

Response to Section 272A of the Work Health and Safety Act 2011 and Work Health and Safety Regulation 2017

Strata Community Association (NSW) Submission
13 September 2023

INTRODUCTION

1. Strata Community Association (NSW) Overview

Founded in 1980, Strata Community Association (NSW) was formerly known as the Institute of Strata Title Management. SCA (NSW) serves as the peak industry body for Strata and Community Title Management in New South Wales. The association proudly fulfils a dual role as both a professional institute and consumer advocate.

2. Membership

SCA (NSW) boasts a membership of over 3,000 members, including lot owners, suppliers, and professional strata managers who oversee, advise, and manage a combined property portfolio estimated to be worth over \$450 Billion.

3. Strata and Community Title Schemes in NSW

NSW is home to 89,049 Strata and Community Title Schemes. A significant 95 per cent of these schemes are comprised of residential lots. Altogether, the total number of Strata and Community Title lots in NSW stands at 1,043,690.¹

4. NSW as a Leader in High-Density Living

According to the 2022 Australasian Strata Insights Report, there are 2,501,351 people residing in apartments across Australia. A majority of these apartment dwellers (51 per cent) are in NSW.² NSW also leads the way in the trend to higher density living in Australia and boasts the highest proportion of apartment households relative to all occupied private dwellings, standing at 22 per cent.

5. Employment Impact

Strata is a significant employer, directly providing jobs to 1,413 managers throughout NSW, as well as an additional 1,317 other related employees.³

6. Promoting Professionalism

1. SCA (NSW) is dedicated to fostering a high standard of professionalism in the strata industry with initiatives like the Professional Standards Scheme (PSS), which contributes to ensuring strong consumer outcomes for over 1 million strata residents in NSW.
2. SCA (NSW) membership encompasses a wide range of entities, from large corporate companies to small family businesses to dedicated volunteers. Members possess expertise in all aspects of strata management, service provision, and governance.

For further information about this consultation, please contact Dylan Lin, Policy and Advocacy Officer, SCA (NSW). Dylan.lin@strata.community

¹ Hazel Easthope, Danielle Hynes, Yi Lu and Reg Wade, Australasian Strata Insights 2022, City Futures Research Centre, UNSW, Accessed at https://cityfutures.ada.unsw.edu.au/documents/717/2022_Australasian_Strata_Insights_Report.pdf

² Ibid, p.8-13

³ Ibid, p.8.

SCA (NSW)'S RESPONSE TO SECTION 272A OF THE WORK HEALTH AND SAFETY ACT 2011 AND THE WORK HEALTH AND SAFETY REGULATION 2017

1. Introduction

This SCA (NSW) submission proposes significant reforms concerning the Work Health and Safety Act 2011 (the "Act") and the Work Health and Safety Regulation 2017 (the "Regulation"). **The core issue is that specific provisions within the Act and Regulation have anomalous effects in the context of strata managing agents performing functions on behalf of strata owners corporations.** These effects, in turn, have the potential to undermine work health and safety measures rather than foster their improvement.

2. Legislative Provisions

This submission focuses on the following legislative provisions, which are included in the appendix:

1. Various provisions of the Act that impose duties related to work health and safety, including:
 - a. Section 19 of the Act, which establishes a primary duty of care for persons conducting a business or undertaking.
 - b. Section 20 of the Act, which imposes further duties in the context of managing or controlling a workplace.
2. Regulation 7 of the Regulation, which currently excludes strata owners corporations from the definition of "person conducting a business or undertaking." This results in the exemption of certain duties under Sections 19 and 20 if the strata scheme's common property is solely used for residential purposes and no workers are engaged as employees.
3. Section 272A of the Act, which effectively prohibits contracts that provide insurance or indemnity related to monetary penalties for incidents occurring after 10 July 2020.

The Act outlines several roles with distinct duties and responsibilities:

- a. PCBU - A person conducting a business or undertaking, who holds the primary duty under Section 19.
- b. PMCW - A PCBU responsible for managing or controlling a workplace, subject to further duties under Section 20. Part 2 Division 3 also assigns additional duties to other individuals, such as those managing or controlling plants at a workplace, as outlined in Section 21.
- c. Officers - Officers of a PCBU are obligated to exercise due diligence to ensure compliance with their duty under the act, as stated in Section 27. This applies to all officers, not limited to Work Health and Safety (“WHS”) officers.
- d. Workers - Workers are required to take reasonable care of their own health and safety, as well as that of others. They must comply with reasonable instructions from the PCBU to facilitate compliance and cooperate with any reasonable WHS policies or procedures outlined by the PCBU, as stated in Section 28.
- e. Other Persons - Individuals present in the workplace must also exercise reasonable care for their own health and safety, as well as that of others. They should comply with reasonable instructions from the PCBU to facilitate compliance, according to Section 29.
- f. WHS Representatives - A person elected by a work group to represent them in WHS matters, upon a worker's request (Section 49).
- g. Work Groups - Groups of workers established through negotiation between the PCBU and workers for the purpose of electing a WHS representative for the group (Section 52).
- h. WHS Committee - A committee established by the PCBU if requested by a WHS representative or at least 5 workers.

3. Legislative Framework

The Act provides a legislative framework that encompasses the following elements:

- a. Duty of a person with a duty to consult other duty holders, as outlined in Section 47.
- b. Duty of the PCBU to consult with workers, specified in Section 48.
- c. WHS Representatives, addressed in Part 5 Division 3.
- d. WHS Committees, discussed in Part 5 Division 4.

Addressing misconceptions related to these duties will be an ongoing challenge for the following reasons:

Different Perspectives: Everyone will inevitably approach these matters with their unique viewpoints. Nevertheless, alternative perspectives exist, and this divergence could result in certain matters needing to be addressed or addressed. For example, a Strata Managing Agent (“SMA”) is primarily focused on its own responsibilities and the Owners Corporation (“OC”) functions assigned to them. However, an SMA might not extend its involvement beyond those areas, as it has not been specifically tasked with doing so. Consequently, concerns arise regarding the outcomes of the OC employees who are not subject to the SMA's oversight.

Pigeonholing Duties: The approach of categorising duties persists. However, one of the objectives of the current legislation was to replace the previous hierarchical obligations with parallel obligations. Sections 15 and 16 of the Act explicitly state that two or more persons can have the same duty, and an individual can have multiple duties.

Interpretation Ambiguity: There is confusion surrounding the interpretation of "management or control" in relation to a workplace. An SMA or OC might understandably approach this from the perspective of managing common property. However, the work health and safety perspective emphasises the management or control of workers, which is a distinct concept that can overlap with property management.

Nebulous Concepts: Some concepts in the Act are nebulous and open to interpretation. For instance, "workplace" is defined as any location where work is performed. The term "worker" includes contractors, subcontractors, and employees of contractors or subcontractors engaged in work for a PCBU. The term "PCBU" attracts the general duty

under Section 19 and does not require management or control of a workplace. On the other hand, a PCBU becomes a Person with Management or Control of a Workplace (“PMCW”) if they have management or control of a workplace, thereby attracting further duties under Section 20.

Challenges with Non-delegable Duties: The concept of non-delegable duties can be problematic. An SMA might think in terms of delegating OC functions, but Section 14 prohibits the transfer of duties. Legal precedents, such as the Baiada case, suggest that engaging a contractor does not absolve the duty but may satisfy it.

The main scenarios can be outlined as follows:

1. When an SMA (on behalf of the OC) engages a contractor to carry out work on common property, the contractor will typically be classified as a PCBU and a PMCW, thus having obligations under Sections 19 and 20 of the Act. Both the SMA and OC will be considered PCBUs (with the possibility of the OC being exempted under Regulation 7) and will have a duty under Section 19. If the SMA also has management or control of the workplace (depending on the terms of the contract), it may have additional obligations under Section 20.
2. If an SMA conducts work on the common property using its own staff, such as inspections or meetings, the SMA will be a PCBU and a PMCW, having obligations under Sections 19 and 20. The OC will also be a PCBU (with the potential for exemption under Regulation 7) and may be a PMCW, depending on the terms of the agency agreement and specific arrangements for the relevant activity.
3. In the case where the OC has its own employees who are not under the control of the SMA, these employees will not be considered workers of the SMA. Consequently, the SMA will not be liable for them as workers. However, the SMA will still be a PCBU and may be a PMCW, at least to the extent that the common property serves as a workplace for the SMA's staff, if not for the OC's employees. Sections 19 and 20 impose duties on the SMA to ensure the safety of other individuals. The OC will be a PCBU and a PMCW, with obligations under Sections 19 and 20. The exemption provided by Regulation 7 will not apply to the OC. Essentially, the SMA's duty is to avoid endangering these workers with its own activities, without being directly responsible for them as workers. The OC will have duties under Sections 19 and 20, while its officers will have duties under Section 27.

4. Impact of Legislative Framework

In the context of an SMA's performance of delegated functions for an OC client, **SCA (NSW) believes that the current legislative framework has an anomalous effect that has the potential to undermine work health and safety rather than furthering it.** The following points outline the specific concerns:

1. Pursuant to relevant agency agreements ("Agreements"), which are subject to regulation under the Strata Schemes Management Act 2015 ("SSMA") and Strata Schemes Management Regulation 2016 ("SSMR"), SMAs provide various services to OCs. These services include the performance of OC functions under delegated authority, which may involve matters relevant to the Act and Regulation, such as managing common property and engaging contractors. This submission aims to address this scenario.
2. While performing these functions for OCs, SMAs also operate their own businesses and represent a person conducting a business or undertaking and a person with management or control of a workplace. As a result, they have duties under Sections 19 and 20 concerning their own employees. Strata common property of OC clients may be considered a workplace for the SMAs employees, such as during meetings or inspections on client premises. SCA (NSW) acknowledge this aspect as uncontroversial and do not intend to address it in this submission.
3. Regulation 7 currently excludes OCs from the definition of "person conducting a business or undertaking," and as a result, they are relieved of liability under Sections 19 or 20 if the common property is used solely for residential purposes and if the OC has not engaged workers as employees. However, the SMA acting on behalf of the OC does not benefit from this exclusion. This creates an anomalous situation where:
 - a. The SMA, while performing functions on behalf of its OC client, bears liability that the OC client does not have. Essentially, a scenario has arisen where the agent faces different liability compared to the principal on whose behalf actions are being performed.
 - b. The SMA, while assisting an OC client with the management of its common property, may have concerns about safety on that property. However, their efforts might be undermined by a less concerned OC client. The exclusion of OC liability under Regulation 7 may lead the OC to perceive safety issues as solely the SMA's responsibility and problem. Consequently, the OC may be

unwilling to fund or even approve safety measures deemed appropriate or necessary by the SMA. The SMA, on the other hand, views these safety measures as essential for the benefit of the OC and believes they should be undertaken at the OC's cost.

4. This issue could be further compounded by circumstances largely beyond the SMA's control. As mentioned earlier, an OC client may be unwilling to fund or approve necessary safety measures. Moreover, actions taken by the OC beyond the SMA's control, such as direct engagement of contractors or workers, might impact safety on the common property.
5. To compound this issue even further, Section 272A prevents SMAs from managing their risk by obtaining indemnity under the Agreement or insurance cover provided by an insurer, particularly concerning monetary penalties for incidents occurring after 10 July 2020.
6. These circumstances appear to distort the typical agency relationship and could lead to adverse impacts on workplace health and safety, including:
 - a. SMAs being unfairly exposed to liability regarding work health and safety issues beyond their practical control and for which they are unable to manage risk through indemnity insurance. This situation could potentially lead to reduced resource levels of agency businesses and even business failure, ultimately undermining the provision of expert support to OC clients.
 - b. SMAs declining to accept delegated authority from OC clients in matters related to work health and safety. In such cases, the responsibility for managing those issues would fall on the OC clients themselves. However, the OC clients are unlikely to possess the necessary resources or expertise to properly address these matters, further jeopardising work health and safety on strata common property.

5. Proposed Reforms

SCA (NSW) proposes addressing these issues through the following reforms:

1. Amendment of Regulation 7 to include a provision stating that an SMA shall also be excluded from the definition of "person conducting a business or undertaking" to the extent that it acts on behalf of an OC client that benefits from the existing exclusion. In other words, the SMA should be exempt from this definition when representing the interests of the OC, as opposed to being treated as an employer of the SMAs own employees.
2. Amendment of Section 272A to enable a SMA to obtain indemnity from an OC client under the relevant agency agreement, and further allow them to secure insurance coverage from an insurer when acting on behalf of an OC. This reform clarifies that such indemnity and insurance apply to the SMA's representation of the OC and not to their role as an employer of their own employees.

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Appendix

WORK HEALTH AND SAFETY ACT 2011 – SECTION 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 – SECTION 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 – REGULATION 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 – SECTION 272A

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. 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.