

A circular photograph of a young man and woman laughing joyfully outdoors. The man is on the left, wearing a light green polo shirt, and the woman is on the right, wearing a light-colored top. The background is a soft-focus green landscape. The circle is outlined in blue.

**Summer
Issue
2009**

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stratachoice
Associates

Welcome from Strata Choice Associates



Strata Choice was a Gold Sponsor of the recent Griffith University Strata and Community Title in Australia for the 21st Century III Conference.

More than 200 delegates gathered to consider a wide range of issues impacting on the future of strata living in Australia.

Subject areas covered included:-

- ▶ Planning for Effective Strata Title Schemes;
- ▶ Environmental Sustainability for Strata Schemes;
- ▶ Dealing with the Increasing Complexity of Large Schemes;
- ▶ Corporate Governance Models for the Future;
- ▶ Strata Title Research; and
- ▶ Strata Law Reform.

The interests of owners in strata schemes were well represented throughout the conference proceedings with attendees from the NSW Owners Corporation Network and similar bodies from other States in attendance.

Strata Choice is committed to supporting initiatives such as this as we see it as part of our role to assist where we can in driving the agenda for change both in terms of legislative reform and education around strata living subject matter.

We hope you find this summer edition of the Strata Choice newsletter interesting. In this issue Peter Dawkins from Kelly Partners looks at changes to GST registration requirements for strata schemes, Bill Kritharis from Deacons Solicitors looks at owners corporations obligations under Occupational Health and Safety legislation and our own Bruce Ferguson provides an insight into risk management issues relating to contractor licensing and insurance requirements.

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Strata Associates Pty Ltd trading as

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GST Registration Threshold

The Australian Taxation Office (“ATO”) has recently conducted a review of bodies corporate (which includes strata plans) in relation to the GST threshold and as a result of this review has increased the threshold from \$75,000 to \$150,000 where a body corporate is considered to be a non-profit body.

The ATO’s announcement states that “bodies corporate are now considered to be non-profit bodies for GST purposes, provided they do not have an intention to distribute interest or other income to members”.

At this stage uncertainty exists as to the interpretation of the word “intention”. However guidance can be taken from GST Ruling 2000/11 where the ATO states “that where the law or the constituent documents do not prohibit distributions, it is a question of fact in each case as to whether the body is not carried on for purposes of profit or gain to the individual proprietors. Factors that we consider relevant include whether distributions have been made, whether there is a stated or demonstrated policy to make or not to make such distributions and whether winding-up is contemplated. Where it is clear from the objects, policy statements, history, activities and proposed future directions of the body that there will be no distributions to individual proprietors, we accept that the non-profit test has been satisfied.”

The ATO considers that the circumstances in which profits will be available for distribution by a body corporate to its proprietors will be limited since in most cases the only assets that a body corporate will hold in its own capacity will be limited to the balance of the sinking fund and administration fund and any personal property such as washing machines, dryers and lawn mowers etc. which are necessary for the basic purposes of the strata scheme.

Owners corporations which are currently registered for GST and have a GST turnover of \$150,000 or less will need to carefully consider their schemes individual circumstances in making a decision as to whether they remain registered for GST purposes or not. A number of factors will need to be considered including the value of input tax credits arising from future sinking fund expenditure for which GST inclusive sinking fund contributions have already been raised.

This is general information only and each scheme will need to carefully consider their individual circumstances. *We strongly recommend owners corporations of strata schemes instruct their strata managing agent to obtain taxation advice prior to making any decisions in this regard.*

Peter Dawkins
Kelly & Partners
Chartered Accountants



Owners Corporation Liability

Can an owners corporation be liable for an incident at a strata scheme?

While owners corporations have not been subject to prosecution under occupational health and safety (OHS) legislation in NSW, the explosion at a strata scheme in Bondi Junction earlier this year has led to much discussion recently in the strata industry of OHS obligations of owners corporations.

OHS Legislation

The OHS legislation in Australia imposes obligations on various duty holders including employers, controllers of work premises, designers, manufacturers and suppliers of plant and substances (for use at work) in order to protect employees and other persons at a place of work against risks to health and safety.

The owners corporation of a residential strata scheme is not ordinarily caught by the Occupational Health and Safety Act 2001 (NSW) (OHS Act) because it is not considered to be a place of work. However, where the common property in the strata plan is used as a place of work by contractors (cleaners, maintenance etc) the common property is transformed into a place of work.

Under section 10(1) of the OHS Act, a person who has control of premises used by people as a place of work must ensure that the premises are safe and without risks to health.

Whether or not the WorkCover prosecute the owners corporation where a contractor is injured whilst undertaking work at the strata plan is a separate matter. In fact, it is unlikely that WorkCover would prosecute an owners corporation except in certain aggravated circumstances where the owners corporation was aware of a serious risk to people's safety and failed or refused to take any steps to minimise the risks. In any case, this does not mean that an owners corporation does not have obligations under OHS legislation.

Explosion at Bondi Junction

On 30 March 2009, an explosion occurred in the plant room (common property) located on level 30 of the East Gate Towers building at Spring Street, Bondi Junction.

Two people were injured as a result of the incident and suffered serious burns to their bodies (both contractors). The contractors were working on the air conditioning unit when the explosion occurred. The force of the explosion also caused extensive damage.

As the owners corporation is the controller of the common property, they may be liable for failing to ensure that the premises were safe (it is believed that the explosion was a result of a natural gas leak in a unit above the shops). The contractor may also be liable under the OHS Act.

A successful prosecution by WorkCover would require the elements of the charge for a breach of section 10(1) of the OHS Act to be established. These elements are discussed below.

Control

The ability to compel or direct corrective action to be taken to any extent, is sufficient to attract coverage of the duty of controllers under section 10 of the OHS Act (it is possible for more than one person to be a controller of premises). The extent of the obligation is limited to the extent of control actually exercised by a party.

Place of Work

There is a distinction between premises that have an inherent character as a place of work and those that are transformed into a place of work by the presence of employees or contractors. A temporal place will take on the character of a place of work temporarily while work is being performed there (as in this case, the plant room).

Unsafe Premises and Causal Connection

The other elements of the charge are to establish that the plant room was not safe and that there was a causal nexus between the detriment to the safety of the contractors and the incident itself.

In this respect, an owners corporation is exempt from clauses 33 to 44 of the OHS Regulation which deal with the responsibilities of controllers of premises as to risk management and provision of information generally as to fall prevention, electricity and asbestos installed in the workplace. In other words, unless a particular risk has been brought to the attention of the owners corporation, it is under no obligation to conduct a risk assessment to identify hazards when work is being undertaken and hence difficult to establish a causal nexus. If it can be established that the

owners corporation was aware that the plant room was unsafe and did not take any steps to eliminate or minimise the risk, then the owners corporation may be liable under OHS legislation.

The contractor on the other hand is obliged to conduct a risk assessment and may be liable under OHS legislation.

An owners corporation has never been prosecuted in New South Wales under OHS legislation. WorkCover attended the strata scheme in the aftermath of the explosion to investigate the incident. Time will tell if WorkCover intends to take any action against the owners corporation as a result of the incident. WorkCover has two years from the date of the incident to commence prosecution proceedings.

Bill Kritharas

Senior Associate
Deacons



Protection for All - Contractor Licensing and Insurance

Strata schemes regularly use the services of contractors, be they cleaners and gardeners, or builders when undergoing a major refurbishment. In the majority of cases, contractors will be companies. However, some owners corporations prefer to use a smaller operator – a sole trader. What added risks does the use of a sole trader create?

Consider the situation where a cleaner is mopping a tiled floor, slips over and is injured. Who is responsible for the cost of medical treatment and a replacement worker during recovery? If the cleaner is a sole trader, the owners corporation will be responsible for workers compensation if payments to them exceed \$7,500 per annum.

Therefore, the owners corporation may be required to source an alternate cleaner, and actively participate in the injured cleaner's rehabilitation. Do owners corporations want this responsibility?

In a similar scenario, a visitor slips on the wet floor and is injured. The cleaner does not have public liability insurance. The visitor may sue both the cleaner and the owners corporation for losses they suffer. Ultimately, the cleaner may end up bankrupt and the owners corporation facing increased future insurance premium costs. The owners corporation is effectively taking on the business risk of a contractor providing services to it, that has inadequate financial protection through insurance.

How do we ensure that both the contractor and owners corporation are adequately protected? Firstly, try to use contractors that are "Pty Ltd". The law requires companies with employees take out workers compensation insurance. Secondly, require all contractors have public liability insurance. This ensures financial protection in the event of an unforeseen occurrence, as well as protecting the owners corporation's financial exposure through increased insurance premiums.

Under NSW law, virtually all contractors to strata schemes will need some form of licensing. The Office of Fair Trading advise that a contractor must have a licence, or employ the holder of a qualified supervisor certificate, to do:

- ▶ residential building work where the total cost of labour and materials is more than \$1,000;
- ▶ electrical wiring;
- ▶ plumbing, draining and gas fitting;
- ▶ air conditioning and refrigeration work; and
- ▶ building consultancy (pre-purchase property inspections)

The government's licensing regime seeks to ensure that contractors have the necessary qualifications and experience to perform the tasks for which they are licensed.

Bruce Ferguson

Group Risk Services Manager
Strata Choice



Newsletter Q and A's

Question:

The timber on the windows and door frames leading onto the balcony of my unit has rotted and is in need of repair or replacement. The glass in one of the windows is also cracked. My strata managing agent told me that I am responsible for maintaining these items. However, a friend who owns a unit in another building has told me that repairs of this nature are the responsibility of the owners corporation. Why do I have to maintain these items when my friend does not?

Answer:

If your strata plan was registered before 1 July, 1974, the balcony wall including windows, doors and their working parts are generally part of the lot and are your responsibility to maintain and repair (unless there is a notation on the strata plan). In some cases repairs (e.g. cracked glass) may be covered by the strata's building insurance policy and an owner can ask the owners corporation to make a claim.

Please bear in mind that if you wish to make alterations to the windows and/or doors leading onto your balcony (e.g. replace them with bi-fold doors) you will need the written consent of the owners corporation to do so, pursuant to standard by-law 17 (appearance of the lot).

If your strata plan was registered after 1 July, 1974, the balcony wall including windows, doors and their working parts are generally common property and are therefore the

owners corporation's responsibility (unless the strata plan says otherwise) (section 62).

Information and copies of your strata plan are available from your strata managing agent or the office of Land and Property Information NSW.

Question:

Water has been leaking through my ceiling from the unit above and has caused damage to the ceiling paintwork and also to my carpet. As this damage has occurred through no fault of mine, I don't see why I should have to pay for any of the repairs. Who is responsible for the cost?

Answer:

Firstly, the ceiling is generally common property and therefore the owners corporation's responsibility (unless the strata plan says otherwise) (pursuant to section 62 of the Strata Schemes Management Act 1995 ("the Act")). The lot owner is responsible for the paintwork and carpet, except where it is damaged by the owners corporation while carrying out work to the common property (section 65(6)).

The owners corporation must insure the building and keep the building insured under a damage policy with an approved insurer (section 83(1) of the Act).

Under section 81 of the Act, the building includes:-

- ▶ owners' improvements and owners' fixtures forming part of the building other than paint, wallpaper and temporary wall, floor and ceiling coverings;
- ▶ a building consisting entirely of common property ; and
- ▶ anything prescribed by the regulations as forming part of



Executive Committee Seminars

Newsletter Q and A's (cont)

a building for the purposes of this definition.
but does not include:-

- ▶ fixtures removable by a lessee or sublessee at the expiration of a tenancy; or
- ▶ anything prescribed by the regulations as not forming part of a building for the purposes of this definition.

The following items are excluded from the definition of "building" and so are not required to be insured by the owners corporation:-

- ▶ paints, varnishes, stains and similar treatments;
- ▶ carpets and underlay;
- ▶ wallpaper, fabric or similar soft wall and ceiling finishes;
- ▶ coverings of vinyl, cork or similar material, which are not fixed with an adhesive to the floor;
- ▶ curtains and blinds within a lot; and
- ▶ light fittings or other electrical appliances that are not built into the lot and which can be removed without interference to the electrical wiring.

It is generally recommended that the owners corporation and owners and occupiers each effect a contents insurance policy to cover personal property owned by each of them.

In this case, repairs to the paintwork and carpet within your lot are your responsibility. (You may be able to make a claim on your home contents insurance policy if you have one).

Alternatively, you may seek independent legal advice about the possibility of compensation from either the owners corporation or the other lot owner.

Executive Committee members are invited to attend an evening seminar, at no charge, to be held at Strata Choice St Leonards offices.

The presentation, delivered by the company education Consultant will provide participants with information regarding:

- █ Meeting conduct;
- █ The duties and obligations of the Executive Committee;
- █ The powers of the Owners Corporation;
- █ The role of the Strata Managing Agent;
- █ Issues relating to risk management for Owners Corporations.

Yes I am interested in receiving EC Seminar dates

Name

Strata Plan Number

Email address

Phone.....



If you would like to attend an Executive Committee Education Seminar please direct your request to education@stratachoice.com.au