

# Proposed Reform in Relation to the Work Health and Safety Act 2011 and Work Health and Safety Regulation 2017

**TO:** **Sophie Cotsis**  
**Minister for Industrial Relations, and**  
**Minister for Work health and Safety**

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**SUBJECT:** Proposed Reform in Relation to the Work  
Health and Safety Act 2011

## **1. Introduction**

This is a submission from BannerMans Lawyers proposing reform in relation to a number of issues with the Work Health and Safety Act 2011 (“Act”) and Work Health and Safety Regulation 2017 (“Regulation”). The essential issue is that certain provisions of the Act and Regulation, in the context of the unique circumstances in which strata managing agents perform functions on behalf of strata owners corporations, have an anomalous effect in the strata sector, which has the potential effect of undermining work health and safety, rather than furthering it.

BannerMans Lawyers is a Sydney based practice focused on property law, particularly strata law. The practice employs approximately 20 solicitors and a number of support staff, all of whom are actively engaged in legal matters relating to the strata industry, including acting for developers, builders, owners corporations, community associations, neighbourhood associations, building management committees, lot owners, strata managing agents, building managers, insurance industry businesses and contractors. In the course of this practice, we have gained considerable experience in relation to the ways in which the strata legislation impacts on these stakeholders and the potential for specific reforms to either address existing issues or introduce new problems.

## **2. Relevant Legislative Framework**

The legislative provisions relevant to this submission, copies of which are extracted in the appendix to the submission, are as follows:

1. Various provisions of the act imposing duties in relation to work health and safety, including:
  - a. Section 19 of the Act, imposing a primary duty of care on a person conducting a business or undertaking.
  - b. Section 20 of the Act, imposing further duties on a person conducting a business or undertaking to the extent that the business or undertaking involves the management or control of a workplace.

2. Regulation 7 of the Regulation, essentially exempting a strata owners corporation from the meaning of “person conducting a business or undertaking” And consequently duties under Sections 19 and 20 if the common property of the scheme is used only for residential purposes and if the scheme does not engage a worker as an employee.
3. Section 272A of the Act, effectively prohibiting contracts providing for a party to give or receive insurance or indemnity in relation to a monetary penalty relating to incidents occurring after 10 July 2020.

### **3. Impact of Legislative Framework**

We submit that these have an anomalous effect in the unique circumstances of a strata managing agents performance of delegated functions for an owners corporation client, having the potential effect of undermining work health and safety, rather than furthering it. In particular:

1. Pursuant to relevant agency agreements ("Agreements"), subject to regulation under the provisions of the Strata Schemes Management Act 2015 ("SSMA") and Strata Schemes Management Regulation 2016 ("SSMR"), strata managing agents ("Agents") provide various services to owners corporation clients ("OCs"), including performance of OC functions under delegated authority. These functions may extend to matters relevant to the Act and Regulation, including management of common property and engagement of contractors. This submission is intended to address that scenario.
2. In parallel with performance of these functions, Agents will be operating their own businesses and represent a person conducting a business or undertaking and a person with management or control of a workplace and have duties under Sections 19 and 20 so far as their own employees are concerned. In this regard, strata common property of OC clients may represent a workplace for the Agent's employees, e.g. when conducting meetings on client premises or undertaking inspections or other management duties on client premises. We consider this uncontroversial and do not intend the submission to address that scenario.
3. Regulation 7 excludes an OC from the definition of person conducting a business or undertaking and consequently liability under Sections 19 or 20, where the common property of the scheme is used only for residential purposes and where the OC has not engaged workers as employees. The Agent acting for the OC does not benefit from that exclusion. This creates an anomalous situation in which:

- a. The Agent, performing functions on behalf of its OC client, has a liability which its OC client does not have, i.e. a scenario has arisen in which an agent has different liability to the principal on whose behalf actions are being performed.
  - b. The Agent, in the course of assisting an OC client with management of its common property, will be concerned about safety upon that common property, but may be undermined in that objective by a less concerned OC client. This is because the exclusion of OC liability under Regulation 7 may result in the OC seeing this as the Agent's responsibility and problem and therefore being unwilling to fund or and possibly even approve safety measures considered appropriate or necessary by the Agent. The Agent will of course see things differently, i.e. as such safety measures would be undertaken on behalf of and for the benefit of the OC, they are the responsibility of and should be undertaken at the cost of the OC.
4. This issue could be compounded by circumstances largely beyond the Agent's control. As discussed in the preceding paragraph, an OC client may be unwilling to fund or even approve safety measures considered necessary or appropriate by the Agent. Further, OC action beyond the Agent's control might impact on safety on the common property, e.g. engagement of contractors or workers by the OC directly.
  5. Compounding this issue further, Section 272A has the effect of preventing Agents from managing risk by indemnity under the Agreement or insurance cover provided by an insurer, at least to the extent of monetary penalties relating to incidents occurring after 10 July 2020.
  6. These circumstances appear to distort the usual agency relationship, potentially leading to adverse impacts on workplace health and safety, including:
    - a. Situations in which agents are unfairly exposed to liability in relation to work health and safety issues, which are beyond their practical control and in relation to which they are unable to manage risk by indemnity insurance, potentially leading to reduction of resource levels of agency businesses and potentially failure of those businesses, undermining provision of expert support to OC clients.
    - b. Situations in which agents decline to accept delegated authority from OC clients to the extent that it relates to work health and safety issues, leaving it to the OC clients to manage those issues themselves, in circumstances where

the OC clients are unlikely to have the resources or expertise to properly manage those issues, also undermining work health and safety on strata common property.

#### **4. Proposed Reforms**

We propose that these issues be addressed by way of the following reforms:

1. Amendment of Regulation 7 to the effect that a strata managing agent is also excluded from the definition of person conducting a business or undertaking to the extent that it is acting for an owners corporation client having the benefit of the exclusion, i.e. to the extent that it is acting on behalf of the owners corporation client, in contrast to acting as an employer of the Agent's own employees.
2. Amendment of Section 272A so as to permit a strata managing agent to obtain indemnity from an owners corporation client under the relevant agency agreement and insurance from an insurer to the extent that it is acting for an owners corporation, in contrast to acting as an employer of the Agent's own employees.

Please let us know if you require any additional information or would like to discuss any of the matters raised in this submission.

Yours faithfully

**BANNERMANS**



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Acc. Spec. (Prop.)

Principal

## APPENDIX

### WORK HEALTH AND SAFETY ACT 2011 - SECT 19

#### 19 Primary duty of care

1. A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
  - a. workers engaged, or caused to be engaged by the person, and
  - b. workers whose activities in carrying out work are influenced or directed by the person,while the workers are at work in the business or undertaking.
2. A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.
3. Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:
  - a. 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.

4. If:

- a. a worker occupies accommodation that is owned by or under the management or control of the person conducting the business or undertaking, and
- b. the occupancy is necessary for the purposes of the worker's engagement because other accommodation is not reasonably available,

the person conducting the business or undertaking must, so far as is reasonably practicable, maintain the premises so that the worker occupying the premises is not exposed to risks to health and safety.

5. A self-employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work.

**Note :** A self-employed person is also a person conducting a business or undertaking for the purposes of this section.

## **WORK HEALTH AND SAFETY ACT 2011 - SECT 20**

### **20 Duty of persons conducting businesses or undertakings involving management or control of workplaces**

1. In this section,

"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.

## **WORK HEALTH AND SAFETY REGULATION 2017 - REG 7**

### **7 Meaning of "person conducting a business or undertaking" - persons excluded**

1. For the purposes of section 5(6) of the Act, 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 in relation to those premises.
2. Subclause (1) does not apply if the strata title body corporate engages any worker as an employee.
3. For the purposes of section 5(6) of the Act, an incorporated association may be taken not to be a person conducting a business or undertaking if the incorporated association consists of a group of volunteers working together for 1 or more community purposes where:
  - a. the incorporated association, either alone or jointly with any other similar incorporated association, does not employ any person to carry out work for the incorporated association, and
  - b. none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the incorporated association.
4. In this clause,  
  
"strata title body corporate" means an owners corporation constituted under the Strata Schemes Management Act 2015.



## **WORK HEALTH AND SAFETY ACT 2011 - SECT 272A Prohibition on certain insurance or indemnity arrangements**

### **272A Prohibition on certain insurance or indemnity arrangements**

A person must not:

- a. without reasonable excuse, enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under this Act, or
- b. provide insurance or a grant of indemnity for liability for a monetary penalty under this Act, or
- c. take the benefit of:
  - i. a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under this Act, or
  - ii. a grant of indemnity for liability for a monetary penalty under this Act.

: Maximum penalty:

- a. for paragraph (a):
  - i. in the case of an individual--250 penalty units, or
  - ii. in the case of a body corporate--1,250 penalty units, or
- b. for paragraph (b) or (c):
  - i. in the case of an individual--500 penalty units, or
  - ii. in the case of a body corporate--2,500 penalty units.

To see the Minister's response please see below.

**The Hon Sophie Cotsis MP**  
Minister for Industrial Relations  
Minister for Work Health and Safety



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Mr David Bannerman  
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Re: Work health and safety legislation

Dear Mr Bannerman,

Thank you for your correspondence of 17 July 2023 regarding work health and safety legislation. I understand the reasons that prompted you to write.

I appreciate your views regarding proposed reforms in relation to issues identified with the *Work Health and Safety Act 2011* (WHS Act) and the *Work Health and Safety Regulation 2017* (the Regulation).

You may be aware that the Regulation is due to be remade by 1 September 2024. The Department will undertake public consultation on the provisions of the Regulation in early 2024. That consultation is an open opportunity to raise any concerns you have through the consultation process. The comments and submission you have provided will be considered in the context of the review and remake of the Regulation.

Please register your details on the NSW government's 'Have your webpage' to ensure that you are advised when this consultation commences: <https://www.nsw.gov.au/have-your-say>.

I trust this information is of assistance to you.

Yours sincerely,



**Sophie Cotsis MP**  
Minister for Industrial Relations  
Minister for Work Health and Safety

Date: 3-10-10