

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.

Where to start?

Take our quiz: [I’m an Owner – Does my scheme need a WH&S policy?](#) to determine if your group title structure needs a policy and if so how we can help.

How can we help?



Owners WH&S Package

A bespoke WH&S policy developed for owners corporations to protect their duty of care as a PCBU! Including motions for committee members, work order amendments & webinar training.

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 through the Bannermans WH&S Package for Building Owners! This will include:

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.

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**”). Extracted from paragraph 7 of the Decision; 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 (extracted from paragraph 41 of the Decision):

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 is summarised below.

- 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 failed to take the gate out of service or post a notice indicating that the gate was non-operational while awaiting full repair or replacement. Additionally, the Owners Corporation did not implement any measures to prevent manual operation of the gate, such as displaying signs instructing that it should not be operated manually until it was fully repaired or replaced.
- There was no Safe Work Method Statement (SWMS) created for the manual operation of the gate, nor was any guidance or information provided to individuals on-site indicating that the gate should not be touched or operated manually until it was completely 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*". The repair of the damaged gate was a standard work order, as it entailed construction work that did not require working at elevations greater than three meters.
- 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 (extracted from paragraph 77 of the Decision):

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 (extracted from paragraph 78 of the Decision):

- 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 requested to submit information detailing how a monetary penalty would affect them. Mr. Petrovski compiled the submissions from each owner and included pertinent documents such as financial statements, tax returns, and letters.

Owners Corporation's Insurance Matters

The Owners Corporation held an insurance policy that was intended to cover legal expenses incurred in WHS matters. However, the insurer declined the claim after the Owners Corporation lodged complaints with regulatory agencies.

The Owners Corporation's Level of Culpability

The findings of the Court regarding the Owners Corporation's culpability were based upon the following:

1. **Foreseeability of risk:** The Court determined that the risk of the gate falling was foreseeable. A basic inspection of the temporary repairs would have revealed that there was no stopper, allowing the gate to slide past the rollers and fall. Additionally, guidance materials indicated this risk.
2. **Significant likelihood:** The likelihood of the incident occurring was deemed significant, supported by CCTV footage showing Mr. Martins struggling to move the gate, indicating a high potential for danger.
3. **Serious consequences:** The potential consequences of the risk were severe, including serious injury or death, which unfortunately occurred in this case.
4. **No-cost mitigation steps:** The Court noted that there were simple, no-cost measures available to eliminate or reduce the risk, such as directing repairs or erecting warning signs.
5. **Lack of burden:** Implementing these safety measures did not impose any significant burden or inconvenience on the Owners Corporation or the strata manager.
6. **Causation of death:** The Court found that Mr. Martins' death was directly caused by the Owners Corporation's breach of its duty to ensure safety.
7. **Continuing offence:** The offence was classified as continuing, with evidence indicating that workers faced the risk on multiple occasions, not just on the day of the incident.
8. **Maximum penalty:** The maximum penalty for the offence was set at \$1,731,500.00, reflecting the seriousness of the breach. This penalty had increased two days before the incident from \$1,500,000.00 to \$1,731,500.00, highlighting the legislative intent regarding safety violations.
9. **Independent duty:** Despite the involvement of other parties, such as 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), the Owners Corporation had its own independent duty under the Act to ensure safety, as it owned the common property, including the gate.
10. **Nature of the case:** The Court noted that this case differed from typical instances where a PCBU conducting a 'for-profit business' creates or ignores a risk to workers engaged or controlled by it. Here, the risk arose from ad hoc repairs by unknown individuals rather than negligence by a profit-driven entity.
11. **Reporting by lot owners:** Some lot owners had promptly reported the gate's damage to the Managing Agent and followed up on the repair process, indicating awareness of the issue.

These findings underscore the Owners Corporation's significant responsibility for maintaining safety in common areas and highlight the legal implications of failing to address foreseeable risks.

Mitigating Factors

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

Here are the key mitigating factors considered by the Court in sentencing the Owners Corporation:

1. The Court considered the Owners Corporation's capacity to pay a fine, taking into account its financial position as evidenced by the financial statements and other documents provided by the lot owners.
2. The Owners Corporation had no prior convictions.
3. The Owners Corporation was found to be of otherwise good character, demonstrated by the positive steps it took after the incident to improve its WHS documentation and procedures.
4. The Court determined the Owners Corporation was unlikely to re-offend in the future.
5. The Owners Corporation had good prospects of rehabilitation, having taken measures to prevent a similar incident from occurring again.
6. The Owners Corporation showed remorse and accepted responsibility for its actions that led to the death of Mr Martins.
7. The Owners Corporation entered an early guilty plea, which entitled it to a 25% discount on the sentence under the Crimes (Sentencing Procedure) Act 1999 (NSW).
8. The Owners Corporation provided assistance to law enforcement authorities by cooperating fully with the prosecutor and promptly providing all requested documents.

In summary, the Court took into account the Owners Corporation's financial situation, lack of prior offenses, remedial actions, remorse, and cooperation as mitigating factors in determining the appropriate sentence.

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.



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For more information regarding Work Health & Safety requirements, watch Bannermans Lawyers [‘WH&S - Requirements for Group Title Schemes’](#) webinar to learn about the importance of your scheme having a WH&S policy.

Related articles

[Important WH&S Case Update for the Strata Industry: Part 1](#)

[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](#)

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