

Important Work Health & Safety Case

Part 3: Strata Managing Agent penalised \$150,000

The District Court has made its third decision following on from our articles regarding *SafeWork NSW v Maluko Pty Ltd [2023] NSWDC 274* and *SafeWork NSW v The Owners – Strata Plan No 93899 [2024] NSWDC 277*, but this time against the strata managing agent (**the “Managing Agent”**).

To briefly summarise the findings of these three cases:

In *SafeWork v Maluko*, the employer, ‘Maluko’, was found liable for failing to comply with its work health and safety duty owed as a person conducting a business or undertaking (PCBU) pursuant to *section 19 of the Work Health and Safety Act 2011 (NSW) (‘Act’)*; which exposed Mr Jose Martins to a risk of death or serious injury contrary to section 32 of the Act. Maluko plead guilty and were penalised \$375,000 plus \$44,000 in costs.

In *SafeWork v SP93899*, the ‘Owners Corporation’, also as a PCBU was found liable for failing to comply with its work health and safety duty but as a ‘person with the control and management of a workplace’ (**PCMW**) pursuant to section 20(2) of the Act; and thereby exposed persons, including Mr Martins, to a risk of death or serious injury contrary to section 32 of the Act. SP93899 plead guilty and were penalised \$225,000 plus \$40,000 in costs.

In *Safework NSW v Chris Darby Strata Pty Ltd [2024] NSWDC 360*, the Court found that the Managing Agent, as a PCBU had also breached its work health and safety duty as a PCMW under section 20(2) of the Act and thereby exposed persons, including Mr Martins, to a risk of death or serious injury contrary to section 32 of the Act. The Strata Managing Agent plead guilty and were penalised \$150,000 plus costs.

The critical provision again 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.”

The details of the case are explored below but following this most recent decision against the Managing Agent, strata managing agents will be surprised to find that they can be found as a PCMW in so far as their client’s properties are concerned and strata managing agents will want to ensure that they have:

- 1) A Work Health and Safety (WH&S) manager.
- 2) 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.
- 3) A suitable delegation of authority in their agency agreement.
- 4) Ensure that suitable inclusions in quote requests addressing the Act are included.
- 5) Training for the WH&S manager to understand and know when and how to apply with relevant WH&S Codes of Practice.

- 6) Licensees in charge will need to ensure that they have a WH&S procedure in accordance with section 32 of the *Property Stock & Agents Act 2002* to address the obligations:
- a) as a PCBU for the strata agency; and
 - b) as a PCMW for agency's respective clients' properties.



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Prosecution's Case against the Managing Agent

- The Managing Agent plead guilty to the Amended Summons ('**Prosecution's Case**').
- The Amended Summons plead that the Managing Agent failed to comply with their duty under section 20(2) of the Act "*between 5 June 2020 and 12 June 2020*", which is the date between when the damage occurred to the gate and the date on which the fatality occurred (the '**Offence Period**'). Extracted from paragraph 6 of the decision; the reasoning was as follows:

"The defendant failed to ensure so far as is reasonably practicable, that the means of entering and exiting the Site, 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:

(a) Require that a competent person promptly repair or replace the damaged Gate after the defendant was notified on 5 June 2020 of the motor vehicle incident resulting in damage to the Gate.

(b) Arrange for the damaged Gate to be immediately tagged out, or otherwise taken out of service to prevent it from being manually operated, until repairs or replacement of the Gate had been completed by a competent person.

(c) Communicate to the owners at the Site such as by use of warning signs, exclusion zones and/or temporary barricades that the damaged Gate should not be operated unless and until such operation of the

Gate was deemed to be safe by a competent person.

(d) Confirm and follow up with relevant competent persons the required timeframes for repair or replacement work, to be undertaken, once the defendant had been notified by the Owners Corporation of the damage to the Gate.”

- The Amended Summons also plead that the following guidance material was not considered by the Managing Agent, despite being available to them (extracted from paragraph 16 of the decision):

Guidance Material

- 1) *“SafeWork NSW (SafeWork) Code of Practice, Managing the Risks of Plant in the Workplace, August 2019 (PX 1, Tab 13)*
- 2) *SafeWork Code of Practice, Managing the Work Environment and Facilities, August 2019 (PX 1, Tab 12).*
- 3) *Western Australian Safety Alert, Worker Crushed by Falling Gate, August 2018 (WA Safety Alert) (PX 1, Tab 14).”*

In short, the above guidance material provides that when plant is damaged and poses a risk to health and safety, it should be immediately withdrawn from service until the risks have been controlled. Some key steps to manage risks of damaged plant are as follows:

- 1) Tag out the damaged plant to prevent use until repaired.
- 2) Notify the appropriate parties like the employer, property owner or manager of the damage.
- 3) Have a competent person assess and repair the damaged plant as soon as possible.
- 4) Until repairs are completed, implement measures to keep people away from the damaged plant, such as:
 - Putting up temporary barricades;
 - Establishing exclusion zones; and
 - Posting warning signs.

By following these steps, strata managing agents can ensure damaged plant is quickly taken out of service, repaired by qualified personnel, and appropriate precautions are in place until the plant is restored to safe working condition. This helps eliminate the risks posed by damaged plant and fixtures.

The Managing Agent’s Conduct following the Incident

The events following the collision highlight significant lapses in safety management and operational protocols by the Managing Agent, raising concerns about the effectiveness of their risk assessment processes and adherence to safety standards.

Incident Overview



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- 1) Collision and Damage: On 4 June, 2020, a vehicle collision caused the gate to become disconnected from its motor, and the guideposts at the northern end were destroyed.
- 2) Reporting the Damage: The Owners Corporation reported the damage to the Managing Agent the following day, 5 June, 2020.
- 3) Lack of Immediate Response: The Managing Agent failed to conduct an immediate risk assessment regarding the damaged gate or its manual operation. There was no system in place to ensure the gate was made safe, such as warning signs or temporary barricades.
- 4) Operational Failures: The Managing Agent did not remove the gate from service or post any signage indicating that the gate was non-operational. They also did not take steps to prevent manual operation of the gate until it was fully repaired or replaced.
- 5) Absence of Safety Protocols: There was no Safe Work Method Statement (SWMS) developed for the manual operation of the gate, nor was there any communication to inform individuals on-site that the gate should not be operated manually.
- 6) Delegated Authority: Under the strata management agreement, the Managing Agent had full authority to effect repairs and maintain common property, which included the damaged gate. Repairing the gate fell within the scope of standard work orders as it did not involve work above three meters.
- 7) Failure to Assess Risk: Neither the Managing Agent nor the Owners Corporation arranged for an immediate risk assessment of the damaged gate.

Courts Findings

The court findings regarding the Managing Agent's culpability were found to be at the lower end of the mid-range, based on several key factors:

- 1) Foreseeable Risk: The risk of the gate falling was foreseeable, and the Managing Agent should have recognised the dangers posed by heavy sliding gates, especially if they were damaged. Guidance materials highlighted these risks.
- 2) Significant Likelihood: The likelihood of an incident occurring was significant, as indicated in the guidance material. Until repairs were completed, measures were required to keep people away from the damaged gate.
- 3) Serious Consequences: The potential outcomes of the risk included serious injury or death, which tragically occurred in this case.
- 4) Available Mitigation Steps: Simple and cost-free steps were available to the Managing Agent to eliminate or minimize the risk, such as ensuring the gate was taken out of service or erecting warning signs.
- 5) No Burden in Compliance: There was no significant burden or inconvenience in implementing these safety measures, as the Managing Agent operated for profit and could charge for the work done.
- 6) Causation of Death: The court found that the death of Mr. Martins was directly caused by the Managing Agent's breach of safety duties under the Act.

- 7) Continuing Offence: The offence was ongoing, with evidence showing that workers and owners were exposed to the risk on multiple occasions, not just on the day of the incident.
- 8) Penalty Considerations: The maximum penalty for the offence was a fine of \$1,731,500, reflecting the seriousness of the breach. This penalty had recently increased just days before the incident, underscoring the gravity of the situation.
- 9) Shared Responsibility: While the default of Maluko and the Owners Corporation contributed to the risk and the death of Mr. Martins, the Managing Agent held an independent work, health and safety duty under the Act. As the managing agent, it had the power and obligation to ensure the site is kept safe.
- 10) Unique Circumstances: The court noted that this case differed from typical scenarios where a PCBU creates or ignores risks. In this case, the risk was exacerbated by unqualified individuals performing makeshift repairs instead of awaiting professional attention.

The court's ruling emphasises the importance of adhering to safety protocols and the legal responsibilities of managing agents in ensuring the safety of common property in strata schemes.

Parity Principle in Sentencing

The principle of parity in sentencing was a key consideration in these cases, which posits that sentences for similar offences should not differ significantly to avoid a sense of injustice among offenders. The court recognised that while the culpability of the parties involved may differ, the overall penalties must reflect the seriousness of the breaches while ensuring fairness in sentencing.

The Managing Agent's Level of Culpability

The Court's findings regarding the culpability of the Managing Agent compared to the Owners Corporation highlight several key points:

- 1) Inspection Responsibility: The Owners Corporation had personnel on-site who were responsible for inspecting the gate and preventing its manual operation before repairs could be made. In contrast, the Managing Agent was unable to attend the site due to COVID-19 restrictions, which limited their ability to assess the situation directly.
- 2) Awareness of Repairs: The Owners Corporation should have recognized that temporary repairs were made to allow the gate to function manually. However, the Managing Agent was not informed of these ad hoc repairs, which contributed to their lesser culpability in the incident.
- 3) Communication of Urgency: The Owners Corporation did not convey any urgency in their request for the gate's repair. This lack of urgency affected how the Managing Agent prioritized the repair work, further diminishing their culpability compared to the Owners Corporation.
- 4) Knowledge of Manual Operation: While most property owners were unaware that the gate was being manually operated, one property owner, Maluko, was aware and had instructed his employees (including Mr. Martin) to manually open the gate whilst it was not operative at the beginning of each business day. The Managing Agent had no knowledge of this manual operation, which played a role in the Court's assessment of their culpability.
- 5) Lack of Communication During Dangerous State: There was no evidence that the Owners Corporation contacted the Managing Agent during the period when the gate was in a dangerous condition to inform

them that the repair had not been completed. The only communication from the Owners Corporation was related to insurance coverage for vehicles damaged in an earlier incident, not the gate's safety.

Overall, the Court concluded that the Managing Agent's level of culpability was less than that of the Owners Corporation due to their lack of direct involvement and the absence of critical information regarding the gate's condition and the urgency of repairs.

Mitigating Factors

The mitigating factors which were considered by the Court was that the Managing Agent:

- 1) has no previous convictions;
- 2) is otherwise of good character;
- 3) is unlikely to re-offend;
- 4) has good prospects of rehabilitation;
- 5) has shown remorse for the offence;
- 6) entered an early plea of guilty; and
- 7) gave assistance to law enforcement authorities.

Take Away

These cases underscore the critical importance of adhering to health and safety regulations in the strata industry. They serve as a reminder for owners corporations and managing agents to implement robust safety procedures and create a culture to protect the health and safety of all individuals on their premises. The outcomes also highlight the legal ramifications of failing to meet these obligations, reinforcing the need for compliance in the strata industry.

How can we help?

This is a complicated area and one in which the strata industry is largely non-compliant but we can assist with:

1. Providing a WH&S policy to comply with its obligations.
2. Assistance with drafting a suitable delegation of authority.
3. Suitable inclusions in quote requests addressing the Act.
4. Advice concerning managing compliance and risks associated with WH&S.
5. Written procedure as required by section 32 of the Property Stock & Agents Act 2002.
6. Access to webinars to assist with training.

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