

Height Safety in Strata Arrangements

Height safety is an ever-increasingly discussed topic in the construction industry, especially in the roofing sector. However, how does this apply to strata titles, and what are the responsibilities of owners corporations and strata managers to ensure safe work at heights? The following is Roof & Balcony Solutions' interpretation of the law and opinion on the duties of care owed by owners corporations in the ACT.¹

Statutory Duty - Work Health and Safety Regulation

Under the *Work Health and Safety Regulation 2011* (ACT) (The Regulations), a Person Conducting a Business or Undertaking (PCBU) has specific duties to reduce the risk of a fall to all persons conducting work at heights.² A strata title is taken to not be a PCBU provided the common areas are only used for residential purposes. If the strata title enters into an employee-employer relationship (i.e. building manager), then they would be considered a PCBU.³ Similarly, a commercial, industrial or mixed-use⁴ strata scheme will be considered a PCBU and would be found to owe duties under The Regulations.⁵

If it is deemed that the strata title is considered a PCBU, then the owners corporation has a duty to 'eliminate risk to health and safety so far as is reasonably practicable'.⁶ The term "reasonably practicable" is not defined in the ACT legislation, however it is considered in the

¹ This document is a statement of opinion only and is not to be taken as legal advice. All readers are urged to conduct their own research and come to a well-informed conclusion as to how the legislation applies to them personally.

² Working at heights is considered "high risk" under chapter 6 of The Regulations which imposes a number of specific requirements including (but not limited to) the completion of a Safe Work Method Statement (SWMS).

³ Section 7 (2) of The Regulations.

⁴ In other words, a strata title that has both commercial and residential common areas. These titles would be considered a PCBU for only those areas which are used for commercial purposes. Access to areas that are only residential would not be encompassed by the titles duties.

⁵ Please see attached flow chart for a simplified method of determining if a strata title is considered a PCBU.

For further information, please view <http://kerinbensonlawyers.com.au/wp-content/uploads/2015/10/Kerin-Benson-Lawyers-Fact-Sheet-6-WHS-and-Units-Plans-in-the-ACT1.pdf>.

⁶ If it is not reasonably practicable to eliminate the risk, the risk must be minimised as far as reasonably practicable. See Regulation 35 of The Regulations.

Commonwealth legislation. The Court will consider what is reasonably practicable under the circumstances on a case-by-case basis.

The following elements will be considered:

- The likelihood of the risk,
- The degree of potential harm,
- What the PCBU knew or ought to have known,
- The availability of methods to eliminate the risk,
- And whether the cost to eliminate the risk was “grossly disproportionate” to the risk itself.⁷

Further to the above, Section 79 of The Regulations provides that a PCBU must minimise the risk of a fall by providing adequate protection against that risk. Adequate protection is then defined as the provision of a fall prevention system if reasonably practicable to do so. We strongly urge all readers to please see the copy of Section 79 provided with this document.

Given the above, it is safe to say that the installation of a height safety system would be a “reasonably practicable” step in reducing the risk of people accessing the roof of a strata title building.⁸

Common Law duty

Alongside legislation is another system of court-prescribed law called Common Law. Under this law is the offence of negligence, which creates a general duty of care to ‘take reasonable care not to cause foreseeable harm to other people or their property’.⁹ This duty has been extended to include owners corporations and entrants to the common property.¹⁰

In considering whether an owners corporation was negligent, the Court would consider what a reasonable person would have done in the same circumstance in response to the risk of injury. This may include considering whether the corporation knew, or ought to have known, of the risk to people who were accessing the roof.

⁷ For more information on what is “reasonably practicable” please see <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/774/Guide-Reasonably-Practicable.pdf>.

⁸ If you would like more information on the reasonable steps in reducing the risk of falls from heights, please refer to the Commonwealth approved code of practice – *Managing the Risk of Falls at Workplaces*. http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/632/Managing_the_Risk_of_Falls_at_Workplaces1.pdf

⁹ *Donoghue v Stevenson* [1932] UKHL 100; Legal Aid Western Australia, *Negligence*, 26/11/2015 <http://www.legalaid.wa.gov.au/INFORMATIONABOUTHELAW/BIRTHLIFEANDDEATH/PERSONALINJURY/Pages/Negligence.aspx>.

¹⁰ *Ridis v Strata Plan 10308* [2005] NSWCA 246.



Although we are not aware of a previous case where a strata title has been found negligent by not installing a height safety system, there are instances of titles being found negligent where there have been falls from height.

In *Mawdesley v The Owners of Careening Gardens Being Strata Plan 3848*,¹¹ the plaintiff was asked by the head of the committee to inspect the roof. The committee did not warn the plaintiff of the hazards on the roof and as a result he fell through a polycarbonate roof sheet and was permanently injured. The committee was found to have owed the plaintiff a duty of care that they did not discharge and were therefore found to be negligent.

It could be argued that a certified height safety system would have reduced the risk of a fall, therefore discharging the committee's duty of care.

Section 79 of the Work Health and Safety Act 2011 (ACT)

79 Specific requirements to minimise risk of fall

- (1) This regulation applies if it is not reasonably practicable for the person conducting a business or undertaking at a workplace to eliminate the risk of a fall to which regulation 78 applies.
- (2) The person must minimise the risk of a fall by providing adequate protection against the risk in accordance with this regulation.

Penalty:

- (a) In the case of an individual — \$6 000.
- (b) In the case of a body corporate — \$30 000.

Note Section 12F of the Act provides that strict liability applies to each physical element of each offence under the Act, unless otherwise stated. The reference in section 12F of the Act includes these Regulations.

- (3) The person provides adequate protection against the risk if the person provides and maintains a safe system of work, including by:
 - (a) providing a fall prevention device if it is reasonably practicable to do so; or
 - (b) if it is not reasonably practicable to provide a fall prevention device, providing a work positioning system; or
 - (c) if it is not reasonably practicable to comply with either paragraph (a) or (b), providing a fall arrest system, so far as is reasonably practicable.

Examples

A safe system of work could include:

- 1 Providing temporary work platforms.

¹¹ [2012] WADC 103.

Kerin Benson Lawyers; <http://kerinbensonlawyers.com.au/wp-content/uploads/2015/11/Kerin-Benson-Lawyers-Fact-Sheet-8-Asbestos-Compliance-and-Group-Title-in-the-ACT.pdf>.

- 2 Providing training in relation to the risks involved in working at the workplace.
- 3 Providing safe work procedures, safe sequencing of work, safe use of ladders, permit systems and appropriate signs.

Note A combination of the controls set out in this subregulation may be used to minimise risks so far as is practicable if a single control is not sufficient for the purpose.

[Subsection (4) omitted for irrelevance.]

- (5) In this regulation, *fall prevention device* includes:
- (a) a secure fence; and
 - (b) edge protection; and
 - (c) working platforms; and
 - (d) covers.

Note See subregulation 5 (1) for definitions of *fall arrest system* and *work positioning system*.

Flow Chart for determining if an owners corporation is considered a PCBU under the Work Health and Safety Regulations

