



**Submission to the Advisory Panel for  
Model Occupational Health and Safety Laws**

## **Company Overview**

Solutions IE is a provider of professional inspections and reports on property and building assets for the strata and property development industries in Queensland, New South Wales, Victoria and the Australian Capital Territory. In 2007/08, we completed Occupational and Workplace Health and Safety inspections and reports on over 4,000 buildings and properties. Our clientele encompasses commercial, industrial, residential and mixed-use buildings and properties.

## **Content of this Submission**

This submission has been prepared by Solutions IE for the advisory panel for the national review into model Occupational Health and Safety (OHS) laws, and focuses primarily upon the impact of OHS laws upon the owners and controllers of strata title buildings. This submission addresses:

1. the exemption of the Owners Corporation of residential strata schemes from the controller provisions of the Model laws;
2. the term 'reasonably practicable', particularly in relation to cost issues; and
3. the introduction of a uniform minimum requirement for the frequency of OHS assessments of workplaces and premises.

## **1. Exempting Owners Corporations of Residential Strata Schemes from the Controller Provisions of the Model Laws**

It is a central principle of this review that there be no reduction or compromise of standards in relation to a legitimate health and safety concern. Victoria, Queensland and the Australian Capital Territory impose clear obligations on the Bodies Corporate and Owners Corporations of residential strata schemes to ensure that the common property, as a workplace, is free from risks to health and safety. New South Wales has introduced a partial exemption to these requirements, which has created confusion throughout the industry and proven largely ineffectual. We submit that the Model laws should create clear, uniform obligations across all workplaces to ensure the safety of workers and other persons, in line with the fundamental aims of this review.

WorkCover NSW Exemption Order No. 014/07 exempts the Owners Corporation in respect of the common areas of a residential strata building, and those common areas of a mixed-use building used only for accessing a residential part of that building from the requirements of clauses 33-44 of the *Occupational Health and Safety Regulation 2001* (NSW), which relate to the duties of a controller of a premises. Not only does this exemption purport to fundamentally undermine the principle that the responsibility for managing risks to health and safety should lie with the person who controls that risk, our professional opinion is that the Order is utterly ineffectual towards its stated purpose of freeing Owners Corporations of an obligation to conduct risk assessments of the exempted common property. The result, in our view, has been to create confusion and uncertainty for Owners Corporations, managers and members of the public.

The Order has no effect on an Owners Corporation's obligations as a controller of a premises, plant and substances under Section 10 of the Act to ensure that the premises under the control of the Owners Corporation are safe and free from risks to health and safety, and that plant and substances are safe and without risks to health and safety when properly used. This obligation means that if the Owners Corporation or another party engages a person (including a volunteer) to perform work on the common property, the Owners Corporation must ensure that no risks to health and safety arise to those persons from the premises, plant or substances.

In addition to not providing any meaningful relief to the Owners Corporation, the Order does not benefit strata management companies or agents in their capacity as controllers of the premises, plant and substances. As such, managing companies and agents must comply with all of the provisions of the Act and Regulation including a strata managing company's obligation as an employer to ensure the safety of their own employees and contractors when performing work on the common property of a residential strata scheme or part of a strata scheme. The effect of this is that, the exemption notwithstanding, the common property of the vast majority of strata schemes must be free from risks to health and safety.

Our experience with the Order (and the preceding Exemption Order No. 2), based on frequent discussions with building owners, residents and managers, is that it has created confusion and uncertainty throughout the strata property sector about the obligations of various parties, and lead property owners and managers to erroneously conclude that residential strata buildings or parts of strata buildings had no obligations under the Act and Regulation. Despite the fact that WorkCover NSW does not have the power under clause 348 of the Regulation to exempt any party from any obligation under the Act, the exemption has created the impression (if not the legal actuality) that Owners Corporations for residential strata schemes are free from OHS obligations. This impression is at odds with the obligations of the Owners Corporation and any managing company or agent. Our experience is that this has frequently lead to conflict between owners and managers and to OHS obligations being eschewed and neglected by Owners Corporations.

The exemption was introduced due to a concern that the non-application of the controller provisions under s10(3)(b) of the Act did not extend to the common property of strata title residential premises.<sup>1</sup> Beyond the failure of WorkCover NSW to introduce a clear, effective and meaningful exemption in this case (which could presumably be remedied by better drafting of an exemption under the Model laws), we submit that there are fundamental differences between strata title residential premises and other residential premises which make this non-application appropriate and, from a Health and Safety perspective, we find the exemption for residential strata buildings to be undesirable.

### **Exemption Would Reduce or Compromise Standards**

We note the commitment under clause 14(d) of the terms of the review that there be no reduction or compromise in standards for legitimate safety concerns. The safety of the common property areas of residential strata title properties is, in our view, a legitimate safety concern given the number of people living and working on such properties and who are thereby exposed to any risks or hazards present on such properties. Given that the majority of jurisdictions do not exempt the Owners Corporations for residential strata schemes from their OHS obligations in respect of

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<sup>1</sup> WorkCover, 2005, *Occupational Health and Safety Act 2000 Review: Controllers of Work Premises, Issue Paper 5, 4.*

the common property areas of the scheme, we submit that the inclusion of an exemption along these lines would constitute a reduction or compromise in standards.

### **Residential Strata Schemes Distinguishable from Private Dwellings**

We believe it is appropriate to maintain an exemption to the controller provisions of the Model Laws for private dwellings. Apart from a general reluctance of law-makers to regulate the private behaviour and choices of individuals, the residential exemption can be justified on grounds that private dwellings are under the direct control of the individual owner and access to the dwelling is generally controlled by the owner, limiting the range of people who can be exposed to any risks or hazards within the dwelling, reducing the need for regulatory intervention.

The common property areas of a residential strata scheme can be distinguished in nature from private dwellings, such as houses and the internal areas of individual units or lots in a strata scheme, however, in that a wide range of parties exercise control over the area, access is often open to the public or can be granted by individuals who may not be aware of particular risks and hazards, and workers and other persons enter the common property on a regular basis. There is a consistent requirement across Queensland, New South Wales, Victoria and the Australian Capital Territory for the Owners Corporation to maintain and renew the common property of strata title buildings for the benefit of the individual owners. These requirements ensure that workers will frequently be present on all areas of the common property of residential strata title buildings to carry out maintenance and repair work. This creates an entirely different control and risk paradigm to private dwellings, far closer to that of any other workplace. We submit that it is inconsistent with the aims of OHS legislation to exclude the controllers of certain kinds of buildings, where there are likely to be a significant number of workers over time, from their obligations as controllers of the premises.

To exempt the Owners Corporation from its duty to ensure the premises and plant are free from risks to health and safety increases the compliance burden upon individual workers, increasing the risk of incidents and injuries. Furthermore, it increases the risk that workers may refuse to undertake necessary maintenance

work due to unsafe working conditions, leading to a further degradation of health and safety conditions within residential strata title buildings.

Given the continuing growth in the number and size of residential strata title buildings in Australia, it is increasingly common to see such buildings fitted with high-risk plant items, anchor systems for work at heights, and generally a greater number and variety of potential risks to health and safety on the common property than would be found within a private dwelling, and which, but for the individual lots being residential rather than commercial, are indistinguishable from a commercial or retail property. Moreover, given that commercial and residential strata title buildings are subject to the same requirements for maintenance and repair, we find it inconsistent to apply differing standards in relation to the obligations of the controller of the premises towards the health and safety of workers on the property. As such, we submit that no exemption should be granted to the controllers of the common property of residential strata title buildings.

**Exemption Compromises Safety of Non-Workers:**

There is a consistent requirement across Queensland, New South Wales, Victorian and the Australian Capital Territory for the controller of a premises to ensure that it is safe and free of hazards to persons other than workers on the premises. We believe that it is appropriate to exclude private dwellings from this requirement as, among other reasons, the individual owner of a private dwelling has effectively complete control of the premises and a strong personal interest in ensuring it is safe and free from hazards towards themselves and those they elect to bring onto the premises.

Individual owners of units in a residential strata scheme do not possess effective control of the common property areas of that scheme and so are unable to ensure it is safe and free from risks and hazards to themselves and other persons. The safety of individual residents and other persons within a residential strata scheme, therefore, is dependant upon the diligence of the controller of the premises, being the Owners Corporation, Manager, or another party. Because the safety of persons while on the common property of a strata scheme is dependant upon the actions of the controller of the premises, and because responsibility for managing risks and hazards on a premises should lie with the person in control of that premises, we

submit that it is not appropriate to exempt the controller from their obligations under the Model Laws.

### **Exemption Compromises the Safety of Volunteers and Contractors**

In our experience, the common property areas of residential strata schemes are often maintained, at least in part, by volunteers residing within the building or property. Volunteers and contractors play a vital role in property maintenance across Australia, however are afforded significantly less protection than permanent employees under current OHS systems, and are particularly vulnerable while working on the common property areas of residential strata title buildings. The treatment of the relationship between the Owners Corporation/Body Corporate and volunteers varies between the various States and Territories and would benefit from standardisation. In NSW and Victoria, the 'employer' provisions apply only where a person is employed under a contract of employment or apprenticeship,<sup>2</sup> and does not extend to volunteers or to persons under a contract for services. In Queensland, the 'employer' provisions include a person engaged as a volunteer, but not a person engaged under a contract for services.<sup>3</sup> In the Australian Capital Territory, the 'employer' provisions apply only where a person is engaged under a contract of service,<sup>4</sup> although the Minister may declare specific classes of persons to be subject to the 'employer' provisions.<sup>5</sup>

In most jurisdictions, persons engaged under a contract for services and volunteers are best protected by the various controller provisions rather than by the employer provisions. As in the case of persons other than workers, detailed above, exemptions for Owners Corporations of residential strata schemes from their obligations as controllers of premises place the safety of volunteers and contractors at risk by purporting to remove the obligations to manage risks to health and safety from the party who has control over those risks.

### **Exemptions Worsen the 'Free Rider Problem' for Owners Corporations:**

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<sup>2</sup> Section 4, *Occupational Health and Safety Act 2000*.

<sup>3</sup> Section 10, *Workplace Health and Safety Act 1995*.

<sup>4</sup> Section 3, *Occupational Health and Safety Act 1989*.

<sup>5</sup> Section 8, *Occupational Health and Safety Act 1989*, see DI2005-232 for the application of this section.

The maintenance and repair of the common property areas of strata title buildings frequently suffer from the 'free rider' problem, where individual owners are unwilling to contribute to the maintenance of the common areas of the property. This leads to Pareto inefficiency, where the choice not to maintain the common areas may benefit an individual owner, but disadvantages the owners as a collective group, or even complete market failure where necessary work is not undertaken due to overriding parochial interests. In a strata scheme, the benefits of unilateral action to improve the common property are diffused across all of the owners, disincentivising action unless the costs are uniformly contributed by all owners.

Where individual unwillingness to act may lead to a communal disadvantage, we submit that it is appropriate to regulate the decision making process to maximise overall utility. In the case of residential strata schemes, we submit that it is appropriate to impose a legal obligation on the controller of the premises in order to protect persons on the common property.

We believe it is reasonable to draw a comparison between the obligations of the Owners Corporation to maintain and renew the common property for the benefit of the owners, and an obligation to ensure the common property of a strata building is free of risks to health and safety. The obligation of the Owners Corporation to maintain the common property can be found consistently in all States and Territories, and is a requirement imposed over and above that imposed on the owners of private dwellings to ensure that the Owners Corporation acts in the best interests of all Owners. We submit that the duty of the controller of the premises to ensure the common property is free from risks to health and safety is similarly in the best interests of all Owners and should not be excluded in the case of residential strata schemes.

**Cost:**

It is worth noting at this point that the cost of identifying and managing risks to health and safety on the common property of residential strata schemes is typically not significant. Moreover, the cost involved is minimal compared to the benefits obtained in lowering injury rates and associated expenses. By way of example, Solutions IE's Annual Safety Reports cost, on average, \$18-23 per unit, or 34-44c per week. The

majority of risks and hazards identified can be eliminated or reduced at a similarly low cost.

**Conclusion:**

The Model laws should not exempt the Owners Corporations for residential strata schemes of their obligations as controllers of the premises. Such an exemption cannot be justified as a logical extension of the exemption granted to private dwellings due to the significant difference in the nature of the premises. The NSW exemption has served largely to confuse individuals as to their obligations, and reduce the standard of OHS management below that intended, placing employees, volunteers, contractors and members of the public at increased risk. Given the low cost involved for most residential strata schemes, there seems to be little practical argument for such an exemption. ... No such exemption was included in the draft NSW OHS legislation, indicating that the approach was considered unworkable following the ... report.

## **2. 'Reasonably Practicable' and Funding Constraints**

We submit that the term 'reasonably practicable', in the context of an obligation to comply with a duty which is subject to consideration of what is reasonably practicable, must be clarified in the Model Laws. Clarification of the term is desirable to reduce uncertainty to individuals, to increase consistency of the enforcement of the associated provisions, and to reduce reliance on expert legal advice when determining the basic standard of reasonable practicability. We believe that the Victorian and West Australian models provide a sound clarification of the term, however further clarification would be desirable, particularly regarding resolving the countervailing considerations of risk and cost.

Strata schemes, particularly residential strata schemes and smaller commercial schemes often operate on limited budgets, constrained by the financial positions of the individual owners. The overwhelming majority of control measures recommended eliminating or reducing risks and hazards identified in our OHS and WHS reports involve only basic maintenance and repair work, or merely require adherence to safety standards, and do not impose a significant cost-burden upon the Owners Corporation and owners of strata title properties. Such work generally assists the

Owners Corporation to preserve, and in some cases even enhance the value of the property by eliminating undesirable elements. On occasion, however, the rectification of major or complex risks or hazards will impose significant costs on the Owners Corporation. In such cases, we find it is common for the Owners Corporation to determine it is not reasonably practicable to undertake remedial work due to the cost involved, leaving a risk or hazard in existence.

We acknowledge that the cost of a control measure must always be a consideration when determining whether it is reasonably practicable for a party to comply with a duty. We submit, however, that the lack of clear guidance as to the relative weight to be given to cost as a consideration under OHS legislation in all jurisdictions results in employers and controllers of premises believing that (or spuriously using) a minor or moderate cost burden is sufficient to warrant not complying with a duty, even where there is a high likelihood of the risk eventuating or a high degree of harm would result if the risk eventuated, leading to serious risks and hazards not being eliminated or adequately reduced.

We submit that ensuring the safety of workers and others must be the primary focus of the Model laws. As such, the Model Regulations should require compliance with a duty except where the cost of eliminating or reducing the hazard or risk is exceedingly disproportionate to the likelihood of the risk or hazard occurring and the degree of harm that would result if the risk or hazard occurred. In particular, where a high degree of harm would result if the risk eventuated, or where there is a high likelihood of the risk eventuating, the cost of eliminating or reducing the risk to an acceptable level should be a peripheral consideration.

### **3. Minimum Requirement for the Frequency of OHS Assessments**

Section 96A of the *Workplace Health and Safety Act 1995* (Qld) requires a Workplace Health and Safety Officer for a workplace to carry out an assessment of the workplace at specified intervals or at least 12-monthly. The systems in New South Wales, Victoria and the Australian Capital Territory have no corresponding requirement. Section 93 of the *Workplace Health and Safety Act 1995* (Qld) requires

a Workplace Health and Safety Officer to be appointed for any workplace of over 30 people.

We note that the fact that an employer in a small workplace is not required to appoint a Health and Safety Officer does not imply any lesser obligation upon that employer to ensure that the workplace and systems for work are free of risks and hazards to health and safety. Further, it would appear difficult, if not impossible, for an employer (or a controller of a premises) to manage the health and safety of the workplace (or premises) without conducting a regular assessment of the workplace (or premises) to identify any change in conditions or work practises which may create a new risk or hazard or modify an existing risk or hazard.

Our view is that the Queensland requirement under Section 96A represents a minimum standard for the assessment of all workplaces, as employers are subject to the same obligations regardless of the size of the workplace. The minimum size of a workplace before the appointment of a Workplace Health and Safety Officer is required under Section 93 appears to be an arbitrary limit imposed to control costs for small workplaces without regard to what is reasonably practicable or desirable to ensure health and safety within a particular workplace and should not imply that a workplace need not manage risks and hazards to health and safety to a lesser degree simply by virtue of its smaller size. We are concerned that the absence of any fixed requirement for regular OHS assessments leads to such assessments being carried out less frequently than is actually necessary to ensure a building or property is free from risks to health and safety, particularly amongst Owners Corporations which lack the resources to establish and maintain a sophisticated OHS management system.

We submit, therefore, that provision should be included in the Model Laws for a minimum frequency for the assessment of risks and hazards to health and safety within workplaces and premises, as well as risks and hazards arising from work practises. The introduction of such a requirement would remove uncertainty for less sophisticated managers of OHS and ensure a basic level of health and safety assessment is carried out. Such a requirement should not be forced upon organisations which have a sophisticated enough management system to determine

the frequency of their OHS assessments, similar to the requirement under Section 96A of the *Workplace Health and Safety Act* (Qld).

## **Conclusion**

The various approach to OHS adopted throughout Australia following the Robens report have produced flexible, adaptable systems capable of being applied to a wide range of industries and circumstances. SMEs and duty-holders with little experience in OHS management typically lack the knowledge, skills and resources to adopt as sophisticated an approach as may be needed to ensure compliance under the current systems, which rely largely on general duties and performance standards. There is need for greater specification and clarity when dealing with the duties for such parties, best introduced in detailed codes of practice or Model regulations. Exemptions under the Model laws should be avoided wherever possible due to the uncertainty they create for duty holders, and the resulting lowering in OHS standards for workers and other persons. In particular, no exemption should be included for the common property areas of residential strata schemes.

**On behalf of Solutions IE Pty Ltd:**



**James Freestun**  
Managing Director



**Peter Byster**  
Quality Manager



**Parker D. Reeve**  
Research Officer