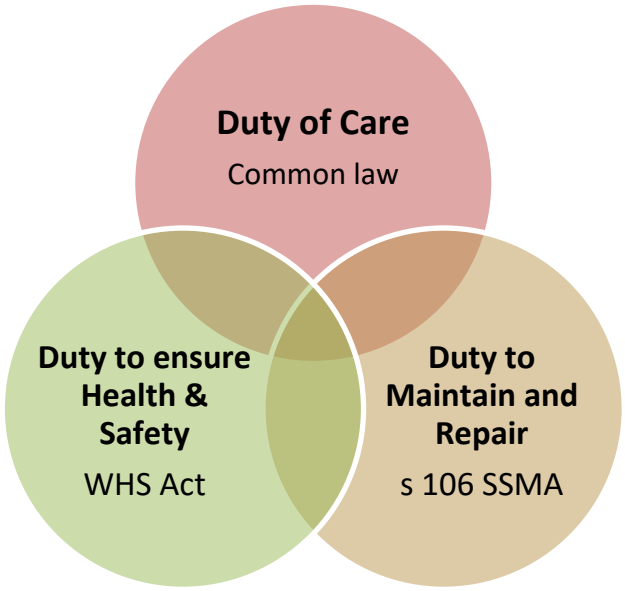
Owners Corporation's Duty to Ensure Safety of the Common Property

It is the responsibility of an owners corporation to ensure that common property is reasonably safe to users. This responsibility can be three dimensional and often with a degree of overlap.



Even if the hazard or danger posed by the common property was obvious and/or a matter of common sense, an owner or occupier is not absolved from liability. For example, in *Panther v Pischedda* [2013] NSWCA 236, the plaintiff was successful against the property owner when she slipped and fell on a steep driveway made of exposed river stones embedded in cement which was wet due to heavy rain at the time. The court held that the risk was foreseeable and the owner failed to take reasonable precautions (such as installing a handrail).

Tenanted units are regularly inspected by the landlord or leasing agent. Despite this, an owners corporation still bears the primary duty to ensure regular and appropriate inspections of the state of common property are carried out and any defects repaired as a matter of priority. In *Wu v Carter* (2009) NSWSC 335, a plaintiff tenant was injured when she fell from the second floor due to a defective balcony railing. The leasing agent had prepared a pre-condition report but had failed to detect the defect with the railing. The court apportioned liability 75% to the body corporate and 25% to the landlord's agent because: ... *the railing formed part of the common property, which the body corporate had a continuing duty to maintain and keep in a state of good and serviceable repair (section 62 of the* Strata Schemes Management Act 1996*)*. Section 62 of the Strata Schemes Management Act 1996 has been replaced by section 106 of the Strata Schemes Management Act 2015.

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If a body corporate (even a wholly residential one) employs a worker, hires a contractor, labour hire or has a volunteer worker on common property, it: ... *must ensure, so far as is reasonably practicable, the health and safety of workers*(section 19(1) of the Work Health and Safety Act 2011).

Due to the contractual relationship, an owners corporation is able to exert a level of control over its worker, contractor, etc. in relation to the work performed. An issue arises as to whether an owners corporation has discharged its statutory obligations by engaging a contractor/worker with its own safety protocols or procedures in place.

In *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14, a contractor of Baiada was killed when he was struck by a crate that fell off a forklift negligently driven by an employee of another contractor at an offsite location. In overturning Baiada's conviction and ordering a retrial, the High Court held the words 'reasonably practicable': ... *does not require an employer to take every possible step that could have been taken.* In some circumstances, engaging a contractor to perform work may be a *reasonable practicable* way for a principal to ensure worker health and safety. This is particularly so if the contractor has greater expertise and experience in performing the work than the principal, and the contractor has its own safety system and procedures that it implements in relation to the work. The *Baiada* decision does not mean that an employer can 'outsource' its WHS obligations to contractors. Rather, 'reasonable practicability' requires consideration of a range of factors, including the competence and experience of the contractor compared to that of the principal.

The recent case of *Doherty v The Owners - Strata Plan No. 36613* [2021] NSWCATAP 285 (*Doherty*), involved whether common property balustrading surrounding a seventh floor balcony needed to be upgraded by the owners corporation to comply with current building standards. The balustrading in question was not in bad repair however its height did comply with current building standards and both the local Council and an engineer had highlighted to the owners corporation that the balustrading was unsafe and recommended that its height be increased to comply with current building standards. The NCAT held that the owners corporation's duty under section 106 of the Strata Schemes Management Act 2015 extended to replacing obviously unsafe common property items and not just to repair and maintaining physically deteriorated common property. The NCAT came to this conclusion on the basis that the balustrading was obviously unsafe and the owners corporation were aware that it was unsafe as a result of being informed by the local Council and the engineer.

As the above cases illustrate, an owners corporation bears the primary responsibility for common property. The courts have been willing to impose liability even if the risk is obvious, a matter of common sense and/or a leasing agent was involved. A way that an owners corporation can minimise its exposure is by obtaining a risk assessment report prepared by a qualified risk/safety assessor. Such a report is beneficial because not only does it identify possible risks in common property (and its likelihood) but it also suggests various control measures or precautions for each risk. If an owners corporation implemented the suggested control measures in a timely fashion, then arguably, it has acted in a reasonably practicable manner to address any foreseeable risk.

In order to ensure that all control measures are kept up to date and any new risks identified, the risk assessment should be performed regularly or periodically by the relevant assessor. Defects or hazards in common property pose varied risks to persons and/or property. Owners corporations should be aware of their responsibilities in relation to common property and proactively seek to manage and minimise the risk.

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