

WORK HEALTH AND SAFETY IN STRATA



WHS AS IT APPLIES TO STRATA SCHEMES AND STRATA MANAGERS

The WorkSafe Commissioner's recent response following a meeting in September 2023, where SCA WA's Position Paper was presented, has been helpful in clarifying several points of concern.

A *Residential Strata Scheme* is a Person Conducting a Business or Undertaking (PCBU) unless it is excluded by subsection 5(8) of the Work Health and Safety Act (WHS):

- if the “*common areas are used exclusively for residential purposes and the company does not employ any persons*”.

A change in use, such as an application to change the use of a residential apartment to short-stay may remove the residential exclusion. Further, individual owners that operate a business from home may be considered a PCBU, and by default, if visitors or customers of the home business traverse the common property, then by default, the Strata Scheme has the potential to lose its exclusion.

WHO HAS A PRIMARY DUTY OF CARE?

Where a Strata Scheme or Strata Manager is a person conducting a business or undertaking (PCBU), the PCBU has a primary duty to eliminate risks to the health and safety of workers so far as is **reasonably practicable**.

If it is not reasonably practicable to eliminate risks, they must be minimised so far as is reasonably practicable in order to:

- a) provide and maintain a work environment that is without risk to the health and safety of workers;
- b) give workers the necessary information, instruction, training or supervision to do their job safely and without risks to health; and
- c) consult with workers and other PCBUs about health and safety issues that may directly affect them

Further, a PCBU must ensure, so far as is reasonably practicable, that the health and safety of ‘other persons’ is not put at risk. For example, visitors or residents at the strata complex must not have their health and safety put at risk because of any work being conducted on-site, such as debris flicked from lawnmowers, or objects falling from roofs, or cleaners mopping tiled floors.

Reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account, and weighing up all relevant matters including:

- a) the likelihood of the hazard or the risk concerned occurring; and
- b) the degree of harm that might result from the hazard or the risk; and

**IF THE VOICE IN YOUR
HEAD HAS TO ASK
“IS THIS SAFE?”
IT ISN'T.**

- c) what the person concerned knows, or ought reasonably to know, about:
 - i. the hazard or the risks at the scheme; and
 - ii. ways of eliminating or minimising the risk at the scheme; and
- d) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

It is not necessary for an accident or injury to occur. A risk to health and safety can give rise to a breach, although, injuries will usually increase potential legal liability (e.g. prosecution, workers' compensation, and civil liability).

In the case of the Strata Scheme and the Strata Manager both being classified as a PCBU, each PCBUs requirement to discharge their duty, is limited by the extent to which it has **the capacity to influence and control the matter in a timely manner.**

A PCBU cannot contract out of their health and safety duties, but they can make arrangements with other PCBUs to do the things that will assist them to meet their duties.

WHAT ARE THE DUTIES IMPOSED ON THE DECISION MAKERS?

An **Officer** is defined as a person who makes or participates in making decisions that affect the whole or a substantial part of the scheme or strata management business. It is important to reference this against the Corporations Act (s. 9) when deciding if you are defined as an Officer.

An Officer has a duty to exercise due diligence to ensure that the Strata Scheme or Strata Management Company complies with any duties or obligations it owes under the WHS Act as a PCBU. This includes taking reasonable steps to:

- a) acquire and keep up-to-date knowledge of work health and safety matters;
- b) gain an understanding of the nature of the operations of the scheme and generally of the hazards and risks associated with those operations;
- c) ensure they have available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out at the scheme;
- d) ensure they have appropriate resources for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
- e) verify and review the standard operating procedures being implemented at the scheme.

In the case of an elected owners committee in a Strata Scheme, if the committee members have significant control or influence over the management and maintenance of the common property and shared facilities, and if they have a duty to ensure that health and safety risks associated with the Strata Scheme are effectively managed, they may be considered "Officers" under WHS legislation.

IF I'M NOT A PCBU, AM I STILL LIABLE IF THERE IS A SAFETY INCIDENT?

YES!! Everyone has a responsibility to be aware and help manage health and safety risks at the Strata Scheme.

UNSAFE IS UNACCEPTABLE!

A person (being anyone) at a Strata Scheme that is not a PCBU still has a **duty of care** to owners, occupiers (includes tenants), contractors, and visitors that attend the scheme, and 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 with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with their WHS obligation.**

HOW DOES THIS ALL RELATE TO THE STRATA SCHEME AND THE STRATA MANAGER?

STRATA SCHEME

Both the Strata Act and the WHS impose a positive obligation on the Owners to maintain the scheme.

The first priority at each Annual General Meeting (AGM) should be to identify and budget for the remediation of all safety issues, then decide if the painting falls into this year or needs to be pushed back to next year.

As soon as a Strata Scheme is made aware of a safety concern and fail to act, they increase their liability exponentially. It is also possible that they have compromised their insurance cover in the event of an accident.

It is also an owner and occupiers' responsibility to be aware of risks, notify the responsible person of the risk and ensure mitigation measures are implemented.

STRATA MANAGER

A bookkeeper is a PCBU, but it would not be expected that they would know, or ought to know, about the hazards or the risks that may exist around a client's office.

Saying this, if the bookkeeper were to attend their client's office each week to undertake their accounting duties, the bookkeeper must ensure, so far as is reasonably practical, that they take responsibility of their own health and safety while at work.

It may also be expected that they notify their client about any perceived risks that they identify, and the client is therefore obligated to remedy the risk. They cannot ignore a perceived safety risk, the 'head in the sand' or 'turning a blind eye' is no defence when being prosecuted by WorkSafe.

Applying this logic to a Strata Manager, if they are only providing an administrative duty, such as managing the accounts and record keeping (including managing correspondence), then it should not be reasonably expected that they would rush down to site as soon as there is a perceived safety risk or incident.

Saying this, the Strata Manager duties may include responding in a timely manner to any correspondence. It may also be expected that they would ensure that the contractor engaged is suitably qualified and adequately informed so that they can safely undertake the task they are instructed to perform on behalf of the Strata Scheme.

Does this extend to inducting the contractors on site and taking a more pro-active approach to managing incidents? I'm not sure.

I come back to the duties of the bookkeeper, and under this analogy, I do not believe the bookkeeper is responsible for managing the client's employees or contractors, and certainly, is not expected to manage safety incidents.

As the custodians of the books and records and the administrator of the communication between parties, the Strata Manager needs to ensure that all persons (owners, occupiers and contractors) are provided the safety reports pertaining to the scheme, including asbestos reports that **MUST** be provided for schemes built prior to 31st December 2003.

**TURNING A BLIND
EYE IS NO DEFENCE
WHEN BEING
PROSECUTED BY
WORKSAFE.**

AS A STRATA MANAGER, HOW DO I KNOW IF THERE IS A SAFETY RISK, AND WHAT SHOULD I DO?



The biggest challenge faced in the Strata Managers role is communication, particularly if quantifying the role as delivering administration/bookkeeping duties only.

The importance of good communication can never be underestimated, for example, you receive an email stating:

- a) the vehicle gate to the complex is not working; or
- b) the vehicle gate to the complex is not working, a car has hit the vehicle gate and knocked it off its rails.

The email in 'a' above is received every day by a Strata Manager and they may not reasonably assume that there is a risk to either the contractor attending, nor the occupiers on site.

However, the email in 'b' above may be providing more context to example 'a'. There was an incident, and this time there was an observer of the accident reporting, and they are reporting fault.

It would now be assumed that there might be a risk, and the gate is not adequately secured. Thus, it is essential the Strata Manager extends a warning to the contractor attending to remedy the gate and to the occupiers on site.

It may also be appropriate to send someone to site to make safe i.e. put-up hazard tape or cone off the gate and install warning signs. It cannot be assumed everyone on site is receiving an email communication from the Strata Manager, thus, active site safety mitigation is essential.

In each incident, the Strata Manager may seek authority from the elected owners committee to issue a work order for the various contractors to attend, and under this scenario, we are simply performing an administrative task.

But what if the Strata Manager has been delegated the authority to action this type of work without direction from the elected owners committee? What if the Strata Manager attends site a couple of times a year to meet with a representative and walk around the scheme to compile a list of maintenance items to action?

The Strata Manager is gaining an understanding of the scheme and generally of the hazards and risks associated around the scheme, and they are taking a more active role in maintaining the scheme and managing the risks.

Must the Strata Manager therefore ensure that they have the appropriate resources and processes to eliminate or minimise risks to health and safety around the scheme, are they now defined as an Officer, and all obligations as defined in the WHS to an Officer apply?

What if the Strata Manager attends site and witnesses a resident spill a cup of coffee in the tiled lobby, are they not now expected to manage the risk, call the cleaner, direct people coming and going around the slip hazard.

I would suggest that as soon as a Strata Manager provides more than an administrative role, for example:

- attending site and taking a more active role in managing maintenance issues around the scheme;
- delegated the authority to issue work orders without approval from the elected owners committee, or engaging and communicating with contractors over and above just sending works orders;
- assist with scoping or organising/planning a works project;

that they are now clearly obligated to meet all duties imposed on the Officer, and subsequently, subject to all the liabilities if they fail to adequately manage site safety and incidents.

Health and safety representatives

WHS resources



WHAT CAN THE STRATA SCHEME AND THE STRATA MANAGER DO TO HELP MITIGATE THEIR LIABILITIES?

Owners and occupiers are generally not aware of their obligations under the WHS legislation. This comment probably extends to Strata Managers who for a long time were of the understanding that they could hide behind the elected owners committee or Strata Scheme.

Perhaps this is the line in the sand when all parties come to fully understanding their obligations, not just as they may be defined under the Strata Act, but also how other pieces of legislation, such as WHS also implicates and imposes duties on the Strata Manager.

I would suggest that it is important that each year there are motions on the agenda that educate the Owners, which may include:

- acknowledge that Owners have a duty of care to other owners, occupiers, contractors, and visitors attending the scheme and that they have a positive obligation to ensure their scheme is free from health and safety risks (or at least mitigated to an acceptable risk level);
- progressing a WHS/Safety Report on a regular basis;
- items of concern being discussed for minuting and actioning following the meeting (noting, safety concerns should be raised with the appropriate person as soon as they are identified, not just at the AGM);
- any reports that have been commissioned on behalf of the Strata Scheme being tabled. The elected owners' committees, and the Strata Manager, cannot sit on these reports, they must ensure all persons are fully aware of any risks that may exist around the scheme, and the best way to do this is in the minutes of the AGM.
- extending the obligation onto Owners to ensure they read all safety reports. As a property owner it would be reasonably expected that if there is a safety report pertaining to their place of residence or investment, they have a positive obligation to be aware (Noting, duty of care also sits in most Landlord and Occupiers legislation).

It is also important to note that Division 11 of the WHS Regulations deals with psychosocial hazards and places a positive obligation on the PCBU to help implement control measures.

Don't just think physical, think psychological as well!!

Depending on the contracted duties of the Strata Manager, if the Strata Manager falls under the definition of an Officer, then there is no hiding.

The Strata Manager cannot hide behind the Strata Act, as the fines and penalties imposed under the WHS are significant and cannot be ignored. If WorkSafe are lining you up for prosecution, they are not referencing the Strata Act, they are targeting you for failing in your duties under the WHS Act.

**PSYCHOSOCIAL
HAZARD
AWARENESS IS
IMPORTANT.**

If your duties or actions define you as an Officer, it is worth including a motion that as an Officer under the WHS, you need to comply with all the obligations of a PCBU, including:



- adopting a robust work, health and safety policy to be followed by the Strata Managers employees, and the workers it engages on behalf of the Strata Company to perform duties at the scheme;
- implementing a system to identify potential risks or hazards and steps to remedy these. This may be delivered by either contracting a safety officer to assess the scheme, or employing a safety officer that attends any newly contracted scheme;
- ensuring that any new workers to be engaged by the Strata Company undertake a site induction of the scheme and ensure they are trained in the Strata Managers' safety policies and procedures;
- when engaging workers to perform services at a scheme, ensuring that they are cognisant of their safety obligations and are competent in the work they are performing (which may include checking licences and certifications);

- periodically 'checking-in' on workers to ensure they are following safety processes and to give them the opportunity to raise safety concerns or suggestions to improve safety;
- establishing clear processes in the event of an incident, including notification and reporting processes, how to respond in the short term (such as evacuating the area or otherwise making the area safe) and what steps the PCBU will take after the immediate risk is removed (including how to prevent the risk or hazard occurring again).



It is also worth noting that the Strata Scheme has an obligation to comply with any reasonable direction given by a PCBU, and they must allow the PCBU to comply with their WHS obligations.

In providing the above interpretation, I have endeavoured to keep it relevant for all States and Territories.

Please note that the observations are based off my individual assessment of the Work Health and Safety Act (WHS) and Regulations, and clearly do not represent a legal opinion nor advice.

If readers have concerns about their obligations under the WHS legislation, then they should seek expert advice.

The context of my discussion above should also be read in conjunction with the SCA (WA) Position Paper I drafted dated 5th September 2023, and the subsequent response from the WorkSafe Commissioner received the 13th of November.



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"Managing and living in strata is not just about strata legislation.

Everyone visiting your strata scheme is entitled to make it home safe and well.

Keep your scheme safe!!"



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