



## ABSTRACT

This paper examines three safety incidents involving a gate, a building management unit, and inadequate signage, leading to six prosecutions with significant implications for workplace responsibilities in the property industry.

The landmark decision by the NSW District Court on August 22, 2024, marks the first instance where WorkSafe prosecuted three distinct parties within a single Strata Scheme<sup>1</sup>. These parties included a business owner, the Strata Scheme Owners, and the strata manager. Although this is not the first prosecution of multiple parties by WorkSafe involving a single incident, it does set a crucial precedent for those managing strata properties.

In 2012, all States except Victoria and WA adopted the Work Health and Safety Act (WHS Act), with WA enacting the legislation in March 2022. Victoria continues to operate under the Occupational Health and Safety Act 2004. Despite minor discrepancies, the legislation is broadly consistent across States, establishing legal precedents that shape workplace practices throughout the property sector.

This paper explores the WHS Act's impact on property professionals, particularly those in strata and asset management, including facility and building managers.

## INTRODUCTION

Every worker has the right to expect a safe workplace, free from risks, ensuring their safe return home each day. However, in the case of Strata Plan 93899, Mr. Martins tragically lost his life, highlighting failures in communication and workplace practices, likely due to a lack of understanding regarding safe work obligations and effective property management.

Before examining the relevant case law, it is crucial to understand the objectives of the Work Health and Safety (WHS) Act. The Act sets forth seven key objectives to safeguard the health and safety of workers and others in the workplace:

### 1. Protection of Workers and Others:

The term "worker" encompasses property professionals, all employees, contractors, subcontractors, apprentices, trainees, work experience students and volunteers.

### 2. Elimination or Minimization of Risks:

This entails identifying hazards and potential risks around a property and implementing measures to control, manage, or eliminate those risks.

### 3. Promotion of Safe Work Practices:

Encouraging practices that ensure continuous health and safety improvements at the property and within a business. In strata legislation, this involves managing common property for the benefit of all owners, maintaining it in good repair, and renewing or replacing common property and related fittings as necessary.

### 4. Clear Roles and Responsibilities:

The Act and subsequent case law clarifies the roles and responsibilities of property professionals, contractors, owners, and others involved in property and building management, ensuring everyone understands and fulfills their obligations.

### 5. Promotion of Worker Involvement:

All parties must collaborate to ensure the property is safe and free from risk. Encouraging consultation, education, and cooperation among property professionals, contractors, residents and other occupiers, enhances awareness and risk management.

### 6. Consistency Across Jurisdictions:

The WHS Act aims to provide a consistent safety framework across all Australian States and Territories, simplifying compliance for businesses operating in multiple locations.

### 7. Enforcement and Compliance:

The Act establishes a framework for enforcement, addressing safety law breaches through penalties and legal action, ensuring businesses uphold their safety responsibilities.

The primary duty of care for ensuring health and safety at a property lies with the Person Conducting a Business or Undertaking (PCBU), which can include multiple parties and may include property professionals, contractors, businesses, and volunteers involved in property management.

The WHS Act and in some States the Regulations, exclude Strata Schemes from being defined as a PCBU if they are used exclusively for residential purposes, lack commercial users, and have no employees. This exclusion does not apply if there has been a change of use approved by the Local Government which may occur if a lot applies for the approval for 'short-stay' letting, or other change of use under the respective Local Planning Scheme.

When a Strata Scheme or property professional qualifies as a PCBU, they must eliminate or minimize risks to workers' health and safety as far as is 'reasonably practicable.'

### This involves:

- Maintaining a safe work environment;
- Providing necessary information, training, and supervision to ensure safe work practices; and
- Consulting with workers and other PCBUs on health and safety issues that may affect them.

"Reasonably practicable" in this context refers to actions that can reasonably be taken to ensure safety, considering factors such as:

- The likelihood and potential severity of the hazard or risk;
- Knowledge of the hazard or risk and ways to mitigate it; and
- The costs associated with mitigating the risk, weighed against the risk's severity.

## WORKSAFE PROSECUTIONS

### 1. Gate Incident

**WorkSafe NSW v - Maluko Pty Ltd  
[2023] (Maluko)**

**The Owners of Strata Plan 93899  
[2024] (the Owners)**

**Chris Darby Strata Pty Ltd  
[2024] (the strata manager)**

#### Incident Summary:

Maluko was an owner and a PCBU occupying an industrial unit in a complex of eight units, and employed five workers, including Mr. Martins. The property, overseen by the Owners, was under a strata management agreement since 2019. The agreement empowered the strata manager to perform routine repairs and maintenance while additional services required Owners' approval. At the time of the incident the strata manager had responsibility for approximately 107 Strata Schemes, including this property.

In respect of the property, the strata manager took instructions from the designated Responsible Person, nominated by the Owners.

When developed, the property included a perimeter fence incorporating a large, custom-built sliding electric gate (the gate). The gate included guideposts and an end-stopper (stopper) to prevent the gate from overtravel in the closing direction. The gate was approximately 8.5 metres long and over 2 metres high.

On the night of 4 June 2020, a van collided with the gate. The gate remained upright but was bent out of shape, partially pulled off its track, and disconnected from its electric motor.

The guideposts were also damaged, and the stopper had come out of position and was no longer capable of preventing overtravel of the gate.

Following the collision, NSW Emergency Services attended the site and secured the gate and perimeter fence. However, it was not otherwise tagged out, repaired, replaced, made safe or attended to.

On 5 June 2020, a number of occupants (including Owners and tenants) within the property removed the hazard tape put up by the Emergency Services and undertook makeshift repairs to the gate, without notifying the strata manager. The ad hoc repairs were not instrumental in remediating the damage to the gate and did not eliminate or otherwise address the risk of the gate falling.

From 5 June 2020 until the day of the incident on 12 June 2020, the gate was opened and closed manually by various workers at the property, as necessary when entering and leaving the site. During this period, there was no system in place for ensuring the safe manual operation of the gate.

On 12 June 2020, Mr Martins arrived for work at the property. Mr Martins' usual duties involved him opening the gate and Maluko's workshop before the arrival of the other workers.

At no time was the strata manager made aware of Mr Martins' usual duties of opening the gate.

Upon his arrival at the property, Mr Martins drove his vehicle up to the entrance at the site. The gate was padlocked and after the ad hoc repairs was only able to be operated manually. Mr Martins alighted from his vehicle to manually unlock and open the gate. Mr Martins attempted to push open the gate from several positions, however, it would not slide open.

As Mr Martins was attempting to push the gate open, the lack of a physical stopper allowed the gate to move too far in the closing direction, to the point where it came out from its guideposts and supporting rollers.

Once out of the rollers, the gate fell against a post that was part of the temporary repairs to the fence. The gate was resting at an angle and no longer aligned with the supporting rollers.

Mr Martins was attempting to push the gate back into position between the supporting rollers when the gate became unstable and fell onto him. The gate pinned Mr Martins to the ground at the entrance to the site until other workers arrived about 15 minutes later and lifted the gate off him. The incident was recorded on CCTV footage.

Mr Martins tragically sustained fatal crush injuries as a result of the incident. He was 64 years old.

Neither the strata manager nor the Owners arranged for an immediate risk assessment of the damage to the gate to be carried out by a competent person following the incident where the car collided with the gate, and no risk assessment was conducted in relation to the presence of the gate in its damaged condition or in relation to it being operated manually.

There was no Safe Work Method Statement (SWMS) or Job Safety Analysis (JSA) developed for the manual operation of the gate, nor was any training or information provided to workers at the property in relation to the safe manual operation of the gate.

On 5 June 2020, the strata manager was notified of the damage to the gate and received approval from the Responsible Person to arrange repairs to the gate and fence. At no point in time was the urgency for the repairs communicated to the strata manager.

The strata manager did not inform the gate contractor of any urgency in relation to having the repair work done, nor did the strata manager arrange for the gate to be repaired or replaced as a matter of urgency. The strata manager did not confirm with the Owners the required timeframe for the repair work to be done.

The strata manager did not communicate to the persons working at the property that the damaged gate should not be manually operated unless and until a competent person deemed it to be safe.

From approximately 16 March 2020 as a consequence of Covid-19 restrictions, all client facing activities, including meetings and site visits, ceased. The strata management company communicated this change to all of their clients.

## Critical Findings

### Duty of Care:

The court highlighted shared responsibilities under the WHS Act among Maluko, the Owners, and the strata manager. The failure to uphold rigorous safety standards in common property areas led to legal consequences.

### Foreseeable Risk:

The gate's instability was a foreseeable risk. A basic inspection would have revealed the missing stopper, making the gate prone to dislodgement. The strata manager should have been aware of the dangers posed by such heavy sliding gates in the event they are damaged. The Guidance Material, in particular the WA Safety Alert regarding gates, specifically said that property managers and Owners, had a responsibility assess potential hazards posed by large, heavy gates if they were damaged. This alert was issued following several serious incidents relating to damaged vehicle gates.

## Court Judgments

### Maluko:

Found guilty of significant negligence contributing to the risk and Mr. Martins' death, resulting in a \$375,000 fine.

### The Owners:

Held responsible for safety breaches due to inadequate repairs and communication, fined \$225,000 after a 25% reduction for an early guilty plea.

### The Strata Manager:

The strata manager's breach of duty as a PCBU, though less culpable, led to a \$150,000 fine, also reduced by 25% for an early guilty plea.

## Lessons Learnt

### Proactive Risk Management:

Immediate action and risk assessments are crucial following any incident that may be suspected of compromising safety on site. The failure to adequately diagnose and address the damaged gate resulted in a fatality.

### Effective Communication:

Clear communication and follow-up on repair orders are essential to ensure hazards are addressed urgently. Poor communication by all parties contributed to the incident.

### Non-Delegable Duty of Care:

Employers cannot delegate their primary duty of care, even when other parties are involved. Maluko remained responsible for worker safety despite the gate being part of common property.

### Consequences of Negligence:

The legal and financial penalties serve as a reminder of the importance of compliance with safety laws.

### Comprehensive Safety Practices:

Implementing thorough safety practices, including clear communication, proper safety signage and restricting access to hazards, can prevent incidents before they occur.

## 2. Building Management Unit Incident

**WorkSafe NSW v - Investa Asset Management Pty Ltd  
[2019] (Investa)**

**Building Maintenance Unit Service Pty Ltd  
[2019] (BMUS)**

### Incident Summary:

Investa managed a building in Sydney where a building management unit (BMU) was installed and used for tasks such as window cleaning.

On 20 October 2015 the BMU was being used by the cleaners to clean windows when it fell 12 storeys onto the awning of the building. Both cleaners were seriously injured.

At the time of the incident the BMU was serviced by BMUS. The Director of BMUS was responsible for the work to be done on BMUs in various buildings.

On 1 April 2014 Investa took over management of the building on behalf of its owners. The day-to-day management of the building was handled by a facilities manager employed by Investa who worked from an office in the building. The facilities manager reported to a senior manager. The senior manager was responsible for the management of a number of buildings and supervising the facility managers at each property.

BMUS serviced the BMU which consisted of quarterly service attendances and an annual inspection for the purpose of issuing a certificate of compliance. BMUS also attended the building to set-up the BMU when it was to be used, induct the workers who would be using it, and to pack it away after it was used.

On each service attendance, BMUS provided Investa a written service report. The service report would identify any items of maintenance or repair that were required. A copy of the service report would be given to the facilities manager and the other copy sent to the office of BMUS. BMUS would then provide a quote for the work involved.

Clause 7.3.5 of AS 2550.1-2011 relevantly provided the major inspection of the BMU every 10-years shall involve examination of all those critical components by either the manufacturer or a qualified person and the assessment needed to be conducted in accordance with the maintenance guide.

On 31 March 2015, a manager of Investa in Queensland sent an email, which included BMUS, seeking information pertaining to the servicing requirements of the BMU, including when the 10-yearly major inspection was due.

BMUS responded 2 April 2015 indicating that the 10-yearly major inspection was 'now due'.

BMUS carried out further services on the BMU on 22 September 2014, 24 February 2015, 18 May 2015 and 19 August 2015. None of the service reports completed referred to the need for the major inspection to be carried out.

The director of BMUS did not tell the service technicians attending site that the major inspection was due, and the technician did not have any independent knowledge that the major inspection was due.

### Critical Findings

#### Duty of Care:

Both Investa and BMUS were found to have failed in their duty of care, as required under the WHS Act. Their failure to perform the overdue major inspection contributed to the incident.

#### Foreseeable Risk:

The risks associated with the BMU were foreseeable, given the knowledge both parties had regarding the overdue inspection. The failure to address these risks heightened the likelihood of the incident.

### Court Judgement

#### Investa:

While Investa had extensive safety protocols and system in place as part of their standard operating procedures, it failed to address the specific risks associated with the overdue BMU inspection. The court imposed a \$400,000 fine plus court costs, and required Investa to publish the case findings in relevant industry magazines.

#### BMUS:

Despite its superior expertise in BMU maintenance, BMUS also failed to ensure the required inspection was conducted. The court fined BMUS \$300,000 plus court costs, reduced from \$400,000 due to an early guilty plea.

### Lessons Learned:

#### Non-Delegable Duties:

Health and safety responsibilities cannot be delegated. Even when relying on expert contractor's businesses must ensure that all safety obligations are met.

#### Documentation and Follow-Up:

It's essential not only to report hazards but also to ensure that follow-up actions are clearly communicated and documented. This includes ensuring that all parties understand their roles and the steps required to mitigate risks.

## 3. Signage Incident

### WorkSafe Qld v Facilities Manager [2023]

#### Incident Summary:

On May 17, 2022, Mr Johnston, an 80-year old man, visited a commercial high-rise in Brisbane's CBD to meet his accountant on the fourth floor. After asking for directions to the bathroom on the fourth floor, he was pointed to an alcove near the elevators with three doors: the left led to a male toilet, the right to a unisex toilet, and the centre door displayed a laminated sign reading "No Exit."

Mr Johnston mistakenly entered the centre door, which led to a disused stairwell. Previously used by a tenant occupying the third and fourth floors, the stairwell had been altered in 2016: the door on the third floor was sealed with plasterboard, and the fourth-floor door was fitted with an automatic lock, making exit impossible once entered.

When he did not return home, his family reported him missing. Tragically, Mr Johnston was later found deceased in the stairwell.

A WHSQ investigation revealed that between 2020 and 2021, three individuals had previously been trapped in this stairwell. The facilities manager, who had been employed for over ten years, was aware of two incidents but took no action to remedy the hazard or report it to his employer.

In one incident on September 23, 2021, a contractor had to use a crowbar to escape. Instead of addressing the hazard, the manager expressed anger about the damage to the door, emailing the contractor's employer to demand repairs.

Following the fatal incident, the building owner spent \$3,000 to improve safety: adding signage, installing deadbolts and sensors, changing the locking mechanism to prevent self-locking, and improving lighting in the stairwell.

#### Critical Findings

##### Duty of Care:

The facility manager failed in his duty to manage and maintain a safe site free from risks which included the stairwell. The stairwell's hazardous condition, coupled with the foreseeable risk of entrapment, resulted in a fatality. The facility manager did not act on known hazards, nor did he report them as required.

##### Foreseeable Risk:

Given the prior entrapments, the risk of further incidents was foreseeable. The facilities manager's inaction, despite being responsible for building safety, directly contributed to the tragic outcome.

#### Court Judgement

Acknowledging the manager's early guilty plea, cooperation, remorse, and otherwise good character, the court imposed a \$30,000 fine—considerably less than the maximum \$150,000. No conviction was recorded.

#### Lessons Learnt

##### Promoting a Safety Culture:

The case underscores the need for PCBUs to foster a strong safety culture in their team. An effective reporting framework is essential to ensure incidents are addressed and safety practices continuously improved.

##### Property professional Duties:

Under the WHS Act, managers must:

- Take reasonable care for their own safety and the safety of others;
- Ensure their actions or omissions do not negatively impact others' safety;
- Comply with reasonable instructions given by the PCBU to fulfill the Act's requirements;
- Cooperate with the PCBU's safety policies and procedures.

## CONCLUSION

Three everyday incidents, stemming from inadequate training and unclear roles and responsibilities, resulted in two fatalities and two serious injuries. The key findings from these cases underscore that safety duties cannot be delegated or discharged. As both a PCBU and a property professional (worker), it is imperative to eliminate or, at a minimum, mitigate risks to health and safety at the property under management as far as is reasonably practicable. Managers must ensure their actions or omissions do not negatively impact a buildings safety.

In each case, the need to clearly define and understand the roles and responsibilities of each party was critical.

### Incident 1

Maluko and the Owners bore primary responsibility for the health and safety of those on the site. Although the strata management company was considered a PCBU, it was communicated to the Owners, including Maluko, that the strata manager did not attend the site due to COVID-19 restrictions.

While the Owners were relying on the strata management company for direction, the strata manager could not attend site and make themselves fully aware of the matter.

As such, the strata manager was solely reliant on the clear communication from the Owners and/or Maluko as to the level of damage done to the gate and the actions being undertaken by the occupiers at the property to open and close the gate.

Had the strata manager regularly attended the site and taken a more hands-on approach, or if the Owners had better explained the damage undertaken to the gate and the activities being undertaken by the occupiers at site, the findings and determination may have placed significantly greater culpability on the strata manager.

### Incident 2

Investa and BMUS both understood the importance of adequately servicing and maintaining the BMU, yet each expected the other to take responsibility. This case clearly demonstrated that health and safety duties cannot be fully delegated or discharged by relying on external contractors.

### Incident 3

Property professionals in the property industry are defined as workers under the WHS Act and must adhere to their specified duties. It could be argued that the PCBU, as the facility managers employer, was responsible for ensuring their employee was properly educated and understood his duties and responsibilities, although this did not appear to be evidenced in Court.

## BEST PRACTICE MEASURES

### Regular Risk Assessments

#### Context:

In the Gate Incident, the failure to conduct a thorough risk assessment after the gate was damaged led to a fatality. If the strata manager or Owners had conducted an immediate risk assessment, they could have identified the instability of the gate and taken steps to prevent the incident.

#### Best Practice:

Property professionals should ensure that risk assessments are conducted promptly after any incident or when potential hazards are identified. Regular inspections and evaluations of site conditions can help detect risks before they lead to accidents. If the strata manager does not attend site and the Owners are not fully aware of their responsibility, properly qualified professionals should be engaged to assist in regular inspections and incident assessments.

### Clear Safety Procedures

#### Context:

The BMU Incident highlighted the dangers of not adhering to clear maintenance and inspection procedures. The failure to conduct the required 10-yearly inspection of the BMU was a critical oversight that resulted in a serious accident.

#### Best Practice:

Property professionals should establish strictly enforce safety procedures, particularly for high-risk tasks like equipment maintenance.

Procedures should be documented, and all personnel should be trained in following them correctly, ensuring that inspections and maintenance tasks are carried out as scheduled.

### Effective Communication

#### Context:

In the Signage Incident, the facilities manager failed to report previous entrapments in the disused stairwell, which could have prevented the fatal incident. The lack of communication about these hazards contributed directly to the tragedy.

#### Best Practice:

Implementing a clear and accessible incident reporting system is essential. Regular safety meetings should be held to discuss potential risks and ensure all stakeholders are informed and engaged. Clear communication channels can prevent miscommunications that may lead to safety incidents.

### Comprehensive Training

#### Context:

Across all incidents, a common theme was the lack of adequate training and awareness among workers and property professionals regarding their safety responsibilities. For instance, if the Owners and the strata manager in the Gate Incident had been better trained, they might have recognized the risk and taken appropriate actions.

#### Best Practice:

Property professionals should provide comprehensive and ongoing training to all workers, ensuring they understand their safety responsibilities and how to perform their tasks safely. Training should include emergency procedures, hazard identification, and the correct use of PPE.

### Foster a Safety-First Culture

#### Context:

The Signage incident demonstrated a lack of a safety-first culture, where the facility manager focused on the damage to the door rather than the safety hazard itself. This lack of prioritizing safety over convenience led to a fatal outcome.

#### Best Practice:

Property professionals should lead by example in promoting a safety-first culture, encouraging workers to prioritize safety over productivity. Empowering workers to report hazards and take preventative action without fear of retribution is crucial to fostering a proactive safety environment. **While Strata Legislation may require Owner's consent for expenditure on maintenance, the WHS Act should take precedence when it comes to mitigating risk.**

## BEST PRACTICE MEASURES

### Emergency Preparedness

**Context:**

The incidents discussed reveal that preparedness for emergencies was lacking, particularly in how quickly risks were addressed. For example, the gate in the Gate Incident remained unrepaired for several days, during which time it posed a serious threat.

**Best Practice:**

Property professionals should develop and regularly update emergency response plans, conduct drills, and ensure that all personnel are familiar with these procedures. Being prepared for emergencies can help mitigate the impact of unexpected incidents.

### Thorough Documentation

**Context:**

In each case, proper documentation of safety procedures, incidents, and corrective actions was either insufficient or missing. This lack of thorough documentation contributed to the failure to address risks effectively.

**Best Practice:**

Property professionals should maintain detailed records of all safety-related activities, including risk assessments, incident reports, and training sessions. This documentation not only ensures compliance with regulations but also provides a clear history of actions taken to improve safety. If in doubt, WorkCover/ WorkSafe provide excellent support services and can be engaged to assist with reviewing large projects.

### Engage Contractors

**Context:**

In the BMU Incident, the reliance on BMUS to manage the inspection and maintenance of the unit without sufficient oversight from Investa led to the incident. Both parties assumed the other would take responsibility, leading to a gap in safety management.

**Best Practice:**

Property professionals should ensure that contractors are fully integrated into the site's safety culture and adhere to the same safety standards as regular employees. Pre-work safety briefings and ongoing monitoring of contractor compliance is essential.

### Continuous Improvement

**Context:**

This article highlights that the property industry is only beginning to fully understand and adopt necessary workplace safety practices. The failure to learn from past incidents and continuously improve safety measures is evident across these cases.

**Best Practice:**

Property professionals should regularly review and update safety practices, incorporating lessons learned from past incidents. Continuous improvement should be a core principle, ensuring that safety practices evolve to meet new challenges and risks.

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#### SCOTT BELLERBY

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“Safety first” isn’t just a tick box – it’s an essential attitude shift, integrated into team culture.

For property professionals, we are managing people’s homes and workplaces; they are there every day. There must be an awareness when it comes to a perceived safety concern and that inaction can put people at risk.



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