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YSP Podcast Transcript: Episode 295. WHS Basics for Residential Owners Corporations - with Bill Kritharas

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Intro: Welcome to Your Strata Property, the podcast for property owners looking for reliable, accurate and bite-sized information from an experienced and authoritative source.

Amanda Farmer: Hello and welcome. I am your podcast host Amanda Farmer and my guest this week is Bill Kritharas. Bill is a partner at Sparke Helmore Lawyers in Sydney and experienced work health and safety lawyer, WHS, as we know it. His clients are not just owners corporations, but also those in construction, agribusiness and transport industries, as well as Commonwealth state and local government sectors. Bill advises on WHS compliance and represents clients in incident investigations, prosecutions, and coronial inquests.

Bill also advises owners corporations on building defects, fire safety and contractual disputes. Bill is the Health and Safety Officer for the Environment, Health and Safety Law Committee of the International Bar Association. Before joining Sparke Helmore, Bill served as a local government counselor and was deputy mayor of what was then Canterbury City Council between 2010 and 2012. He was instrumental in establishing a partnership between the council and Salvos Legal to enable community legal services for disadvantaged people in the local area. Bill previously worked with Norton Rose Fulbright, where he was a partner before joining Sparke Helmore in 2011. Bill is a director of the Hellenic Club in Sydney.

In this chat, Bill walks us through an area I get asked about a lot, but have only a little knowledge of myself, work health and safety obligations for owners corporations, particularly residential owners corporations. Are there any legal obligations we need to be aware of when it comes to WHS? If there are any, how are those obligations met? What should our residential owners corporations, their committee members, their managers be thinking about when contractors are on site carrying out work? Whose responsibility is it to make sure they are safe? These questions answered and more in this chat with Bill Kritharas, enjoy.

Bill Kritharas welcome to the show.

Bill Kritharas: Hi Amanda. Thank you for the invitation. It's good to be here.

Amanda Farmer: Pleasure to have you with us. And I am hoping today to dive into a topic that comes up often amongst owners corporations, amongst my clients, members inside our community, podcast listeners. It's been on my list for some time to cover off this topic, but I thought I'd start by asking you to tell us a little bit about your background. Yours is a name that has been around our strata circles for some time. And I'd love for our listeners to know a bit about your experience in the strata legal world.

Bill Kritharas: Yes. Thanks Amanda. Yes, I have been around for a long time and I was having a think about that just before this interview and I think I'm coming up to 20 years, next year, in strata. So it's been since 2002, I have been working with strata managers and acting for owners corporations. And since about 2005, I've also specialised in work health and safety law. So I have a dual practice acting for owners corporations, and acting also for some contractors, with respect to building defects mainly. And I also am the Head of the Work Health and Safety Group here at Sparke Helmore. And I specialise in work health and safety, which is quite a niche area.

Amanda Farmer: Just like strata, and did practicing in strata then introduce you to the work health and safety area, or was it the other way around, or how do these two things fit together in your world?

Bill Kritharas: Well, they probably don't, I've got a commercial litigation background and I was working in strata because one of the firms I was working at previously had a practice in strata. And then I moved across to Deacons in 2005 and I was working with one of the partners there who was a work health and safety lawyer, so that's how I developed the specialisation in health and safety. Interestingly, there are quite a few synergies with respect to owners corporations, whether they a residential, commercial or mixed, and health and safety law.

Amanda Farmer: And why is it Bill, so important for our owners corporations to be aware of their work health and safety

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obligations?

Bill Kritharas: Right, so look, it's a really interesting question the Act is the Work Health and Safety Act in New South Wales. And back in 2011, the laws were harmonised, so that almost every jurisdiction, and they state-based laws, every jurisdiction in Australia have adopted the harmonised work health and safety legislation with the exception of Victoria who didn't opt into the harmonised scheme. Even New Zealand out of interest adopted the work health and safety act with almost identical obligations to the harmonised legislation in Australia.

So the Act itself imposes an obligation on what they call a PCBU, a person conducting a business or undertaking, and the obligation imposed on a PCBU is to take all reasonably practicable steps to ensure the health and safety of their workers and of others or anyone who can be exposed to a risk arising from their undertaking.

And the acronym itself, PCBU, is quite a broad definition. So it applies to any employer, anyone involved in business, and anyone who may have an undertaking, not necessarily engaged in business or don't have a profit motive. So it also applies to government for example, and volunteer associations. But the Act itself applies to workplaces. So it needs to be a workplace in order for the legislation to have coverage. And interestingly, there is an exemption in the work health and safety regulations for residential owners corporations. So the regulation itself says that 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.

Amanda Farmer: What if somebody is working on the common property, does that change the situation?

Bill Kritharas: Very good question. So where an owners corporation engages contractors, and obviously we know that a lot of contractors are engaged by owners corporations, then it becomes a workplace. So the term I like to use is it's a temporal workplace. So transforms into a workplace by the presence of contractors and therefore the Act does apply. The next question is who does the act apply to, however? Is it the owners corporations, or is it the contractors? And because there is an exemption for residential owners corporations, the Act will generally apply to the contractors. They are the ones who have the obligation to take all reasonable practicable steps to ensure the health and safety of their workers and also of anybody else. So the residents of that strata scheme, for example, must also be protected from any risk that could arise from the contractors work activities.

Amanda Farmer: Okay. So the plumbing company sends a plumber out to go and fix a leak that is on a pipe, that's on the common property. The plumber is working on this common property, it's a residential owners corporation. That part of the common property becomes their temporal workplace for that moment in time. And if they're an employee then their boss, the head of the plumbing company, is responsible for ensuring their safety on your common property. Have I got that right?

Bill Kritharas: That's right. Yes.

Amanda Farmer: Interesting.

Bill Kritharas: Health and safety legislation is risk-based legislation. And obviously the risk profile of any particular work activity is important in determining what steps need to be taken. Whether that's by the owners corporation, who just because they don't have the obligations under the health and safety laws doesn't mean they shouldn't be taking any proactive steps in any case, or what steps should be taken by the contractor. So in determining what is a reasonable step, it's a risk assessment process. It's a risk management approach that's taken to that. So first thing that the plumber would do is try and identify whether there are any hazards associated with that particular workplace. For example, there could be other works happening, there could be rectification works taking place to rectify defects, or the building could have scaffold erected at that particular time.

So identify the hazards, then analyze the risk. And a risk analysis essentially involves two steps. What is the consequence of the risk occurring? What's the probability of the risk occurring? And once that analysis has been undertaken, then the next step would be to identify what are the appropriate controls to eliminate those risks or to minimise those risks, so far as is reasonably practical.

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So in the case of a plumber attending someone's lot to undertake some plumbing work, it's a low risk job. There wouldn't be any need for a site specific risk assessment to be undertaken, but where contractors are coming in to do some window cleaning, for example, and using the abseiling technique, then perhaps they would need to undertake a more comprehensive site-specific risk assessment. And then develop some sort of procedure or safe work method statement, as to how they are going to undertake that work.

Amanda Farmer: And where is the owners corporations involvement in all of that? Do they have some obligation, if not a legal duty, to make sure they have addressed those risks, or can the contractor come to them and say, "Hey, if you want us to do this work, we've identified the following risks on the common property. You need to deal with those, otherwise we're not going to do the work." Is that how the owners corporation gets drawn in?

Bill Kritharas: Look, I probably need to give some more background because there's an exemption for residential owners corporations. For a mixed-use scheme or a commercial scheme, then they would be deemed to be a PCBU. And they would have obligations under the work health and safety legislation. Similarly, a mixed scheme would have obligations, but they would be limited to the common areas used by commercial lots, and the common areas that are jointly used by the commercial and residential lots. So what that means is that the owners corporation in that case would have an obligation to take some steps, to put in place controls, to guard against any particular risks.

Strata managers also play an important role in this respect. Now, the reason why the legislature has given an exemption to residential owners corporations, I think is because they're saying that we're talking about homeowners. They can't have an understanding of work health and safety laws or other laws, so there's an exemption for them. And where contractors are coming onto the site, then steps should be taken. And a strata manager who is probably a little more knowledgeable in, not just work health and safety laws, but that typically would be across a number of different pieces of legislation that apply to owners corporations, they would be taking steps to make sure that the contractor that's selected has good safety policies and has a work health and safety management system and procedure. They're not cowboys that they will do a risk assessment and they will undertake the job in a proper manner.

And then there'd be a consultation process as well for higher risk jobs, hopefully, where the contractor would discuss what the risks of the particular job are and whether or not they need to cordon an area, delineate that particular area. Make sure there's no one who could be exposed to falling objects, for example, or if someone's working at heights. Have an exclusion zone in that particular area. So there are steps that should be taken, notwithstanding that a residential owners corporation doesn't have strictly speaking obligations under the work health and safety legislation.

I should add, however, that there still are common law obligations. So where there are certain risks that are obvious or reasonably foreseeable, to use the test that the courts would use in determining whether there's a connection between an Act or an omission, and the incident that has occurred, an owners corporation still has common law obligations, has a duty of care. And also under Section 106, they have a duty to ensure that the common property is properly maintained.

An example would be, Amanda, if, and I remember giving an owners corporation some advice in relation to balustrades. So it was an owners corporation that had a number of residents who were retired and the balustrades that were erected around the various levels were climbable. The actual design on the balustrade had almost like a ladder. And a number of residents raised with me the fact that they had their grandchildren coming over and that the balustrades were climbable. So, it was possible that a child could climb and topple over. So the advice I gave is, you need to take immediate steps to eliminate this risk. And essentially elimination of the risk is you need to replace all of the balustrades. So they get away, they do a calculation and they say, well, it's going to be quite an expensive fix. And we're not sure if all of the owners are going to agree.

I said, well, my view is you have to do it. You're aware of the risk. In fact, that's right, they had a report that they had commissioned, that identified that particular risk. I said, you're aware of the risk. So you need to replace the other balustrades. In the meantime, if you need some time to raise the funds or to get a proper resolution through the strata committee or the general

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meeting, then I would take some steps to put some perspex, perhaps, around all of the balustrades to ensure that no child can climb.

Amanda Farmer: I'm not sure when you were giving that advice, Bill, but if it was some years ago, you were ahead of the curve because we have just had a New South Wales appeal panel decision to that effect, essentially. Saying in respect to balustrades, if the owners corporation is on notice and on notice being there is a report, they have been informed by an expert that there is a problem. That there is a safety issue, then indeed that triggers your Section 106 obligation to repair and maintain the common property.

Bill Kritharas: That's right. And I gave that advice quite a few years ago. And I did say the duty to repair and maintain common property, but also the fact that you might be liable as an owners corporation and there might even be individual liability. So, I would be taking immediate steps. And they did, to their credit.

Amanda Farmer:

I just want to circle back to mixed-use schemes, just to be clear with our listeners, what we're talking about there. We may have a building where we have residential apartments above, often, and retail below shops. Commercial premises below. And therefore we have occupants coming and going from a common foyer. Some are visiting the retail. Some are working in the retail premises. And I think what I heard there, Bill, is that you're saying the Work Health and Safety Act directly applies to that common property where it is used by commercial or retail occupants and the owners corporation, if there is a single owners corporation in this mixed-use scheme. Sometimes we have two different strata plans with two owners corporations. But a single owners corporation, they are going to have obligations under the Work Health and Safety Act. Have I got that right?

Bill Kritharas: Yes, that's right. So the act would apply in those circumstances. Now, what does that mean? If there's an incident and an incident under the work health and safety legislation doesn't mean that someone needs to be injured. It's the exposure to risk that would trigger the reporting obligation, in any case. The regulator in New South Wales is Safe Work New South Wales. So what would happen is if there's an incident on a part of the common property that would fall under that mixed-use definition, then it's a reportable incident, and the regulator has jurisdiction to come in and investigate that particular incident. And to determine whether any enforcement action would need to be taken.

I just want to say it's really important that I delineate between safety and the legal obligations. So safety should always come first. And any steps we take to promote better safety outcomes, shouldn't be about avoiding a potential prosecution. But as lawyers, obviously we talk about the regulator and prosecutions. So going back to that example, the regulator would have jurisdiction to come in and investigate, issue notices and conduct interviews. And then take enforcement action against that particular owners corporation for a failure to comply or to adhere to its obligations. To ensure the health and safety of people, essentially. So it would be deemed a workplace, that's the point.

Amanda Farmer: Yes. I often see, Bill, on meeting agendas for residential owners corporations, that they're often at their annual general meeting, there is a motion that the owners corporation obtain a work health and safety report. So bringing in an expert to walk around the common areas and identify those parts of the common property that may cause a safety problem, may be a hazard. And I know some buildings take that up and get those reports and others don't because they say, well, we're a residential owners corporation, we don't have these obligations. I can probably guess, but what's your view on residential owners corporations getting those kinds of reports?

Bill Kritharas: What would your guess be?

Amanda Farmer: My guess having heard what you've just said about prioritising safety, is that they should get that report. That they should be aware of where there are hazards and risks in their common property in order to ensure the safety, not just of workers who may be attending the premises, but their own residents. And so my bet is that that's your view. I've also heard another view, which is we don't have to get it, we're not a workplace, and the minute we're on notice of the issues, we're going to have to

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deal with them. And we don't have the money. We don't have the inclination, we've got other things to do in our building. So I've definitely heard that view.

Bill Kritharas: Okay. So I do have a view about this, and I've been discussing this view for a number of years. I find it interesting that they're called work health and safety reports. I don't think they should be called work health and safety reports when it comes to a residential owners corporation. Because, often the premise for getting that report is that they're obliged to do so, or they're not. They don't have to get a work health and safety report because the Act itself doesn't apply to residential owners corporations.

However, should they be getting regular safety reports, whether they choose to do that, annually or bi-annually or every 2 years, would be a matter for that particular owners corporation. How many activities it has, how many services it has. Obviously for a building that doesn't have any other services, no pool, no concierge, no gardens, no road network, for example. They don't really need to get an annual safety report, but that safety report is essentially a defects report.

Someone that has an understanding of defects to identify whether there are any defects or whether there are any safety hazards. So for example, that report relating to the balustrades, I think came out of a work health and safety report. So that was great thing because it identified this particular safety issue. So yes, I think it's a matter for the owners corporations and it's not a bad idea because you're putting safety first. But they're not obliged to get it and I just don't think they need to be called work health and safety because particularly speaking that premise is not correct.

Amanda Farmer: Yes. I like that point. That's an important one. And focusing on the safety, as opposed to the fact of it being a workplace or not, may well produce a different attitude to these kinds of reports when they're being spruiked, if you like, at general meetings.

Bill Kritharas: Yes. Now, if a contractor's coming on site, then an owners corporation, a proactive owners corporation may then decide, "Hey, look, let's get our own safety report as well." But it depends on what the contractor is doing. If the contractor is coming onto the site, to undertake extensive rectification works, then that's something the contractor should be doing as well. And I would recommend that that is done in consultation with an owner corporation because the owners corporation may have knowledge of certain parts of the building or common property that the contractor doesn't.

Amanda Farmer: Now, Bill, you've shared a story there about a client dealing with balustrades. Did you have any other wins or challenges that you've come across with clients and owners corporation clients in the context of work health and safety? Any case studies or interesting cases you wanted to share with our listeners?

Bill Kritharas: Look, I've advised quite a number of owners corporations where they've had incidents on the common property, whether they've been slips and falls. Whether they have been electrical contractors undertaking electrical work. Where there has been an arc flash or an explosion even, and the regulator has attended. That particular one, where there was an explosion, where some electrical works were being undertaken. This involved a building where they were trying to install a service, I think it was Optus, were trying to install the service on the roof. And they were passing the wires down from the roof, down to the basement of the building. And there was an arc flash and an explosion, and the electric contractors sustained some serious injuries to their face. And that was a mixed scheme. So the regulator did undertake an extensive investigation and did investigate the owners corporation, but then focused the rest of the investigation on the contractor.

So the takeaway is, in my experience with residential owners corporations and mixed scheme owners corporations that do have obligations, I haven't seen a prosecution commenced against one, yet. Commercial buildings are slightly different where you talk about a Westfield, for example, that has a residential component attached to it. Then in that case, I have seen prosecutions against the commercial building for a failure to maintain a safe system of work with a particular work activity.

And look, another point I should make, and this is pretty important for a lot of your listeners to also understand is that the Act imposes an obligation on organisations, so what they call a PCBU that we've been discussing. But the Act also imposes obligations

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on individuals. And the individuals are broken into two categories. They can be either officers or they can be workers. If they're not officers, they're workers. The officers are typically the directors of a corporation, the upper echelons of an organisation, the senior leadership team. And they have specific obligations imposed on them to exercise due diligence. To ensure that the organisation they are an officer of is complying with its obligations.

And workers have an obligation to take reasonable care. So it's a less stringent test, but they still have an obligation to take reasonable care, that their acts or their omissions don't harm themselves or don't harm others. In terms of owners corporations, the strata committee members are considered to be volunteer officers. And a volunteer officer is someone who is deemed to be a person who is not working for reward, although they may receive reimbursement of expenses that may be incurred. And interestingly, a volunteer officer cannot be prosecuted under the WHS Act for a failure to comply with its duties.

So, then the question is, the strata committee of an owners corporation, how would they be categorised? And they would be volunteer officers. And even though they can't be prosecuted, regulators can still compel compliance with duties by issuing an improvement notice. So I would recommend that anyone who is on a strata committee should have some knowledge and some level of understanding, even for residential owners corporations of work health and safety obligations. And also that as officers, as strata committee members, the regulator can issue a notice to them, but they can't be prosecuted.

Amanda Farmer: Just another thing for our strata committee members to be aware of.

Bill Kritharas: That's right.

Amanda Farmer: Another reason not to be putting their hands up at the next AGM.

Bill Kritharas: They need to be accountants, they need to be lawyers, they need to be engineers.

Amanda Farmer: Very true. They need to be very special people. Well, Bill, please do let us know how our listeners can find out more about you and connect with you. And if there is anything we haven't covered that we absolutely must hear, please do fill us in.

Bill Kritharas: Okay. There are two more issues I will throw in, right.

Amanda Farmer: Go for it.

Bill Kritharas: One is asbestos because I've had a number of queries over the years in relation to the management of asbestos.

Amanda Farmer: Great point.

Bill Kritharas: And the other one is high risk plant.

Amanda Farmer: Let's do it.

Bill Kritharas: So in terms of asbestos, under WHS legislation, any building that was built prior to 31 December, 2003, needs to have an asbestos register. So a scheme, and once again, it's important to emphasise that this applies only those buildings that are deemed to be PCBU's.

Amanda Farmer: Yes, commercial or mixed-use when we're talking about strata.

Bill Kritharas: That's right. So the residential owners corporation would still have an exemption from this particular requirement. But my view is that they should still have an asbestos register. Why? Because if contractors do come onto the building, and a lot of

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the older buildings that require maintenance work, it might not be a defects claim with rectification work being undertaken, but they would require every 15 or 20 years maintenance work to be undertaken. So they should have an asbestos register.

If the building was constructed before 31, December, 2003, post that date, then obviously it's banned substance

Amanda Farmer: So shouldn't be there.

Bill Kritharas: It shouldn't be there, exactly.

And high risk plant as well. Strata schemes obviously must ensure the health and safety of persons so far as they are using high risk plant within the Strata scheme. So what does that mean? They need to take reasonable steps to make sure that the plant is designed, installed, cleaned, maintained, operated by competent persons with appropriate qualifications. And obviously the lift registration in which they are aware of, which most buildings have to comply with, but any other high risk plant may also fall under that requirement.

Amanda Farmer: So, lifts would probably be the most common high risk plant that we'd see in residential strata, well, in strata, full stop, maybe?

Bill Kritharas: That's right. That's right. Yes. And that's one that obviously sits on the agendas at general meetings, I think, of most owners corporations. So some of the things that just owners corporations should be thinking about and a takeaway for owners corporation, when it comes to health and safety, they are not PBCU's and therefore residential owners corporations don't have obligations under work health and safety laws. But they still need to have, I think, an understanding that there are work health and safety obligations. As strata committee members, they are volunteer officers. Where contractors are coming onto the site, residential owners corporation does become a workplace. And then the contractors do have obligations. They should ensure that they understand what their obligations are in the strata agency agreement. And that probably an important one, as far as strata managers are concerned. Where contractors are coming onto the site, strata managers, as well as I think proactive committee members should ensure that the contractors are properly qualified, that they have insurance, that they have, if required, appropriate licenses. And they should have a consultation process prior to the commencement of any works.

And they should also, if they are an owners corporate that was built prior to 31, December, 2003 and a asbestos register, and yes. Look, the regular safety inspections that we talked about, Amanda, that's also, I think an important thing.

Amanda Farmer: Thank you. Great summary. Bill, how do our listeners find out more about you and connect with you for that time in the future when they might just need you?

Bill Kritharas: So I'm a partner at Sparke Helmore Lawyers. So, I'm happy if they contact me through the website, through LinkedIn or they can email me. So, bill.kritharas@Sparke, with an E on the end, .com.au. So thanks, Amanda.

Amanda Farmer: Thank you very much, Bill and thanks for taking the time. I know how busy you are not just a workplace and safety lawyer but a lawyer at this time of the year. We are recording towards the end of 2021 and it's crazy for our lawyers at the moment. There is no such thing as January for a lawyer and their clients, apparently.

Bill Kritharas: Yes, that's right. Well, I'm hoping to take a couple of weeks off.

Amanda Farmer: Good on you. Enjoy and I hope to see you on 2022.

Bill Kritharas: Thank you. Certainly. Thanks, Amanda.

Outro: Thank you for listening to Your Strata Property, the podcast which consistently delivers to property owners, reliable and accurate information about their strata property. You can access all the information below this episode via the show notes at

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