

Common Property Safety

Strata Titles Act 1985 and Workplace Health and Safety Act 2020 as at 10 Nov 2020



A presentation for LookupStrata

Marcus Munstermann, 03 March 2022



The material in this presentation is intended for educational purposes only and does not replace the need to engage independent professionals where necessary prior to providing any advices in respect of the following material. Statements of fact and opinions expressed are those of the participants individually unless expressly stated to the contrary. The following information is given in summary form and does not purport to be complete. Information in this presentation, including excerpts from legislation, interpretative comments as to the intent of legislation or the obligations of persons in respect of any legislation, code or standard, are QIA's interpretation of that information and should not be considered as advice or a recommendation to anyone in relation to any compliance related matters. Any information provided does not take into account any specific situation or does not serve as a statement as to the level of compliance of any person or organisation attending the presentation or receiving a copy of the presentation.

QIA Group does not endorse or approve, and assumes no responsibility for, the content, accuracy or completeness of the information presented beyond its' level of expertise and experience.

Disclaimer



The focus of this presentation is to provide an overview of the requirements for Common Property Safety as it relates to the Work Health Safety 2020 and Regulations which are expected to come into force in March 2022.

Key Reference Terms

- **Common Property** – Land shown as common property on a plan of subdivision, Registered Plan, Lodged Plan or a plan of strata or cluster subdivision
- **Occupiable lot** – A lot that is ordinarily used for residential and/or business purposes
- **Strata Company** – a body corporate which is incorporated by registration of a plan of subdivision or a plan of strata or cluster subdivision.
- **Duty Holder** – refers to any person who owes a work health and safety duty under the WHS Act.
- **PCBU** – person conducting a business or undertaking alone or with others, whether or not for profit or gain. A PCBU can be a sole trader (for example, a self-employed person), each partner within a partnership, company, unincorporated association, government department or public corporation (including a local or regional government).
- **Other Persons at the Workplace** – Any person at a workplace, including customers and visitors
- **Workplace** – 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.

Definitions

Common Property Safety – The Vibe

- Strata Companies consist of Lots and Common Property. The Lots are individually owned and the Common Property, as the title would suggest, is held in Common.
- Owners furnish and maintain their lot to their Own selected standard and for the most part the standards they set are sufficient to meet their needs whether their Lot is to be let or Owner occupied.
- Owners generally understand that there is a legislative requirement to maintain the Common Property but there is typically not a uniform approach to how this is done and Legislation generally attempts to provide guidance and rules to set up a framework for owners to follow.
- Common Property Safety is also impacted by many other pieces of Legislation such as Disability, Fire Safety, Dangerous Goods.

The Safety Framework

- Building Codes and Standards provide for how a Strata Scheme is to be built throughout Australia.
- The National Construction Code (NCC) is Australia's primary set of technical design and construction provisions for buildings. As a performance-based code, it sets the minimum required level for the **safety, health**, amenity, accessibility and sustainability of certain buildings.
- The Strata Titles Act 1985 Section 91 requires a Strata Company keep in good and serviceable repair, properly maintain and, if necessary, renew and replace —
 - (i) the common property, including the fittings, fixtures and lifts used in connection with the common property; and
 - (ii) any personal property owned by the strata company, and to do so whether damage or deterioration arises from fair wear and tear, inherent defect or any other cause.
- The Work Health and Safety Act and Regulations provide a framework to protect the health, safety and welfare of workers in Western Australian workplaces, and of other people who might be affected by the work.
- Duty holders under the Work Health and Safety Act are persons who owe a work health and safety duty under the WHS Act

Common Property Safety

The Safety Framework – in practice for Strata Companies

- Buildings are built to accepted standards of safety
- Maintained to those same standards over time
- Workers who carry out the maintenance works are not exposed to harm in the maintenance process.

The new Work Health Safety legislation deals with worker safety, in the context of a business or undertaking.

The business or undertaking that a Strata Company engages in is managing and maintaining the common property.

Common Property Safety – New Laws

New Legislation in the form of the Work Health and Safety Act 2020 and the Work Health and Safety Regulations are expected to come into effect in March 2022.

Key features of the Act include:

- A Primary Duty Holder called a Person Conducting a Business or Undertaking (PCBU) which is intended to capture a broader range of contemporary workplace relationships.
- A primary duty of care requiring PCBUs to, so far as is reasonably practicable, ensure the health and safety of workers and others who may be affected by the carrying out of work.
- A primary duty of care requiring PCBUs to, so far as is reasonably practicable, ensure the health and safety of workers and others who may be affected by the carrying out of work.
- A requirement that ‘officers’ exercise ‘due diligence’ to ensure compliance.

How is the Safety Framework applied to Strata Companies?

Strata Companies need to establish whether they are a Duty Holder under the Work Health Safety Act.

- Do they have a Workplace?
- Are they a Person Conducting a Business or Undertaking?,
- What kind of a business or undertaking - designer, manufacturer, importer, supplier, installer of products or plant used at work?
- Do they manage or control workplaces, fixtures, fittings, and/or plant at workplaces as a PCBU?
- Do they have officers and/or workers or other persons at the workplace.

Does a Strata Company have a Workplace?

Strata Companies own, manage and maintain the Common property and they generally do so via meetings of Committees and General meetings of all Owners.

From time to time Workers are engaged by the Strata Company to carry out works upon the common property to ensure that the common property is maintained

When the common property is being worked upon, it becomes 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.

Is a Strata Company a PCBU Duty Holder ?

Section 5 (8) of the Work Health Safety Act 2020 states:

A strata company 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 in relation to those premises.

Subsection (9) goes on to state, “Subsection (8) does not apply if the strata company engages any worker as an employee.”

It is important to note that proceedings for an offence against the WHS Act may only be brought by the Regulator – so check with WorkSafe WA (they will be the Regulator) if in doubt

Does a Strata Company have Officers?

Section 4 (A) of the Work Health Safety Act 2020 states:

(a) means —

- (i) an officer within the meaning of the Corporations Act 2001 (Commonwealth) section 9 other than a partner in a partnership; or
- (ii) an officer of the Crown within the meaning of subsection (2); or
- (iii) an officer of a public corporation within the meaning of subsection (3);

Does a Strata Company engage a worker as an employee?

Section 7 (1) of the Work Health Safety Act 2020 states:

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*

Strata Companies often engage contractors, subcontractors or volunteers but rarely engage workers as **employees**.

Does a Strata Company have Others at a workplace?

Section 29 of the Work Health Safety Act 2020 advises:

A person at a workplace (whether or not the person has another duty under this Part) must —

- (a) take reasonable care for the person's own health and safety; and
- (b) take reasonable care that the person's acts or omissions do not adversely affect the health and safety of other persons; and
- (c) comply, so far as the person is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person conducting the business or undertaking to comply with this Act.

Owners, their guests and visitors are Others at a workplace when the common property is being worked upon and so have a duty to comply with the above.

Is a Strata Company non residential and manages or controls a workplace?

Section 20 (1) and (2) of the Work Health Safety Act 2020 advises:

A “person with management or control of a workplace means a person conducting a business or undertaking to the extent that the business or undertaking involves the management or control, in whole or in part, of the workplace but does not include —

- (a) the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking; or
- (b) a prescribed person.

(2) The person with management or control of a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person.

Practical Application – Residential Strata Companies

Residential Strata Companies own, manage and maintain the Common property and they generally do so via meetings of Committees and General meetings of all Owners. This is their business or undertaking.

- If they are residential and engage a worker as an employee, a Strata Company becomes a PCBU and has substantial duties under the Work Health Safety Act 2020.

Otherwise Owners, tenants, their visitors and guests in a Residential Strata Company that engage workers (other than employees) to carry out works upon the common property, have a duty to:

- to take care of their own health and safety; and
- Ensure what they do does not adversely effect others; and
- Advise persons about anything that may impact the health or safety of persons when work is being conducted; and
- Comply with any reasonable instructions given by a person carrying out work involving the Common Property.

Practical Application – non residential Strata Companies

Non-residential Strata Companies properties also own, manage and maintain the Common property and they generally do so via meetings of Committees and General meetings of all Owners. This is their business or undertaking.

Non residential Strata Companies have a Primary Duty of Care to ensure so far as is reasonably practicable some or all of the following as part of their undertaking:

- The health and safety of the workers they engage and others at the workplace
- the provision and maintenance of a work environment without risks to health and safety; and
- (b) the provision and maintenance of safe plant and structures; and
- (c) the provision and maintenance of safe systems of work; and
- (d) the safe use, handling and storage of plant, structures and substances; and
- (e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and
- (f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
- (g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

Practical Application – non residential Strata Companies

Non-residential Strata Companies properties will also manage and control the common property to some extent when it becomes a workplace and so will need to ensure:

- so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person.

Practical Application – Duty of Care

While residential Strata Companies have few duties under the proposed Work Health Safety Act 2020 (as assented to on the 20th of November 2020), they do have duties under Common Law.

At its most basic, a duty of care is a legal obligation (that we all have) to take reasonable steps to not cause foreseeable harm to another person or their property. A duty of care is breached when someone is injured because of the action or inaction of another person when it was reasonably foreseeable that the action could cause injury, and a reasonable person in the same position would not have acted that way.

This duty is a positive duty which means Owners are required to find out if the Common property is safe and do their best to rectify any issues they discover. It is not a defence for Owners to say that they were not aware of or did not know that the Common Property was unsafe, as they are required to ensure it is, at all times.

Next Steps

Strata Companies need to determine:

- If they are a duty holder under the proposed WHS legislation and Common Law
- In what context
- Which duties they need to discharge
- How they intend to discharge those duties

Discharging Obligations

WHS Safety compliance for residential Strata Companies is essentially achieved by managing and maintaining common property and ensuring that any changes made to the Common property comply with the relevant Standards and/or Codes.

Owners can decide to engage persons to assist them with in discharging their obligations.

Currently Owners obtain a 10 year plan which sets out the common property and the personal property of the strata company that is anticipated to require maintenance, repair, renewal or replacement (other than of a routine nature), to assist them with budgeting for capital repairs and replacements.

A Safety Report is mechanism by which Owners can identify, manage and control the risks associated with persons utilising the common property and tends to include items of a routine nature.

What is a 10 year plan?

It is an assessment that includes:

- The *Covered Items* anticipated to require maintenance, repair, renewal or replacement (of a non-routine nature) within the next 10 years; and
- The present condition or state of repair of those items; and
- When those items or components of those items will need to be repaired or replaced; and
- The estimated cost of the repair and replacement of those items or components; and
- The expected life of those items or components once repaired or replaced; and
- Any other prescribed information.

The Regulation defines a covered item as including a plant and equipment such as:

- lifts, air conditioning, heating plant, solar panels, car stackers and pumps.
- common property structures, including the roof, stairways, balustrades, and window frames;
- common property services, such as shared water, gas and sewerage pipes, pumps, drains, electrical and telephony infrastructure;
- common property assets, such as fences, pools, and water tanks.

Not to overcomplicate it, if the OC owns it, or if it is critical whole of building infrastructure, or if it services more than one lot, it should form part of the plan.

What is a Safety Report?

Is based on a visual inspection of the readily accessible Common Property areas and accounts for the likelihood that a physical hazard will represent a substantial risk to people and the consequences of exposure to that risk.

It is an assessment that:

- Identifies each of the physical hazards found; and
- Provide the location of each hazard; and
- Explain why each item has been identified; and
- Apply practical and sensible methods to minimise the risks associated with each hazard.

Owners, residents and contractors move across the Common Property every day. The Owners own the Common Property are required by law to maintain it on a routine basis.

Owners are afforded a defence under Common and Statute law if they can demonstrate that they have, on a routine basis taken steps to assess the condition of the common property and manage any issues that arise.

Carrying out Common Property Safety inspection on a routine basis provides Owners with a defence and minimizes the potential for personal injury posed by any physical hazards and assists Owners in the **routine maintenance** of the Common Property.

What do we do with a 10 Year Plan or Safety Report?

- A 10 Year Plan does not have effect unless it is approved by the Strata Company.
- The Strata Company must report to the annual general meeting in relation to the implementation of its approved 10 Year Plan.
- An owners corporation that has an approved 10 Year Plan must establish a reserve fund in the name of the owners corporation.
- Subject to any conditions specified in the regulations and an ordinary resolution of the owners corporation, money may be paid out of the maintenance fund at any time in accordance with the approved 10 Year Plan. Money may also be paid out of the maintenance fund other than in accordance with the approved 10 Year Plan if the owners corporation by special resolution approves the payment.
- Address the issues mentioned in the to do list of the Safety Report as soon as possible.
- Consider updating the plan or Safety report on an annual or routine basis once considering costs for the year, changing priorities, and changing status of the Common Property.

What makes them a good idea?

- A 10 year plan provides clarity around what assets, plant and equipment, services, etc are present on the property and sets a strategy for maintaining them and the Common Property in a safe condition.
- Too often, items are neglected because no-one considers the maintenance and upkeep, and the resultant failure could lead to a much larger problem than it would have if an item had been properly maintained.
- Sound planning and maintenance strategies will help “smooth” levies over time and actually decrease the levy burden on owners over the long term, avoiding unexpected funding requirements and being “surprised” by large or unexpected maintenance costs
- Carrying out Common Property Safety inspection on a routine basis provides Owners with a defence and more importantly minimizes the potential for personal injury posed by any physical hazards present on the Common Property.
- Owners and residents benefit directly from the installation of a handrail or elimination of a trip hazard in their walkways.

4 Safety Myths

If a new Code, Standard or law comes into effect I need to upgrade to comply with it.

It is generally accepted that the Code, Standard or Legislation of the day a Strata Company was approved is what applies until such time as a part of the Common Property needs to be replaced, upgraded or modified. **Interpretation Act 1984 Sec 37**

There is a Code, Standard or Law that provides instructions for all safety issues.

There are many Codes and Standards that provide a great deal of information as to how something is to be built, some information as to how a building is to be maintained and very little as to how often. A risk assessment is often the best and only method of identifying and managing a safety issue.

If I get a safety report done then I will be made liable for any safety issues identified in the report.

Owners have a duty to ensure that the Common Property is safe at all times and must satisfy themselves that the Common Property is safe as a part of that process.

Putting up a sign is all I need to do to solve the problem

Before you put up a sign you must have tried to eliminate the hazard or reduce the risk via substitution or isolation – then you can turn to signage.

QIA Group is here to help

We provide specific common property reports and services to

Identify:

- what needs to be maintained and consider any risks that need to be managed
- What needs to be insured, what needs to be replaced following an insurable event

Assess:

- the condition of the Common Property, buildings, plant, facilities and infrastructure

Prescribe:

- the required or suitable maintenance standard and intervals
- the necessary insurable value of the property to advise your insurer

Prioritise:

- necessary maintenance

Fund:

- anticipated long-term capital maintenance
- review and revise budgets in real time

Thank You



More Information

QIA Group Pty Ltd

Email: craig@qiagroup.com.au

Phone: 1300 309 201

www.qiagroup.com.au

