Work Health & Safety Act 2011 and the Work Health & Safety Regulation 2017

The current work health and safety legislation in New South Wales comprises:

1. The Work Health and Safety Act 2011 ("Act"). The Act set up the legislative framework and imposed general obligations.

2. The Work Health and Safety Regulation 2017 ("Regulation"). The regulation imposed more detailed obligations in relation to specific areas.

3. Various codes of practice ("Codes") approved under section 274 of the Act. It is important to note that the Codes provide guidance as to how obligations under the Act and Regulation may be complied with and do not impose independent obligations, because in some respects the Codes appear to go beyond the requirements of the Act and Regulation.

Key points:

1. Section 14 of the Act provides that an obligation cannot be transferred to another person, i.e. a person with an obligation under the Act remains liable, notwithstanding that they may have appointed an expert consultant to assist with compliance. In practical terms, this means that a person with obligations under the Act needs to verify compliance and not simply delegate to consultants. It may also be appropriate to obtain indemnities from consultants.

2. The legislation imposes significant penalties for non-compliance and non-compliance would potentially give rise to the arguably greater risk of a negligence action by a third party suffering loss as a result of the relevant acts or omissions.

Application to owners corporations and managing agents

From the perspective of owners corporations and their managing agents, determination of whether the legislation applies to them requires consideration of the following:

1. The provisions of the Act imposing obligations impose those obligations on a "person conducting a business or undertaking" ("PCBU").

2. The provisions of the Regulation imposing obligations impose those obligations on a "person with management or control of a workplace" ("PMCW").

3. Section 20 of the Act provides that PMCW means a PCBU to the extent that the business or undertaking involves management or control of a workplace, but does not include the occupant of a residence (unless the residence is used for the conduct of the business or undertaking) or a prescribed person.

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4. Section 8 of the Act defines workplace as 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.

5. Regulation 7 of the Regulation prescribes certain persons and hence exempts them from the operation of the new legislation, including a strata title body corporate in relation to common property areas used only for residential purposes, unless the strata title body corporate engages any worker as an employee. This gives rise to at least the following issues:

   a. What uses of the common property and/or lots negate use of the common property "only for residential purposes". In our view, use of a lot for a home occupation does not negates the common property being used "only for residential purposes".

   b. Whether owners corporations can be attributed with liability for actions by lot owners and others. In our view, action by a lot owner, e.g. engagement of a contractor to perform work on his lot, does not give rise to liability on the part of the owners corporation.

   c. What engagement of workers will negate the exemption. In our view, the expression "engage a worker as an employee" does not include non-employee workers, such as building managers and caretakers employed on a contract basis. Such a person may himself be a PCBU or PMCW, but does not make the owners corporation one.

   d. Whether strata managing agents are managing a workplace on the common property, e.g. as a result of site inspections and either are independently liable under the new legislation or render the owners corporation liable by negating use of the common property "only for residential purposes". It is unfortunate that the new legislation did not clarify this, by expressly extending the exemption available to residential owners corporations to their strata managing agents, but in our view it is strongly arguable that:

      i. the exemption available to owners corporations must, by implication, extend to their managing agents performing functions delegated from them.

      ii. inspections of a residential property by a managing agent, not involving construction or other actual work is incidental to residential use of the property and arguably does not render the common property a workplace.

6. Section 27 of the Act imposes obligations on officers of bodies corporate. Section 4 of the Act defines "officer" by cross-reference to the Corporations Act and in our view that will result in strata committee members being officers of an owners corporation for the purposes of the legislation. The principal obligation imposed on officers is to exercise "due diligence" to ensure that the owners corporation complies with its obligations under the new legislation. The legislation elaborates on what "due diligence" requires and it appears clear that strata committee members will need to take a proactive role.
7. As to application of the legislation to common property of strata schemes:

   a. In commercial schemes, the lots may well represent workplaces and a lot owner or occupier may well be a PCBU or PMCW, but it does not necessarily follow that the owners corporation or its managing agent will be a PCBU or PMCW with respect to the common property. That will depend on the use of the common property, but may be the case where lot owners or others are allowed to use parts of the common property for commercial purposes and the terms of the lease, licence or by-law involve the owners corporation or managing agent having "management or control" of the workplace.

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b. In residential schemes, the owners corporation will generally not be a PCBU or PMCW unless it has employees working on the common property or where lot owners or others are allowed to use parts of the common property for commercial purposes and the terms of the lease, licence or by-law involve the owners corporation or managing agent having "management or control" of the workplace.

Obligations Imposed

For owners corporations to whom the new legislation applies, the most relevant obligations under the new legislation are as follows:

1. The primary duty of care, imposed by section 19 of the Act and Chapter 3 of the Regulation, to ensure a safe workplace, which will necessitate a risk audit and management and emergency plans.

2. Part 5 of the Act dealing with consultation, representation and participation, which will necessitate adoption of procedures and appointing persons to various roles.

3. Part 3 of the Act, dealing with notification of “notifiable incidents”, which will necessitate adoption of appropriate procedures.

4. Chapter 5 of the Regulation, dealing with registration of prescribed plant and structures, particularly lifts.

5. Chapter 6 of the Regulation, dealing with construction work, which will necessitate adoption of procedures when engaging contractors to perform works within the common property or lots.

6. Chapter 8 of the Regulation, dealing with management of asbestos, which will necessitate identification of asbestos contaminated materials which may be present and if so formulation of an asbestos register and asbestos management plan.

Recommended Action

We suggest that owners corporations and their managing agents consider the following, where they have not already done so:

1. Reviewing current strata managing agents’ agreements, which may not properly address issues arising under the legislation.

2. Reviewing this building manager and caretaker agreements, which may also not properly address issues under the new legislation.

3. Determining whether the new legislation applies to the scheme, according to the considerations set out above, but erring on the side of caution.

4. If so, putting into place procedures and motions in order to ensure compliance with obligations under the legislation, particularly:

    a. Conducting a risk audit and preparing risk management and emergency plans.

    b. Reviewing lift and other plant registrations.

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c. Obtaining an asbestos report and if present formulating an asbestos register and asbestos management plan.

5. There may be special cases, such as appointments under Section 237 of the Strata Schemes Management Act 2015. In our view, statutory protections available to managing agents appointed in this way may not be sufficient to address issues under the new legislation and they may wish to explore the possibility of an agreement with the owners corporation for that purpose.

Key takeaways

- The Work Health and Safety Act 2011 establishes a framework for safety obligations in NSW.
- Obligations under the Act cannot be transferred to another person, maintaining liability for compliance.
- Owners corporations may have specific exemptions under the legislation, depending on their activities.
- Engagement of certain workers can affect the liability of owners corporations under the WHS legislation.
- The legislation imposes significant penalties for non-compliance, highlighting the importance of adherence.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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