescribe contracts to which the accreditation requirement will not apply, and it is intended that regulations will be made to limit the accreditation requirement to head contractors.

*Application to both indirectly and directly funded projects:* As a result of the amendments to the BCII Act, the requirement for accreditation under the OHS Accreditation Scheme will apply to both directly and indirectly funded projects from 1 October 2007. Unlike the previous s 35(4), there will no longer be a need for agencies to be entering into a 'Commonwealth building contract' (or any other form of legally binding agreement, for that matter) to trigger the application of the OHS Accreditation Scheme, with the key link now being the provision of Commonwealth funding and its value.

*Monetary thresholds for indirectly funded projects—OHS Accreditation Scheme:* It is expected that the \$6 million threshold under the BCII Regulations will be reduced to \$3 million for directly funded projects.

*Monetary thresholds for indirectly funded projects—OHS Accreditation Scheme:* In the case of indirectly funded projects (based on project value), the OHS Accreditation Scheme is expected to apply if the value of the Australian Government contribution is:

- at least \$5 million and represents at least 50 per cent of the total construction project value, or
- \$10 million or more, irrespective of the proportion of the Australian Government funding.

## ***National Code of Practice for the Construction Industry***

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### **Summary**

There have also been some changes made to the model clauses for the application of the Implementation Guidelines in particular to provide model clauses for *indirect* funding.

### **Application of the Code**

The Code has a very broad application—it applies to all Australian Government departments, agencies covered by the *Financial Management and Accountability Act 1997* (the FMA Act), and *Commonwealth Authorities and Companies Act 1997* bodies (see ss 2.2 and 2.3 of the Implementation Guidelines). Note that it prevents the Commonwealth from accepting a tender for construction work if the tenderer is not compliant with the Code at the time of tender (see s 1.10 of the Implementation Guidelines).

The Code covers a wide range of building and construction work (see s 2 of the Implementation Guidelines), which is much broader than the definition of ‘building work’ used for the purposes of the OHS Accreditation Scheme. For example, the Code extends to contracts with consultants and project managers (see s 4.5 of the Implementation Guidelines). Grants and funding agreements are specifically referred to in s 4.6 of the Implementation Guidelines, and there is a particular reference to funds being provided from the Australian Government to the states and territories or local governments.

### **Threshold for projects funded by the Commonwealth**

There is no monetary threshold for work that is directly funded by the Commonwealth, only for indirectly funded projects.

The same thresholds apply to indirectly funded projects (through grant or other programs) as are expected to apply to Stage Two of the OHS Accreditation Scheme from 1 October 2007.

### **Model clauses**

There are now new model clauses for the Code, which include:

- model clauses for inclusion in grants and funding agreements (where the \$5 million or \$10 million threshold is met for indirectly funded work)
- short-form clauses for inclusion in tenders, purchase orders, or other contractual documentation for directly funded work where the value of the contract is less than \$25,000
- a requirement that compliance with the Code and the Implementation Guidelines must be made a condition of tender for Australian Government funded work

- clauses for inclusion in all tender documentation and contracts for both directly and indirectly funded projects (where the value of the work is more than \$25,000 for directly funded work and where the \$5 million or \$10 million threshold is met for indirectly funded work). The tender documents also include a standard form of tenderer declaration of compliance with the Code to be included in tender documentation.

### ***The Commonwealth Procurement Guidelines***

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Under the CPGs, Mandatory Procurement Procedures apply to procurement of construction services if the value of those services exceeds certain thresholds. The definition of 'construction services' is set out in the CPGs and expanded upon in Finance Circular 2005/12. Finance Circular 2007/02 advises that the threshold has been increased from \$6 million to \$9 million. Construction projects that fall under the \$9 million threshold are still required to comply with other aspects of the CPGs.

The CPGs (including the Mandatory Procurement Procedures) apply to all FMA Act agencies. The Mandatory Procurement Procedures also apply to Commonwealth authorities and companies listed in Schedule 1 of the *Commonwealth Authorities and Companies Regulations 1997*.

The CPGs do not apply to grants.

### ***Useful links***

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#### **BCII Act and OHS Accreditation Scheme**

[Australian Government Building and Construction OHS Accreditation Scheme: Guidance for Australian Government Agencies](#)

[Scheme Documentation](#)

[Accreditation Register](#)

(List of Contractors who have OHS Scheme Accreditation)

[Model clauses](#) for OHS Accreditation Scheme

#### **National Code of Practice for the Construction Industry**

[Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry](#)

[Tender and Contract Documentation](#) (Model clauses for Code)

#### **Commonwealth Procurement Guidelines**

[Commonwealth Procurement Guidelines](#)

[Finance Circular 2006/02: Commonwealth Procurement Guidelines—Clarification](#)

[Finance Circular 2007/02: Commonwealth Procurement Guidelines—Threshold for Procurement of Construction Services](#)

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