



The New Workplace Health and Safety Amendments; All your questions answered.

When a committee member asks you a question you need to have the answer at hand. To assist you with this all the most commonly asked questions are answered for you below. You will note that rather than use our own words we have quoted directly from the WH&S Act, its regulations, the Workplace Health and Safety Amendment Bill 2002, its explanatory notes and official Division of WH&S documentation.

Questions, thoughts and conundrums covered include: What is a registrable workplace? How is the common property a workplace? Who is the 'person in control' of the common property? What obligations does a body corporate have? When is the body considered an employer?

TO SAVE TIME AND GET THE BEST OUT THIS DOCUMENT, SIMPLY SCAN THE QUESTIONS BELOW TO FIND THOSE ANSWERS YOU NEED AND THEN READ THE SUMMARY AT ITS END

What are your risks?

As a body corporate/body corporate manager you are exposed to a number of risks relating to your workplace health and safety obligations and common law responsibilities.

The bodies corporate responsibilities and risk can be clearly divided into two areas: -

1. The body corporate has a responsibility to **ensure that the common property is safe**. Specifically that it is free from health and safety risks for people working including self-employed contractors, volunteer workers and employees and that there is appropriate, safe access to and from the common property for others including members of the public, visitors, tenants, etc.
2. That the body corporate/body corporate manager **engages quality contractors properly**, that is; in such a way that that if an accident should happen it does create any major issues for the body corporate/body corporate manager.

If these two areas of risk are handled effectively then a body corporate and its manager can move forward knowing its obligations have been met to the best of their ability and if anything does go wrong they can show they took these reasonable steps.

Is the common property considered a workplace under the Workplace Health and Safety Act?

Yes. The department has made it clear that they consider the common property a workplace. The Division of Workplace Health and Safety advised me as recently as The 14th April 2003 that they had received crown advice; *"That a residential body corporate is a person in control of a relevant workplace area."* Their general manager of the division of Workplace Health and Safety Robert Seljak made this clear in his presentation at the CTIQ (Communities Titles Institute of Queensland) state conference in 2001. In his presentation notes it says: -

'Under the Act, a body corporate is a 'person in control' of a workplace for the common property.'

Services:

- Sinking Fund Forecasts & Updates
- Safety Reports & Updates
- Insurance Valuations
- Asbestos Audits
- Balustrade Testing
- Division 10 & Maintenance Reports

Offices:

- Sydney
- Brisbane
- Melbourne
- Cairns
- Gold Coast
- Sunshine Coast
- Ph: 1300 136 036
- Email:

PO Box A72, Sydney South NSW 1235
PO Box 1564, Milton QLD 4060
GPO Box 3025, Melbourne VIC 3000
PO Box 8002, Cairns QLD 4870
PO Box 2253, Southport QLD 4215
PO Box 726, Maleny QLD 4552
Fax: 1300 136 037
enquiry@solutionsie.com.au

His assertion is backed up by the definition of a workplace under the Act, which states: -

'a workplace is any place where work is, is to be, or is likely to be performed by a worker, self-employed person or employer.' The common property clearly fits into this category. And the body corporate clearly has control of this area.

When is a body corporate an employer for the purposes of the Act?

A quote directly from the division of Workplace Health & Safety states: -

'Body corporate as employer

An employer is a person who, in the course of his or her business or undertaking, engages someone else to do work, other than under a contract for service. A worker is a person who does work for an employer, other than under a contract for service. For there to be a worker/employer relationship, the person engaged to do the work must do the work for or on behalf of the other person, or at the direction of the other person. There are a number of factors that should be given consideration in determining whether a worker/employer relationship exists. These include the degree of control the employer exercises over the person performing the work, the mode of remuneration, the provision and maintenance of equipment the obligation to work the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.

For example, if a body corporate employed a manager for the premises on a wage or salary, provided all necessary equipment for the manager's use, determined the manager's hours of work and deducted income tax on the manager's behalf, then the manager would be considered to be a worker. On the other hand, where a person is engaged to perform work such as lawn maintenance, where the person engaged to do the work determines the hours of work, provides a quote on the cost of the work and has no obligation to commit to the work, then that person is considered to be engaged under a contract for service and no employer/worker relationship exists.'

The upshot of this is that generally a body corporate is rarely considered an employer. When they are an employer they have obligations that include providing safe working plans (guidelines on how to do aspects of their job and use equipment safely), providing personal protective equipment for the employee(s), provision of a first aid kit, evacuation plan in the case of an emergency and more. With most employees you can meet the majority of your obligations by inducting the employee properly (when they are hired) and most importantly sign off on that induction process. A sign off means that if anything comes up later there is no question as to whether the employee was informed.

What obligations does the body corporate have as the 'person in control' of the common property?

The division in its documentation states: -

'Under the Act, a body corporate is a 'person in control' of a workplace for the common property. The obligations on a 'person in control' of a workplace are less onerous than for an employer. They include ensuring that the risk of injury/illness from a workplace is minimised for persons coming onto the workplace to work, that the risk of injury/illness from any plant or substance provided by the body corporate for the performance of work by someone other than the body corporate's workers is minimised when used properly and that there is appropriate, safe access to and from the workplace for persons other than the body corporate's workers.'

Is the body corporate or the body corporate manager considered the 'person in control' of the common property?

The Workplace Health and Safety Amendment Bill 2002 explanatory notes have this to say: -

'The clause defines "person in control" of a "relevant workplace area" as the person who is the owner of the building or other structure or part. However, the clause also specifies if there is in place a lease, contract or other arrangement that provides, or has the effect of providing, for another person to have effective and sustained control of the area then the other person, and not the owner is the "person in control" of the area.'

The explanatory notes repeat the above set of responsibilities for "person in control" of fixtures, fittings or plant included in a "relevant workplace area"...

In our newsletter 28 we noted that this new clause could have the effect of blurring the lines of responsibility between the body corporate and the body corporate manager. The question is would the agreement between the body corporate and the body corporate manager be considered a 'contract or other arrangement that provides, or has the effect of providing, for another person (the body corporate manager) to have effective and sustained control of the area.' We suggest you seek your own legal advice in this area, ours has been that it depends on how the agreement is worded and (regardless of the agreement) what work is actually being done by the body

Services:

- Sinking Fund Forecasts & Updates
- Safety Reports & Updates
- Insurance Valuations
- Asbestos Audits
- Balustrade Testing
- Division 10 & Maintenance Reports

Offices:

- Sydney
- Brisbane
- Melbourne
- Cairns
- Gold Coast
- Sunshine Coast
- Ph: 1300 136 036
- Email:

PO Box A72, Sydney South NSW 1235
PO Box 1564, Milton QLD 4060
GPO Box 3025, Melbourne VIC 3000
PO Box 8002, Cairns QLD 4870
PO Box 2253, Southport QLD 4215
PO Box 726, Maleny QLD 4552
Fax: 1300 136 037
enquiry@solutionsie.com.au

corporate manager for the body corporate. Could you effectively argue that you are not the 'person in control' if you are the person organising the common property maintenance and maintenance contracts?

N.B. It is clear that the full delegation of body corporate powers available under the new version of the Act is a double-edged sword. Consider your approach and manage your risks carefully.

Regardless of who is legally the 'person in control' the obligations of the 'person in control' must be met to mitigate both the body corporate and body corporate managers risks.

How does a body corporate/ body corporate manager discharge their obligations under the Act?

The Act says that: -

"a person discharges the workplace health and safety obligation for exposure to the risk only if the person takes reasonable precautions, and exercises proper diligence, to ensure the obligation is discharged." (Section 27)

How do you take reasonable precautions and exercise proper diligence?

Again let me refer to the divisions' explanation: -

'Bodies Corporate can meet their obligations under the Act by taking a risk management approach to workplace health and safety by:

- (a) Identifying hazards; and*
- (b) Assessing risks that may result because of the hazards; and*
- (c) Deciding on control measures to prevent, or minimise the level of, the risks; and*
- (d) Implementing control measures; and*
- (e) Monitoring and reviewing the effectiveness of the measures'*

Our companies' safety audit service has been specifically designed to directly assist in meeting your WH&S responsibilities and indirectly mitigate some of your obligations and risks.

How often does a body corporate have to 'monitor and review the effectiveness of the measures' they have taken to prevent and minimise risk?

Workplace Health and Safety Act 1995, Division 5, Section 96A states that: -

1(a) 'A Workplace health and safety officer has the function, at the specified intervals for the workplace, of conducting an assessment at the workplace to identify any hazards and unsafe or unsatisfactory workplace health and safety condition and practices.'

It then defines under 96A, Section 7: -

(b) "Specified intervals", for a workplace, means if there is no workplace health and safety committee established at the workplace, or if there is a committee established, but the officer and the committee cannot agree – at least once every 12 months.'

Until this amendment came through most companies who had sought legal advice as to what was a reasonable time frame for 'regularly monitoring and reviewing the effectiveness of the measures' they had taken to prevent and minimise risk for the common property had come up with an answer of every 12 months. This amendment backs this opinion up and seems to clarify what is needed.

What is the difference between a 'workplace' and a 'registrable workplace'?

Schedule 9 of the WH&S Regulations 1997 states: -

"registrable workplace" means a workplace at which-

- (a) activities of the kind stated in schedule 2 are conducted (Schedule 2 is a comprehensive list of every activity and occupation imaginable including cleaning services, residential property operators, real estate agents); and*
- (b) more than 2 persons (including the employer, a self-employed person and a person employed part or full-time) are employed between 1 February of the year and 31 January the next year.'*

There is clearly a difference between a 'registrable workplace' that needs to be registered with the division of WH&S and a non-registrable 'workplace', some people have come to the mistaken conclusion that because a workplace does not need to be registered with the division of WH&S it does not need to be properly audited and kept free from health and safety risks this is clearly not the case. You have an obligation to any and all people working, visiting and accessing the common property to ensure they have a safe environment.

What are the fines?

Services:

- Sinking Fund Forecasts & Updates
- Safety Reports & Updates
- Insurance Valuations
- Asbestos Audits
- Balustrade Testing
- Division 10 & Maintenance Reports

Offices:

- Sydney
- Brisbane
- Melbourne
- Cairns
- Gold Coast
- Sunshine Coast
- Ph: 1300 136 036
- Email:

PO Box A72, Sydney South NSW 1235
PO Box 1564, Milton QLD 4060
GPO Box 3025, Melbourne VIC 3000
PO Box 8002, Cairns QLD 4870
PO Box 2253, Southport QLD 4215
PO Box 726, Maleny QLD 4552
Fax: 1300 136 037
enquiry@solutionsie.com.au

The Workplace Health and Safety Act 1995, Division 1, Section 24 states: -

- (1) A person on who a workplace health and safety obligation is imposed must discharge the obligation.

Maximum penalty-

- a) if the breach causes multiple deaths - 2000 penalty units or 3 years imprisonment; or
- b) if the breach causes death or grievous bodily harm - 1000 penalty units or 2 years imprisonment; or
- c) if the breach causes bodily harm - 750 penalty units or 1 years imprisonment; or
- d) if the breach involves exposure to a substance likely to cause death or grievous bodily harm - 750 penalty units or 1 year's imprisonment; or
- e) otherwise - 500 penalty units or 6 months imprisonment

Won't insurance cover any fines?

No. Fines and penalties are in almost every case not covered by any insurance policy. A fine indicates you have not fulfilled your obligations under law and this is specifically excluded from insurance cover. Some insurance policies cover damages awarded in a court of law and legal costs, it does not cover punitive damages or fines and penalties. Some body corporate public liability policies have an amount that can be claimed as a fighting fund against fines or penalties considered unwarranted or unfair, one major provider to the body corporate industry has an amount of \$20,000 for a fighting fund. You would no doubt have first to prove to the insurance company that the fine was unwarranted to get access to the fighting fund.

Solutions IE approached a few of the larger insurance companies to argue that our clients buildings that had had their common property areas audited were reducing the insurance companies risks as well as their own and therefore should qualify for lower premiums. They responded by pointing out that their policy conditions included the requirement that the body corporate comply with all relevant Australian laws, Act, Standards, duty of care etc and that to meet their policy conditions a body corporate should be doing the safety audit.

We understand that the insurance company's application form now asks if a safety audit of the common property has been done, one can only assume that they take this into some account when assessing their risks. As you are probably aware most insurers have gone away from their previous policy of accepting all the buildings in a body corporate management company's portfolio whether a good or bad risk in order to maintain all the body corporate management company's business.

They now say they are refusing insurance on buildings that are in their opinion a high risk. In some cases they are auditing the buildings themselves for risks and insisting on a list of often very expensive modifications that are based on an extremely conservative approach to risk management. The cost of this audit is obviously recovered by them in the premium charged. There is no doubt that dealing with these risks yourself using a specialist company like Solutions IE will provide you with cheaper and more flexible options for your risk management. It's a bit like an industry driving self regulating rather than waiting for the government to impose regulation. Self-regulation will always be better for the industry as the financial services industry found out recently.

Is complying with safety audit recommendations expensive?

Usually NO. In most cases recommendations will relate to things like: Signage (\$50), Cleaning of driveways (\$1-3 per m2), high-lighting of trip hazards (\$not much), installation of an RCD on community power circuits (\$150-\$200), replacement of a light bulb (\$2-60 depending on who does it). Most risk management is relatively cheap, the trick is to identify and deal with it.

Services:

- Sinking Fund Forecasts & Updates
- Safety Reports & Updates
- Insurance Valuations
- Asbestos Audits
- Balustrade Testing
- Division 10 & Maintenance Reports

Offices:

- Sydney
- Brisbane
- Melbourne
- Cairns
- Gold Coast
- Sunshine Coast
- Ph: 1300 136 036
- Email:

PO Box A72, Sydney South NSW 1235
PO Box 1564, Milton QLD 4060
GPO Box 3025, Melbourne VIC 3000
PO Box 8002, Cairns QLD 4870
PO Box 2253, Southport QLD 4215
PO Box 726, Maleny QLD 4552
Fax: 1300 136 037
enquiry@solutionsie.com.au

Our approach to your common property risks: -

- clearly identify hazards
- assess risks that may result because of the hazards
- assist you in deciding on control measures to prevent, or minimise the level risks present and future
- provide the necessary tools to allow you to implement control measures and take the hassle out monitor and review the effectiveness of these measures annually or upon request.

Summary

The Workplace Health and Safety Act 1995 prescribes significant fines for non-compliance with legislative obligations. The maximum fines being up to \$750,000 and or imprisonment.

Those who ignore the Workplace Health and Safety legislation do so at their peril. It has been made clear for a number of years now that the common property is a workplace and action must be taken to ensure that all obligations are met between the body corporate and body corporate manager who are responsible for a workplace (the common property) and must comply with current workplace health and safety legislation Act 1995, Section 30.

As a legal expert in the area of Workplace Health and Safety said recently: -

“Incidents do and will occur. Doing something to prevent them is simple and easy with professional advice. Cleaning up after an accident will always be too little, too late.”

Workplace health and safety can generally be managed by:

- Identifying hazards; and
- Assessing risks that may result because of the hazards; and
- Deciding on control measures to prevent, or minimise the level of, the risks; and
- Implementing control measures; and
- Monitoring and reviewing the effectiveness of the measures.

If you have any further queries or need to engage the services of a professional safety audit company call us now and we will do all we can to help you out.

What is the service we offer?

Our experienced properly qualified professional inspector will inspect your Common Property and provide you with an informative and easy to read report to ensure you have peace of mind and a low risk common property area.

We will:

- Clearly identify hazards and provide digital photographs illustrating their location.
- Assess risks that may result because of the hazards.
- Assist you in deciding on control measures to prevent, or minimise the level of risks present and future.
- Provide the necessary tools to allow you to implement control measures and take the hassle out of compliance.
- Monitor and review the effectiveness of these measures every six months, for a small additional fee.
- Provide the Building Manager (if there is one) with a basic introduction to the important elements of Workplace Health and Safety and risk management.
- Provide telephone support in the event of an incident to advise what should be done and how.
- Provide policies and procedures for engaging and managing commonly used contractors and commonly performed tasks.

Our total Workplace Health and Safety solution is available to you at a very competitive price and is backed by our 100% satisfaction guarantee.

Bibliography

- ◆ Workplace Health & Safety Act 1995
- ◆ Workplace Health & Safety Regulation 1997
- ◆ Workplace Health and Safety and Another Act Amendment Bill 2002
- ◆ Workplace Health and Safety and Another Act Amendment Bill 2002 Explanatory Notes
- ◆ Workplace Health and Safety Obligations for Body Corporate Managers: What are the Risks? (Presentation notes - Robert Seljak, General Manager, Division of Workplace Health and Safety BCMIQ Conference 2001)

Services:

- Sinking Fund Forecasts & Updates
- Safety Reports & Updates
- Insurance Valuations
- Asbestos Audits
- Balustrade Testing
- Division 10 & Maintenance Reports

Offices:

- Sydney
- Brisbane
- Melbourne
- Cairns
- Gold Coast
- Sunshine Coast
- Ph: 1300 136 036
- Email:

PO Box A72, Sydney South NSW 1235
PO Box 1564, Milton QLD 4060
GPO Box 3025, Melbourne VIC 3000
PO Box 8002, Cairns QLD 4870
PO Box 2253, Southport QLD 4215
PO Box 726, Maleny QLD 4552
Fax: 1300 136 037
enquiry@solutionsie.com.au



Are you sending Contractors to Buildings that do not have a current Workplace Health & Safety Report? It could cost you \$750,000 and 5 years jail ...

Did you realise that if a Body Corporate does not undertake an annual safety inspection of the common property then they are not meeting their WH&S obligations. If a contractor carrying out works for the Body Corporate was to have an accident then the body corporate manager (as well as the Body Corporate) could be sued under common law and fined under the WH&S Act and Regulations.

Some managers think they are safe if they put up a Safety Report motion and it is voted down. This is only the case if they then stop organising any maintenance for the building. By instructing a contractor to go to a building's common property to do work, you are the 'controller' of the 'worker' and have knowingly sent them to a workplace that has not been checked for safety issues.

Under the Workplace Health & Safety Act corporations can be fined up to \$750,000. Also the amount an individual can be fined has recently been increased, '*the maximum fine imposed for an offence that resulted in death under the Act is \$70,000 and for multiple death, \$125,000*'. These are compelling reasons to ensure that the Body Corporate and their Managers comply with their obligations under the Workplace Health & Safety Act.

Workplace Health & Safety is of paramount importance in having Body Corporates fulfil their duty to keep the "workplace" (common property) safe and free from health and safety risks for people working there, including self-employed contractors. Under the Act, a body corporate is a '*person in control*' of a workplace for the common property. *The obligations on a 'person in control' of a workplace include ensuring that the risk of injury/illness from a workplace is minimised for persons coming onto the workplace to work, that the risk of injury/illness from any plant or substance provided by the body corporate for the performance of work by someone other than the body corporate's workers is minimised when used properly and that there is appropriate, safe access to and from the workplace for persons other than the body corporate's workers.*' (Extract from Division of WH&S document.)

This duty of a Body Corporate to maintain common property in a safe condition and free from hazards has far-reaching ramifications that directly involve a Body Corporate and its Manager and can invoke civil liability issues.

So you've got to ask yourself, is it worth the massive fines and the risk of possibly being sent bankrupt in a civil action being brought against the Body Corporate and its Manager? Does the potential civil liability risk (an action could stretch over several years) of continuing to send contractors to the building justify short-term gain?

In the interests of protecting yourself both individually and your company, a Manager should inform their Body Corporate client that by refusing to have a Safety Inspection or an Annual Safety Inspection undertaken they are effectively hampering both you and themselves, in managing the on-going maintenance of their property.

The easy and affordable answer is to commission a Safety Inspection or an Annual Safety Inspection Report from Solutions ie.

We will:

- Clearly identify hazards and provide digital photographs illustrating their location.
- Assess risks that may result because of the hazards.
- Assist you in deciding on control measures to prevent, or minimise the level of risks present and future.
- Provide the necessary tools to allow you to implement control measures and take the hassle out of compliance.
- Provide the Building Manager (if there is one) with a basic introduction to the important elements of Workplace Health and Safety and risk management.
- Provide telephone support in the event of an incident to advise what should be done and how.
- Provide policies and procedures for engaging and managing commonly used contractors and commonly performed tasks.

All services provided by Solutions IE are supplied on the basis of 'Supply Terms and Conditions' which are available from our Office and from our website www.solutionsie.com.au

Services:

- Sinking Fund Forecasts & Updates
- Safety Reports & Updates
- Insurance Valuations
- Asbestos Audits
- Balustrade Testing
- Division 10 & Maintenance Reports

Offices:

- Sydney
- Brisbane
- Melbourne
- Cairns
- Gold Coast
- Sunshine Coast
- Ph: 1300 136 036
- Email:

PO Box A72, Sydney South NSW 1235
PO Box 1564, Milton QLD 4060
GPO Box 3025, Melbourne VIC 3000
PO Box 8002, Cairns QLD 4870
PO Box 2253, Southport QLD 4215
PO Box 726, Maleny QLD 4552
Fax: 1300 136 037
enquiry@solutionsie.com.au