

INDUSTRY UPDATE

WORK HEALTH AND SAFETY CHANGES



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CHANGES TO WORK HEALTH AND SAFETY LEGISLATION

Prelude

There have been many articles, seminars and views expressed on the Work Health & Safety legislation (**Act**) before and after its commencement in various states and territories on 1 January 2012. This workbook is to review the basic issues that have been raised in the various forums and provide some guidance so that executive committees, bodies corporate and managers have some general information to assist them in their varying obligations. Naturally this is not to be construed as legal advice and individual circumstances may impact on comments in this article.

The examples and various sections (to make it easier) focus on the application of the legislation in NSW (**Act**). The system should be identical in other States and Territories as they join (or have joined) the system. For the purpose of this booklet we shall use the generic term of bodies corporate to include strata schemes, community associations, body corporates, company title and stratum developments except where specific reference is required.

What is the WHS?

The Commonwealth Work Health and Safety Bill (**WHS**) was introduced into the House of Representatives on 6 July 2011. The reforms came about as a result of the July 2008 signing by COAG (Council of Australian Governments) of the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety.

What followed was years of comprehensive national review into work health and safety laws across Australia, culminating in the Model WHS. The Model WHS was released for comment in September 2009 and endorsed by the Workplace Relations Minister in December that same year.

As a result, each jurisdiction, including the Commonwealth, has developed legislation to give effect to the Model WHS, with an intended focus on harmonizing Occupational Health and Safety arrangements through the implementation of uniform legislative measures. The WHS commenced on 1 January 2012 in New South Wales, Queensland and Northern Territory (the remaining States continue to discuss).

The various legislative regimes are accompanied by the Model Work Health and Safety Regulations (**MWHSR**). The MWHSR is supported by a number of model Codes of Practice which were agreed to by all Ministers in December 2009.

The legislation is the product of a harmonisation initiative introduced throughout Australia. The legislation has as its main thrust the concept of making places safe and the prevention of injury. So at the basic concept level the legislation deals with safe working environments, hazardous chemicals and materials and requires those in control of a premises to provide information to people who attend the premises so that any risks or hazards are brought to their attention (and thus reduced or eliminated).

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The legislation has some heavy fines and in some instances personal liability for breaches. The liabilities that may extend to bodies corporate are broad and intended to prevent those with responsibility from trying to get out of it.

The fundamental concepts in the legislation can be summarised as follows:

An owner of land or someone with some control over the land who is considered to be a Person Conducting a Business or Undertaking (PCBU) pursuant to the legislation is to ensure that areas used by others are safe. In order to comply there must be a system in place to consider the risks and hazards that may arise, a methodology on what should occur to reduce or minimize that risk or hazard and then a system of monitoring what has been done to ensure that it remains relevant.

In a management concept not only are the Owners Corporations, Body Corporates, Community Schemes, Company title buildings and Stratum Developments included, the Executive Committee are also covered by the obligations. In a strata title building for example,

- the owners corporation will have obligations to ensure that compliance is made. To do so certain decisions will need to be made at meetings (engaging experts etc);
- the executive committee (depending on their delegated authority) will have similar obligations to ensure compliance and potentially the added obligation of bringing matters to the attention of a general meeting if and when they arise;
- a strata or body corporate manager may also have obligations towards the Owners Corporation/bodies corporate depending on the terms of the Agency Agreement and their involvement in maintenance and repair.
- On site building managers or caretakers may have similar obligations of reporting risks and hazards to the Owners Corporation/Bodies Corporate.

Will the WHS affect me?

Any **PCBU** pursuant to the Act will have obligations and duties that it will have to perform under the Act. Accordingly, the first step is to determine whether or not you are considered a PCBU for the purposes of the Act.

It appears that this definition is far reaching in implementation and will apply to most bodies corporate. There is an exemption in Section 7 (NSW) to exempt a "strata title body corporate". Curiously there is no mention of other forms of community style titles being exempt.

The exemption only applies to premises that are only used for residential purposes. The conjecture is what constitutes "only for residential premises" (for example in NSW only a strata scheme is included). However the exemption does not apply if the strata title body corporate engages any worker as an employee.

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The simplest way to get a broad indication of whether or not you will be considered a PCBU is to apply the chart attached to this article.

Once you have determined whether you are a PCBU, you will then need to understand the obligations that the Act imposes upon you. What is a PCBU?

As the law is new it will take some time for clear direction on what is and what is not a PCBU. A PCBU is defined in section 5 of the Act as follows:

- (1) *For this Act, a person conducts a business or undertaking—*
- a. *whether the person conducts the business or undertaking alone or with others; and*
 - b. *whether or not the business or undertaking is conducted for profit or gain.*

As can be seen this definition on its own is far reaching in implementation. Curiously under Section 5(6) of the regulations it may exempt certain types of operations (these are yet to be completely finalised but discussed below).

In circumstances where a strata title body corporate is considered a PCBU, the building the subject of the strata title body corporate will be considered a workplace for the purposes of the WHS and MWHRS.

Section 8 of the WHS provides that:

“A workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.”

On that basis, a strata title body corporate, which is classified as a PCUB (we believe a large majority), will be deemed to be a workplace for the purposes of the WHS and MWHRS.

Accordingly, for the purposes of the Act a strata title body corporate will be considered a person conducting a business or undertaking *unless* the scheme is wholly residential (the circumstances in which this will occur are incredibly limited as set out above/below);

As a consequence, the building the subject of the strata title body corporate will be considered a workplace for the purposes of the WHS and MWHRS.

The following appear to be covered as a PCBU:

- Mixed Use developments of residential, commercial and retail;
- Residential buildings where common property is not purely used for residential purposes (a lease over common property for a coffee cart on the ground floor);
- Residential schemes where they employ a worker (caretakers);
- Company title buildings;

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- Community, neighbourhood and precinct title buildings (depending on the definition in the relevant state);

The more controversial ones which will need to be determined but may be also covered are:-

- Owners who allow lots to be used for non residential purposes;
- Occupiers or tenants working from home (which can include web based businesses, like selling items on eBay);
- Directly employed workers like cleaners or baby sitters;
- An executive committee member;
- Volunteers doing work in the common property area.

While 'employee' is not defined by the WHS, 'worker' is.

Section 7 of the WHS provides as follows:

- (7) *A person is a "worker" if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:*
- (a) *an employee, or*
 - (b) *a contractor or subcontractor, or*
 - (c) *an employee of a contractor or subcontractor, or*
 - (d) *an employee of a labour hire company who has been assigned to work in the person's business or undertaking, or*
 - (e) *an outworker, or*
 - (f) *an apprentice or trainee, or*
 - (g) *a student gaining work experience, or*
 - (h) *a volunteer, or*
 - (i) *a person of a prescribed class.*
- (2) *For the purposes of this Act, a police officer is:*
- (a) *a [worker](#), and*
 - (b) *at work throughout the time when the officer is on duty or lawfully performing the functions of a police officer, but not otherwise.*
- (3) *The person conducting the business or undertaking is also a "worker" if the person is an individual who carries out work in that business.*

On that basis, even in the event that a party is not 'employed' in the classical sense, the carrying out of any work will render them a worker for the purposes of the legislation.

Am I exempt?

Section 7 of the MWSHR also provides a form of exemption for a "strata title body corporate" (in NSW). The clause relevantly provides:

7 Meaning of a person conducting a business or undertaking – persons excluded

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(1) *For the purposes of section 5(6) of the Act (the WHS), a strata title body corporate that is responsible for any common areas used only for residential purposes may be taken not to be a person conducting a business or undertaking on relation to those premises.*

(2) *Subregulation (1) does not apply if the strata title body corporate engages any worker as an employee.*

(3) *In this regulation, strata title body corporate means an owners corporation constituted under the Strata Schemes Management Act 1996*

The legislation attempts to exclude a “strata title body corporate” (NSW) where it is used for residential purposes. The problem then is, are we entirely residential and to what extent?

The following seems to be the criteria:

- The common areas (or common property) must be used for residential use (exclusively). So, if someone goes across the common property to do “work” within the complex then the exemption may not apply.
- If the strata title body employs an employee then the exemption doesn’t apply.

It seems that the residential complex which does not employ any person, has no home businesses and no working bee to fix common areas may be the only set up that is excluded from the requirements.

Who else is included?

The PCBU is not necessarily the controlling body all the time. In some instances others involved in the management of a building will also be involved or captured. One area is “officers” of the PCBU.

For the purposes of the WHS, an officer means *an officer within the meaning of section 9 of the Corporations Act 2001*, which is as follows:

“officer” of a [corporation](#) means:

- (a) a [director](#) or secretary of the [corporation](#); or
- (b) a [person](#):
 - (i) who makes, or participates in making, [decisions](#) that affect the whole, or a [substantial part](#), of the business of the [corporation](#); or
 - (ii) who has the capacity to affect significantly the [corporation](#)'s financial standing;

Accordingly, where a strata title body corporate is included in this definition, the members of the Executive Committee will also be considered officers for the purposes of the WHS.

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Section 14 of the WHS provides as follows:

“A duty cannot be transferred to another person.”

Importantly, this means that any duty owed by any person, PCUB, officer, employee etc under the WHS or MWSHR cannot be transferred to another. These duties are explored further below:

Section 27 sets out the duties of officers under the WHS. As set out above, members of a strata title body corporate not excluded by section 5(6) are officers under the WHS. Largely, this section provides that:

“...an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.”

In this section, **due diligence** includes taking reasonable steps:

- (a) to acquire and keep up-to-date knowledge of work health and safety matters, and
- (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations, and
- (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking, and
- (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, and
- (e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act, and

Example. For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include:

- reporting notifiable incidents,
 - consulting with workers,
 - ensuring compliance with notices issued under this Act,
 - ensuring the provision of training and instruction to workers about work health and safety,
 - ensuring that health and safety representatives receive their entitlements to training.
- (f) to verify the provision and use of the resources and processes referred to in paragraphs (c)–(e).

The duties of officers must be carefully understood and carried out in accordance with the WHS, MWSHR and the Codes of Practice in order to ensure compliance with the new regime.

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Offences

There are a number of classifications of offences under the WHS.

Three (3) categories of offences are provided for:

1. Category 1 - Reckless Conduct;
2. Category 2 - Failure to comply with health and safety duty (with a higher level of damage/injury/seriousness);
3. Category 3 – Failure to comply with health and safety duty (with a lower level of damage/injury/seriousness).

For example, a category 1 offence is committed if:

- (a) the person has a health and safety duty, and
- (b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness, and
- (c) the person is reckless as to the risk to an individual of death or serious injury or illness.

As set out previously, these offences are taken to be strict liability offences and as such, leave little to no room for excuse or defence.

Each category carries a separate maximum penalty and, as set out previously above, these penalties are more severe in the case of a breach by an applicable strata title body corporate.

The conviction of a strata title body corporate under Category 1 carries a three million dollar maximum penalty (\$3,000,000.00), with Category 2 carrying a maximum penalty of one and a half million dollars (\$1,500,000.00) and Category 3 half a million dollars (\$500,000.00).

More than one person involved

Section 46 states that if more than one person has a duty under the WHS in relation to the same matter, those individuals have a duty, as far as reasonably practical, to consult regarding the matter.

In the case of a strata title body corporate, this duty could be dispensed with during meetings of the Owners Corporations. Failure to comply with this duty carries a maximum penalty of one hundred thousand dollars (\$100,000.00) for a body corporate.

Officers and liability

Section 244 makes express provision for the liability of a strata title body corporate as follows:

- (1) For the purposes of this Act, any conduct engaged in on behalf of a body corporate by an employee, agent or officer of the body corporate acting within the actual or apparent scope of his or her

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employment, or within his or her actual or apparent authority, is conduct also engaged in by the body corporate.

- (2) If an offence under this Act requires proof of knowledge, intention or recklessness, it is sufficient in proceedings against a body corporate for that offence to prove that the person referred to in subsection (1) had the relevant knowledge, intention or recklessness.
- (3) If for an offence against this Act mistake of fact is relevant to determining liability, it is sufficient in proceedings against a body corporate for that offence if the person referred to in subsection (1) made that mistake of fact.

What this clause means for a strata title body corporate, is that if any employee, agent or officer (ie, any lot owner) breaches a provision under the Act, the strata title body corporate itself is liable for that offence in a strict liability capacity.

Such a breach could occur in the instance where, if the building is caught by the operation of the Act, a lot owner engages a tradesman to perform work on their lot, without carrying out the requisite acts provided for in the WHS and the MWSHR.

What do I need to do now?

A PCBU or “responsible person” is required to implement control measures to minimise or eliminate risks to the health and safety of workers, self-employed persons and members of the public.

The bodies corporate must ensure that the common property is a safe environment for workers (including those conducting maintenance and repair), tenants, owners and visiting members of the public. The PCBU must ensure, so far as reasonably practical, that health and safety of workers engaged is not put at risk.

Hazards and risks which may apply to the Committee can include pools, storage of hazardous material, slips, trips and falls. This will require bodies corporate to keep registers, discuss issues with tradespersons, have adequate training for risks and have adequate documents displayed advising of risks. Some of the things that need to be covered are:

1. Fire and Evacuation/Emergency Management Plans;
2. Asbestos Management Plans;
3. Contractors’ Safe Work Method Statements;
4. Contractors’ Site Facilities Schedules.

The new legislation places more onerous obligations on bodies corporate. They are required to take a more pro-active role in the management of risk at their premises.

The Executive Committee needs to work closely with their managing agents to ensure that the measures are in place and risks identified (and dealt with). There needs to be an ongoing risk management system developed and regularly reviewed and updated.

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How does it affect Managers

The impact on managers will vary depending on the Agency Agreement and the work to be undertaken. It will fall generally into the following categories:

A. Where the Manager is a compulsory appointment

In some States managers can be appointed to manage bodies corporate by a Court or Tribunal. In these instances the managers would appear to be a PCBU for the purposes of the Act and covered for all obligations and responsibilities.

B. Where the Manager provides administrative tasks only

Some Agency Agreements provide for managers to only provide administrative tasks (i.e. paying accounts, sending levy notices, arranging meetings). In these cases it appears that there is no exercise of control over decision making or influence over the processes of management of the bodies corporate.

C. Where the Manager provides management and administrative tasks

It will be in these instances where managers may be considered as part of the decision making processes and then covered by the provisions of the Act. Examples are where:

- a. Where the manager is able to pledge an amount for works under the Agency Agreement (ie urgent repairs or maintenance under a certain monetary limit);
- b. Where the manager is delegated the duties and functions of the Executive Committee to make some or all decisions;
- c. Where the Agency Agreement delegates the manager full powers without limitation;
- d. Where the Agency Agreement delegates the manager responsibilities for repairs, maintenance, annual fire safety inspections, arranging contractors, engaging contractors etc.

The respective roles and delegated tasks contained in Agency Agreements should be reviewed to determine what level of delegation a manager has, the power to exercise that delegation and how far that delegation extends.

What should managers do?

Manager should review their delegations in their Agency Agreements (and in some instances seek assistance) to determine whether they have been delegated duties and functions that may make them a PCBU.

Managers should also work with their bodies corporate to determine regimes for the implementation of the legislation as it applies to that bodies corporate.

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