

WORK HEALTH AND SAFETY ACT 2011 IMPACT ON COMMUNITY TITLES SCHEMES

1. Introduction to the WHS laws

- 1.1 The Act and the Regulations are the result of an intergovernmental agreement in which the Commonwealth, States and Territories agreed to enact new work health and safety laws based on the national *Model Work Health and Safety Act* and *Model Work Health and Safety Regulations*.
- 1.2 The Act and the Regulations take effect from 1 January 2012.
- 1.3 The WHS laws establish a range of duties that apply to defined categories of people who are involved in work conducted at a workplace. The duties generally compel those people to ensure health and safety at the workplace by taking reasonably practicable steps to eliminate or reduce health and safety risks.
- 1.4 The duties under the WHS laws apply to persons who fall into one of the following broad categories:
- a) a person conducting a business or undertaking (“PCBU”); or
 - b) a worker.

2. The meaning of PCBU

- 2.1 A PCBU is defined in section 5 of the Act as follows:
- (1) *For this Act, a person conducts a business or undertaking—*
 - (a) *whether the person conducts the business or undertaking alone or with others; and*
 - (b) *whether or not the business or undertaking is conducted for profit or gain.*
 - (2) *A business or undertaking conducted by a person includes a business or undertaking conducted by a partnership or an unincorporated association.*
 - (3) *If a business or undertaking is conducted by a partnership (other than an incorporated partnership), a reference in this Act to a person conducting the business or undertaking is to be read as a reference to each partner in the partnership.*

- (4) *A person does not conduct a business or undertaking to the extent that the person is engaged solely as a worker in, or as an officer of, that business or undertaking.*
 - (5) *An elected member of a local government does not in that capacity conduct a business or undertaking.*
 - (6) *A regulation may specify the circumstances in which a person may be taken not to be a person who conducts a business or undertaking for the purposes of this Act or any provision of this Act.*
 - (7) *A volunteer association does not conduct a business or undertaking for the purposes of this Act.*
 - (8) *In this section, volunteer association means a group of volunteers working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.*
- 2.2 The WHS laws do not define “business” or “undertaking” but the interpretive guidelines provided by Safe Work Australia recommends that the ordinary meaning of those terms is to be adopted as follows:
- a) “business” means an enterprise usually conducted with a view to making a profit and which has a degree of organisation, system and continuity; and
 - b) “Undertaking” means a venture that is usually not profit-making or commercial in nature but which may have elements of organisation, systems and possibly continuity.
- 2.3 Relevantly, a PCBU for the purposes of a community titles scheme could be any of the following:
- a) a body corporate (which, although restricted from operating a business pursuant to section 96(1) of the *Body Corporate and Community Management Act 1997* (the “BCCMA”) may conduct an undertaking, including any business activities to the extent necessary for properly carrying out its functions pursuant to section 96(2) of the BCCMA);
 - b) the occupier of a lot (to the extent that the by-laws for the relevant scheme allow a person to conduct a business or undertaking from their lot);
 - c) a caretaking service contractor or letting agent;

- d) a body corporate manager.
- 2.4 However, section 5(6) of the Act provides that the Regulations may determine that a person be excluded from performing the duties required of a PCBU.
- 2.5 We note that section 7 of the Regulations provides:
- (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) *Sub-regulation (1) does not apply if the strata title body corporate engages any worker as an employee.*
- 2.6 The meaning and application of section 7(1) of the Regulations is not clear since none of the substantive terms are defined in the WHS laws.
- 2.7 We have suggested three alternative interpretations of the phrase *common property that is used only for residential purposes*, starting with a narrow interpretation and ending with a broad interpretation, as follows:
- a) Common property that is part of residential premises but which remains the responsibility of the body corporate to maintain, such as an exclusive use area allocated to a residential lot - the body corporate would be excluded as a PCBU only in respect of such exclusive use areas and would retain the duties required of a PCBU in respect of all of the common property that was not allocated as an exclusive use area to a residential lot.
 - b) Common property other than common property that is used for non-residential purposes, such as occupation authority areas granted to an onsite manager or parts of the common property that are licensed or leased to a third party, or areas granted as exclusive use to commercial lots - the body corporate would be excluded as a PCBU in respect of all of the common property that was not used for non-residential purposes.
 - c) All common property in a scheme that contains only residential lots - the body corporate would be excluded as a PCBU in respect of all of the common property.
- 2.8 However, those possible interpretations could be further limited depending on the interpretation of “residential purposes”.

2.9 In *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd* [2010] 1 Qd R 439 (“Hedley’s Case”), the Court held that “residential”, in the context of the *Property Agents and Motor Dealers Act* 2000 and the *Integrated Planning Act* 1997, had its ordinary meaning, namely that it connoted permanent or long-term occupation of the premises in question. The Court referred to the judgment of the Full Federal Court in *Marana v Commissioner of Taxation* (2004) 141 FCR 299 which considered the meaning of the term “residential premises” and concluded:

[26] Clearly, both 'reside' and 'residence' have the connotation of permanent, or at least long-term commitment to dwelling in a particular place...

[28] ... a hotel was described as '[f]irst-class family and residential'. The word 'residential' was obviously meant to suggest something other than ordinary hotel accommodation... the word 'residential' implies a special kind of accommodation, probably long term...

[31] (The dictionary) references stress the relationship between the word 'residential' and the word 'residence', suggesting the aspect of permanent or long-term occupation to which we have previously referred. They recognise use of the expression in connection with hotels but generally suggest that such usage describes a hotel that caters for long-term residents."

2.10 In light of Hedley’s Case, section 7(1) of the Regulations might be more narrowly construed so that “residential purposes” exclude any short-term, holiday or executive letting types of accommodation.

2.11 Having regard to the exemption orders from similar legislation in New South Wales as well as the Workplace Health and Safety Queensland fact sheet for bodies corporate, it appears that the interpretation suggested in our paragraph 2.7(b) (above) may be favoured.

2.12 In our view, the exemption in section 7(1) of the Regulations will not apply to a body corporate in the following (inclusive) circumstances:

- a) The body corporate has engaged a service contractor or authorised a letting agent to conduct a business from scheme land (so that the common property is being used in whole or in part for the operation of a business);
- b) One or more occupiers of lots conduct a business (including a home business) from their lot and their lot can only be accessed via common property;

- c) One or more lots are used for short-term accommodation;
- d) The body corporate has an arrangement with a third party which retains ownership of property which is located on scheme land (such as a communications tower, satellite dish or advertising signs) and which it is entitled to access from time to time.

2.13 We note that section 7(2) of the Regulations prevents a body corporate from being excluded as a PCBU where it engages a worker as an employee.

2.14 The term “employee” is not defined in the WHS law but is distinguished from other terms such as contractor, subcontractor, volunteer and apprentice in the definition of “worker” in the Act. Consequently, for example, the engagement of a caretaking service contractor by a body corporate is not the engagement of a worker as an employee and any exclusion that the body corporate might be entitled to under section 7(1) of the Regulations will not be affected in those circumstances.

3. Primary Duties of a PCBU

3.1 Section 19 of the Act establishes the primary duties of care for a PCBU and provides as follows:

- (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.

- 3.2 All of the duties in section 19 of the Act will apply to a body corporate that is a PCBU where the body corporate has engaged workers to conduct work on the common property.

4. Further Duties of PCBU

4.1 The Act contains further duties that apply to a PCBU in circumstances where the PCBU is responsible for:

- a) the management or control of a workplace; and
- b) the management or control of fixtures, fittings or plant at workplaces.

4.2 Section 20 of the Act provides:

- (1) *In this section, 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 (not defined).*
- (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.*

4.3 A workplace is defined in section 8 of the Act as follows:

- (1) *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.*
- (2) *In this section **place** includes-*
 - (a) *a vehicle, vessel, aircraft, or other mobile structure; and*
 - (b) *any waters and any installation on land, on the bed of any waters or floating on any waters.*

4.4 In relation to the definition of workplace, the explanatory memorandum to the Act refers to the decision in *Telstra Corporation Ltd v Smith* [2009] FCAFC 103, in which the Court found that it was unnecessary to establish an immediate temporal connection between the place and the work to be performed in order to establish the place was a workplace.

4.5 In the context of a community titles scheme, a PCBU with management or control of a workplace could be any of the following:

- a) The body corporate - where it is managing or controlling the common property or where it is managing or controlling lots under an arrangement with owners pursuant to, for example, section 169 of the *Body Corporate and Community Management (Standard Module) Regulation 2008* (the "Standard Module");
- b) The committee – for the same reasons as above. We note that section 5 of the Act excludes volunteer associations from the duties required to be performed by a PCBU. However, a volunteer association is defined to be a group of volunteers working together for one or more community purposes. Our view is that the members of a body corporate committee, although they are working on a voluntary basis, are not working for a greater community purpose – they are working to comply with the body corporate’s statutory obligations in order to best protect their individual and collective proprietary interests;
- c) The caretaking service contractor – where it is managing or controlling the common property pursuant to the terms of an agreement with the body corporate by, for example, supervising contractors on the common property or performing work on common property itself or by its own contractors;
- d) The letting agent – where it is managing or controlling the common property by operating an office on common property and where it is managing or controlling the lots as a workplace as the agent of an owner under a letting appointment;
- e) The body corporate manager – where it is managing or controlling the common property as a workplace to the extent required under its administration agreement with the body corporate or under an agreement made pursuant to section 120 of the Act.
- f) An occupier of a lot who conducts a business (including a home business) – where it is managing or controlling its lot as a workplace.

4.6 Section 21 of the Act provides:

- (1) *In this section, **person with management or control of conducting a business or undertaking to the extent that the business or undertaking involves the management or control***

of fixtures, fittings or plant, in whole or in part, at a 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 (not defined).*

(2) *The person with management or control of fixtures, fittings or plant at a workplace must ensure, so far as is reasonably practicable, that the fixtures, fittings and plant are without risks to the health and safety of any person.*

4.7 In the context of a community titles scheme, a PCBU with management or control of fixtures, fittings or plant could be any of the following:

a) The persons identified in our paragraph 4.4 (above) insofar as they have management or control over fixtures, fittings and plant;

b) A person who owns fixtures, fittings or plant located on common property (such as a communications tower, an advertising sign, a utility service provider) and who retains ownership and control of that equipment.

5. Duties of an Officer of a PCBU

5.1 Section 27 of the Act provides that an officer of a PCBU that has duties or obligations under the Act must exercise due diligence to ensure that the PCBU complies with its duties and obligations.

5.2 An officer includes an officer as defined in section 9 of the Corporations Act 2001 (but does not include a partner of a partnership).

5.3 Due diligence is defined in section 27(5) of the Act as follows:

due diligence includes taking reasonable steps—

(a) *to acquire and keep up-to-date knowledge of work health and safety matters; and*

(b) *to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and*

(c) *to ensure that the person conducting the business or*

undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and

- (d) *to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and*
- (e) *to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and*

Example—

For paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include—

- *reporting notifiable incidents*
 - *consulting with workers*
 - *ensuring compliance with notices issued under this Act*
 - *ensuring the provision of training and instruction to workers about work health and safety*
 - *ensuring that health and safety representatives receive their entitlements to training.*
- (f) *to verify the provision and use of the resources and processes mentioned in paragraphs (c) to (e).*

5.4 In the context of a community titles scheme, where a body corporate is a PCBU an officer may include any of the following:

- a) a committee member;
- b) an owner who controls the majority of voting (e.g. the original owner);
- c) an administrator appointed under the BCCMA;
- d) a body corporate manager (particularly under a Chapter 3, Part 5 appointment, and possibly also in the ordinary course of its engagement);
- e) a caretaking service contractor.

6. **The meaning of Worker**

6.1 A Worker is defined in section (7) of the Act as follows:

- (1) *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.*
- (2) *For this Act, a police officer is—*
 - (a) *a worker; and*
 - (b) *at work throughout the time when the officer is on duty or lawfully performing the functions of a police officer, but not otherwise.*
- (3) *The person conducting the business or undertaking is also a **worker** if the person is an individual who carries out work in that business or undertaking.*

6.2 In the context of a community titles scheme, a worker could be any of the following:

- a) service contractor;
- b) letting agent (although, in a strict sense the letting agent is not conducting work for the body corporate);
- c) body corporate manager;

- d) outside contractor engaged by the body corporate or by an owner or occupier;
- e) committee members;
- f) owners or occupiers who perform any voluntary work on common property.

6.3 Section 15 of the Act provides that a person can have more than one duty under the Act by being in more than one class of duty holder. For example, a committee member may be both an officer of a PCBU (because the common property is used for non-residential purposes) and a worker (by attending a committee meeting on common property).

7. Duties of a Worker

7.1 Section 28 of the Act provides:

While at work, a worker must—

- (a) *take reasonable care for his or her own health and safety; and*
- (b) *take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and*
- (c) *comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and*
- (d) *co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.*

7.2 In the context of a community titles scheme, where a body corporate is a PCBU, any person conducting work on the common property will need to take reasonable care for the health and safety of themselves and others and will need to comply with the instructions given to them by a person who has the authority of the body corporate (e.g. a committee member, a building manager, a body corporate manager) as well as any relevant policy or procedure (possibly in the form of a by-law) that has been given to the worker by the body corporate.

8. Offences and Penalties

- 8.1 The consequences for failing to comply with a duty under the Act are severe.
- 8.2 Where a person has recklessly breached a duty and has exposed a person to death or serious injury or illness, criminal penalties (up to 5 years imprisonment) as well as monetary penalties (up to \$3,000,000 for a body corporate that is a PCBU and up to \$600,000 for an individual that is a PCBU or an officer of a PCBU).
- 8.3 The penalties are reduced where the breach of the duty is not reckless and where there is no risk of death or serious injury or illness.

9. Summary

- 9.1 The WHS laws will have a significant impact on community titles schemes when they come into effect on 1 January 2012.
- 9.2 Most bodies corporate will be a PCBU for the purposes of the Act and will need to comply with the relevant duties.
- 9.3 The exclusion in section 7(1) of the Regulations is, subject to any amendments prior to the Regulations taking effect and subject to future judicial interpretation, unlikely to apply to many bodies corporate unless the scheme meets the following requirements:
- a) all of lots in the scheme are used only for residential purposes;
 - b) any tenants occupying lots are renting on a long-term basis;
 - c) there is no business conducted from a lot (including a home business) or from the common property;
 - d) there is no caretaking service contractor.

A body corporate that was of the view that it met these criteria and wanted to ensure that it avoided the prospect of becoming a PCBU in the future might, for example, amend its by-laws (if necessary) to assist in preserving its exempt status. The difficulty for many bodies corporate is that it will not always be possible to determine whether, for example, an occupier is conducting a business from its lot.

- 9.4 Where a body corporate is a PCBU, other persons may have duties as officers of the body corporate such as the committee, the caretaking service contractor and the body corporate manager.
- 9.5 Where someone other than the body corporate is a PCBU and has some level of responsibility over the management and control of the

common property, they will have duties to ensure that the common property is without risks to the health and safety of any person. For example, a caretaking service contractor or a body corporate manager may, subject to the specific terms of their engagement, be a PCBU with management and control of the common property.

- 9.6 The penalties for non-compliance with a duty are severe. Consequently, we recommend that bodies corporate, unless they can unequivocally prove that they meet the requirements of the residential exemption, comply with the WHS law as though they were a PCBU under the Act.

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