

# Important Work Health & Safety Case

## Part 2: Owners Corporation fined \$225,000.00 as a PCBU

Following on from our article regarding [SafeWork NSW v Maluko Pty Ltd \[2023\] NSWDC 274](#) (“**Maluko**”), another notable judgment has been handed down by the Court, but this time against The Owners – Strata Plan No. 93899 (the “**Owners Corporation**”).

This case was determined with respect to the same factual events as Maluko. The important facts concerning this recent criminal case of *SafeWork NSW v The Owners Strata Plan No 93899* [2024] NSWDC 277 (the “**Decision**”) have been summarised and set out in this article.

Similar to the decision in Maluko, the Court found that the Owners Corporation breached its duty as a “*person conducting business or undertakings (“PCBU”) involving management or control of workplaces*” pursuant to section 20(2) of the *Work & Healthy Safety Act 2011* (NSW) (the “**Act**”).

As a result of this finding of breach of duty, the Owners Corporation was penalised with a fine in the sum of \$225,000.00, plus an order for costs in the sum of \$40,000.00.

Section 20(2) of the Act provides that a PCBU:

*“... must ensure, so far as reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person.”*

Following the Decision, group title structures such as [owners corporations who are PCBU’s](#) should ensure that they have the following:

1. An officer (such as a committee member) armed with a suitable WH&S policy to adequately implement, assess, train, induct and manage the risks and WH&S Policy as required by section 27 of the Act;
2. Ensure that suitable inclusions in quote requests addressing the Act are included;
3. Ensure adequate insurance for the legal defence costs, as \$50,000.00 is woefully inadequate. Bear in mind that you cannot insure against (or claim indemnity in respect of) the substantial penalties; and
4. Take compliance measures as required by the Act.

### Prosecution’s Case

The Owners Corporation pleaded guilty to the amended summons filed by the prosecution (the “**Amended Summons**”), which stated that the Owners Corporation failed to comply with its duty under section 20(2) of the Act “*between 5 June 2020 and 12 June 2020*”, being the period during which the damage occurred to the gate and extending to the date on which the fatality occurred (the “**Offence Period**”). The reasoning was as follows:

*“The defendant (Owners Corporation) failed to ensure so far as is reasonably practicable, that the Site, the means of entering and exiting the Site, and anything arising from it were without risks to the health and safety of any person, and in particular, Mr Martins in that it failed to take one or more of the following reasonably practicable measures to eliminate, or alternatively minimise if not reasonably practicable to eliminate, the risks to the health and safety of any persons:*

*Undertake, or require Chris Darby to arrange, an immediate risk assessment in relation to the safety and security issues at the Site arising from the motor vehicle incident and the resulting damage to the Gate.*

*Take the Gate out of service immediately after the motor vehicle incident and post signage to the effect that the damaged Gate was not to be operated manually until it was fully repaired or replaced. Implement, or require Chris Darby to implement, measures to keep persons away from the damaged Gate, such as temporary barricades, exclusion zones and/or warning signs.*

*Direct that the damaged Gate not be touched and remain opened and unlocked so as to allow access to the Site pending the repair or replacement of the damaged Gate by a competent person.*

*Develop and implement a safe work method statement or safe work procedure for the manual operation of the Gate.”*

The Amended Summons also pleaded that the following guidance material was not considered by the Owners Corporation, despite being available at the time of the incident:

1. SafeWork NSW (SafeWork) Code of Practice, Managing the Risks of Plant in the Workplace, August 2019 (PX 1, Tab 13). Part 3.6 provided that damaged plant that poses a risk to health and safety should be withdrawn from service until those risks have been controlled.
2. SafeWork Code of Practice, Managing the Work Environment and Facilities, August 2019 (PX 1, Tab 12). Part 1.1 provided specific guidance to entities with responsibilities under s 20 of the WHS Act. Part 1.3 provided clear guidance on the need for promptly replacing or repairing damaged fixtures and fittings within the work environment.
3. Western Australian Safety Alert (WASA), Worker Crushed by Falling Gate, August 2018 (PX 1, Tab 14), which provided:
  - A. *“When an incident occurs that results in damage to a gate or when it is identified that a gate is not working correctly, the gate should be immediately tagged out and the employer property owner and/or property manager notified.”*
  - B. *“Any damaged or defective gates should be immediately assessed and repaired by a competent person.”*
  - C. *“Until such repairs are completed, measures must be implemented to keep people away from a damaged gate (for example by temporary barricades, exclusion zones, warning signs).”*

## Owners Corporation's conduct following the incident

The conduct of the owners corporation following the incident factored into the Decision ultimately made by the Court:

- Following the collision on 5 June 2020, the Owners Corporation reported the damaged gate to the strata managing agent for the Scheme (the “**Managing Agent**”).
- However, the Owners Corporation did not carry out (or otherwise arrange for) an immediate risk assessment to be conducted in relation to the damaged condition of the gate or in relation to its manual operation.
- The Owners Corporation did not remove the gate from service or post a sign to the effect that the gate was not operational pending its full repair or replacement, nor did the Owners Corporation take any actions to prevent the manual operation of the gate, including using signs to the effect that the gate was not to be operated manually until it was fully repaired or replaced.
- There was no Safe Work Method Statement (SWMS) developed for the manual operation of the gate, nor was any information or direction provided to persons at the site that the gate was not to be touched or operated manually until it was fully repaired or replaced.
- Under the strata management agreement, the Owners Corporation delegated the Managing Agent “*full authority with no limitation for effecting repairs to and maintaining common property or engaging appropriately qualified tradespersons to undertake standard work orders*”. Repairing the damaged gate was a standard work order as it was construction work with no requirement to work above three metres.
- Neither the Managing Agent or the Owners Corporation carried out, or otherwise arranged for, an immediate risk assessment to be conducted for the damaged gate.

## Financial Affairs of the Owners Corporation

On 24 January 2023, the Scheme was valued at \$1,955,000.00 for insurance purposes.

Mr Petrovski, a lot owner in the Scheme, prepared an affidavit (which is a sworn statement used as evidence in legal proceedings). Annexed to this affidavit were the following documents, which set out the Owners Corporation's financial position:

1. Darby's interim reports for the financial year ending 31 December 2022;
2. Financial report for financial period 1 December 2022 to 30 November 2023; and
3. Financial report for financial period 1 December 2023 to 31 May 2024.

The Owners Corporation's financial position was reflected in the most recent financial report, which confirmed the following:

- A. The total assets of the Owners Corporation (comprising of the administrative fund and the capital works fund) were at \$13,296.92; and
- B. For the period between 1 December 2023 and 15 April 2024, the Owners Corporation operated at a deficit of \$8,356.66.



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In preparation for the sentencing hearing, each lot owner was asked to provide information about how a monetary penalty (by way of a fine) would personally impact them. Mr Petrovski listed the information provided by each owner and annexed relevant documents, including financial statements, tax returns and letters.

### **Insurance Matters**

During the offence period, the Owners Corporation held an insurance policy that was intended to cover legal expenses incurred in WHS matters up to an amount of \$50,000.00 with an excess of \$1,000.00. Soon after this prosecution was commenced, the Owners Corporation made a claim on its policy, which was not responded to in a timely manner. On 24 April 2024, following complaints to regulatory agencies, the underwriters responded to the Owners Corporation declining the claim for defence costs under the policy. Mr Petrovski advised the insurer that the Owners Corporation did not agree with the decision and that the Owners Corporation was considering challenging it.

On 25 June 2024, the solicitors for the Owners Corporation wrote to the insurer setting out their position and requesting a response within seven days. At the time that Mr Petrovski affirmed his affidavit, the Owners Corporation had not received a response to the letter.

Following the incident, the Owners Corporation co-operated with SafeWork's investigation, which included complying with statutory notices and lot owners making themselves available to answer questions and provide information.

### **Courts Findings**

The findings of the Court with respect to the Owners Corporation's level of culpability was based upon the following:

1. The risk of the gate falling was foreseeable. Even a cursory inspection of the rough and ready temporary repairs would have led to the realisation that there was no stopper and the gate could slide past the southern rollers and ultimately fall. Further, there was guidance material which disclosed the risk.
2. The likelihood of the risk occurring was significant. This is particularly illustrated by the CCTV footage of the incident which shows that Mr Martins had to wrestle with the gate to get it to move.
3. The potential consequences of the risk were serious injury or death (the latter of which unfortunately did eventuate).
4. There were simple no-cost steps available to eliminate or minimise the risk.
5. There was no burden or inconvenience involved in those steps.
6. The death of Mr Martins was caused by the breach of a duty by the Owners Corporation to ensure safety.
7. This was a continuing offence and the evidence shows that workers were exposed to the risk on several days, not just on 12 June 2020 (being the date of the incident).
8. The maximum penalty for the offence is a fine of \$1,731,500.00, which reflects the legislature's view of the seriousness of the offence. The penalty increased from \$1,500,000.00 to \$1,731,500.00 only two days before the incident, but during the period of the continuing offence committed by the Owners Corporation.

9. The default of other parties, Maluko (for which sentencing has already happened – [see the outcome here](#)) and the Managing Agent (who has pleaded guilty but is yet to be sentenced) made a significant contribution to the creation of the risk and the death of Mr Martins. However, the Owners Corporation had its own independent duty to ensure safety under the Act. As the Owners Corporation is ultimately the owner of the common property, which includes the gate, it had the power (as well as the obligation) to ensure that the site was safe.
10. This case is not of the usual type that comes before the Court, where a PCBU conducting a ‘for-profit business’ creates or ignores a risk to workers engaged or controlled by it. The risk here was created by unknown persons performing ad hoc repairs to put the gate back into service, before it could be professionally repaired.
11. Some lot owners did report the damage to the gate promptly to the Managing Agent and did follow up the Managing Agent with respect to having the gate repaired.

In considering the determinative issue of whether the maximum penalty applies, the Court took into account the Owners Corporation’s mitigating factors.

### **Mitigating Factors**

The mitigating factors which were considered by the Court were:

1. The Owners Corporation’s capacity to pay a fine with regard to section 6 of the *Fines Act 1996* (NSW);
2. The Owners Corporation had no prior convictions pursuant to section 21A(3)(e) of the CSP Act;
3. The Owners Corporation was otherwise of good character pursuant to section 21A(3)(f) of the CSP Act, demonstrated by the steps which it took after the incident;
4. The Owners Corporation was unlikely to re-offend pursuant to section 21A(3)(g) of the CSP Act;
5. The Owners Corporation had good prospects of rehabilitation pursuant to section 21A(3)(h) of the CSP Act. The Owners Corporation had taken positive steps to guard against the risk of an incident such as this ever happening again and had brought its documentation and its procedures into line with those which, on all the evidence, should have been in place before this incident occurred.
6. The Owners Corporation had shown remorse for the offence pursuant to section 21A(3)(i) of the CSP. It had provided evidence that it accepted responsibility for its actions and acknowledged that the death of Mr Martins was caused by its actions.
7. The Owners Corporation entered an early guilty plea pursuant to section 21A(3)(k) of the CSP Act. Pursuant to section 22(1) of the CSP Act, the Court must take into account the fact that the offender has pleaded guilty, when the offender pleaded guilty, and the circumstances in which the offender indicated an intention to plead guilty. Accordingly, the Court determined that it was appropriate to grant the Owners Corporation a 25% discount for its plea (reflected in the Court orders made in the Decision).
8. The Owners Corporation provided assistance to law enforcement authorities pursuant to section 21A(3)(m) of the CSP Act. It co-operated at all times with the prosecutor and provided all documents requested in a prompt fashion.

## Penalty and Court Orders

With consideration to the Owners Corporation's mitigating factors, the Court made the following orders (extracted directly from the Decision):

1. The Owners – Strata Plan No 93899 was convicted on 5 July 2024.
2. The appropriate fine is \$300,000 but that will be reduced by 25% to reflect the early plea of guilty.
3. Order The Owners – Strata Plan No 93899 to pay a fine of \$225,000.
4. Order pursuant to Section 122(2) of the Fines Act 1996 (NSW) that 50% of the fine is to be paid to the prosecutor.
5. Order The Owners – Strata Plan No 93899 to pay the prosecutor's costs agreed in the amount of \$40,000.

## How can we help?

A strata managing agency agreement will usually leave it to an owners corporation to comply with its own work health and safety obligations that became issues in this case. Bannermans Lawyers can assist owners corporations with:

1. Providing a WH&S policy to comply with its obligations;
2. Motions for committee members;
3. Suitable inclusions in quote requests addressing the Act;
4. Advice concerning managing compliance and risks associated with WH&S; and
5. Access to webinars to assist with training.

If you are interested in acquiring in any of the above, please contact Bannermans Lawyers on 02 9929 0226 or on enquiries@bannermans.com.au for advice on how to proceed.

## Related articles

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[Work Health & Safety Act 2011 and the Work Health & Safety Regulation 2011](#)

[Is Your Strata Scheme Exempt From Complying With WH&S?](#)

[Safety Reports in Strata Schemes and Occupiers Liability](#)

[Owners Corporation's Duty to ensure safety of the Common Property](#)

**Prepared by Bannermans Lawyers**

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