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HR highlights series.

WHS prosecutions of officers

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Duties under the WHS Act

Who has a duty?	What is the scope of their duty?
Person conducting a business or undertaking (PCBU)	• Must ensure, so far as is reasonably practicable, the health and safety of: • Workers - while the workers are at work in the business or undertaking • Other persons - from work carried out as part of the business or undertaking
Officers	• Must exercise due diligence to ensure that the PCBU complies with its duty
Workers (employees, contractors and volunteers (if carrying out work for the PCBU))	• Take reasonable care for their own health and safety • Take reasonable care for the health and safety of other persons • Comply with any reasonable instructions • Comply with any reasonable policies and procedures
Other persons (clients, visitors, etc.)	• Take reasonable care for their own health and safety • Take reasonable care for the health and safety of other persons • Comply with any reasonable instructions

- A person can be in more than one class of duty holder (e.g. officer and worker)
- Duties are not transferable, and more than one person can have the same duty
- Each duty holder must:
 - eliminate risks, so far as is reasonably practicable; and
 - if it is not reasonably practicable to eliminate risks, to minimise those risks so far as is reasonably practicable

What is due diligence?

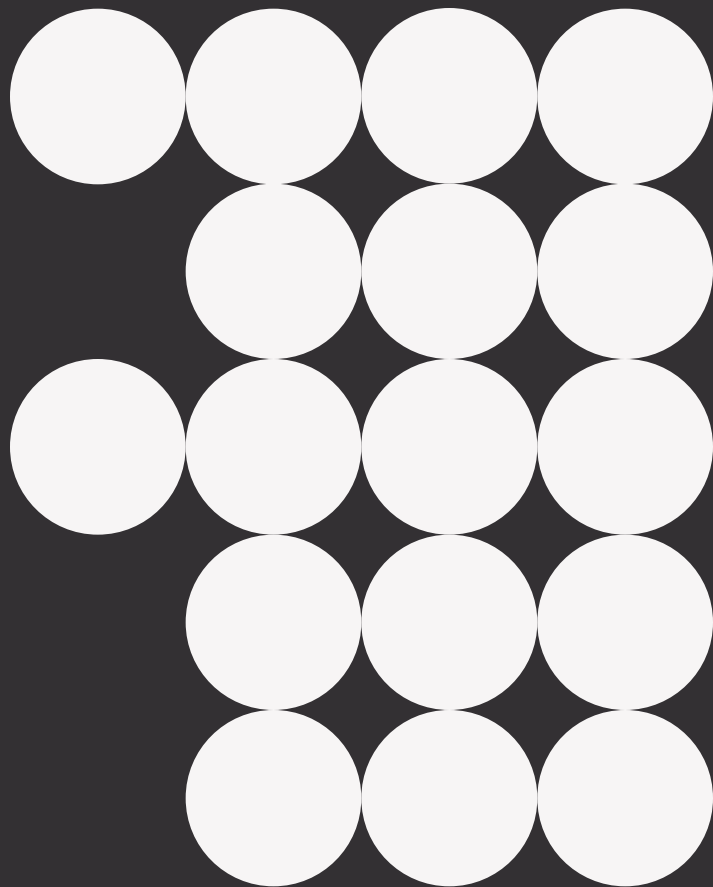


Consequences for failing to exercise due diligence

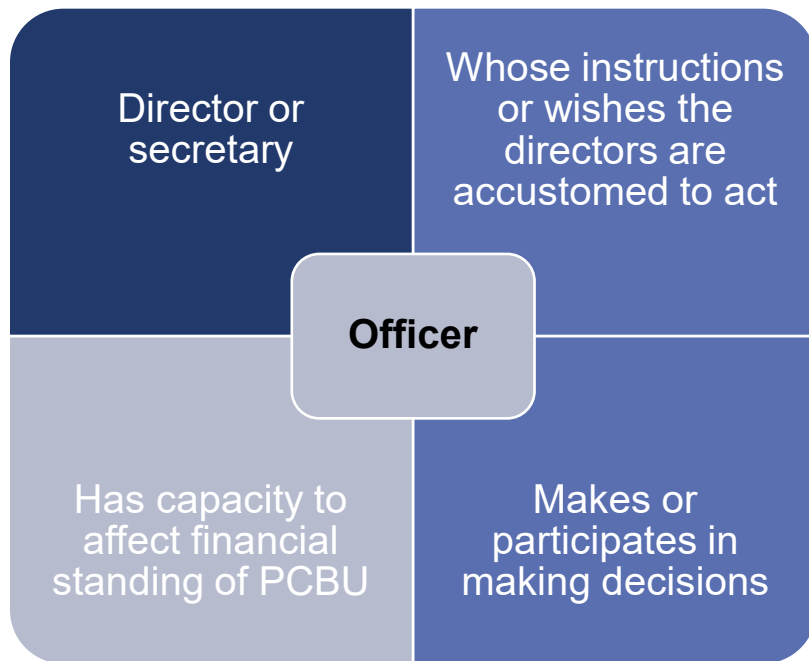
Category	Description	Maximum Penalty
Industrial manslaughter	Negligent conduct causing death of a worker	Individual = 20 - 25 years imprisonment
Category 1	Breach of duty and person is reckless as to risk of death or serious injury or illness to an individual	Individual = \$600,000 - \$3,407,000 and/or 5 - 10 years imprisonment
Category 2	Breach of duty and the failure exposes an individual to a risk of death or serious injury or illness	Individual = \$300,000 - \$475,000
Category 3	Breach of duty	Individual = \$100,000 - \$159,000

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**Who is an
officer?**



Who is an officer?



Who might this include?

- Leadership team
- Key management personnel

Relevant notes

- A person does not have to be at the highest level of the management structure to be considered an officer
- Who is an officer in relation to a particular matter will depend on the relevant facts, and may change from time to time

***SafeWork NSW v Casella* [2023] NSWDC 503**

Director by title only fined \$120,000 plus costs

Mr Casella agreed to be the sole director and secretary of his cousin's company

- He played no role in running the company and instead worked as a truck driver and yard manager for one of the other businesses within the group
- He provided no explanation as to how or why he became the sole director and secretary

The company was engaged to supply and install formwork at a construction site

The incident involved an apprentice falling 12 metres through a penetration and landing on the concrete floor of the basement after he stepped on a piece of plywood that gave way

Due diligence failures:

- Failed to take steps to inform himself of hazards and risks
- Did not require staff to provide information in relation to risks, or the relevant controls
- Did not require the company to develop a formwork SWMS
- Failed to ensure adequate supervision
- Failed to direct that a risk assessment be completed regarding formwork stripping
- Did not take any steps to verify that the company had sufficient resources



SafeWork NSW v CNH Management Pty Ltd [2025]

NSWDC 371

Site Manager with operational and financial control fined \$20,000 plus costs

CNH was engaged as a contractor to undertake formwork, steel fixing, and concreting works for the construction of a residential duplex

Mr Hadidi was a site manager of CNH, and he exercised operational and financial control over CNH and made decisions that affected the whole or a substantial part of its business - he was primarily responsible for the following tasks:

- obtaining contracts to provide formwork, steel fixing, and concreting works;
- inspecting sites at which CNH was engaged to provide formwork, steel fixing, and concreting works;
- directing to undertake and complete formwork, steel fixing and concrete works; and
- providing supervision and instruction to workers engaged by CNH to undertake and complete formwork, steel fixing, and concrete works

While a worker was removing formwork materials and stacking timber, his foot slipped on the edge of the pool and caught on one of the reo-bars protruding from the eastern edge of the concrete - he then fell and was injured on an uncapped steel reinforcement bar that was protruding vertically from the edge of the pool

Due diligence failures:

- Was not aware of the control measures and systems that should have been implemented;
- Failed to consult and implement the control measures referred to in the guidance material; and
- Failed to implement a system of work to control the site-specific risks

Maritime New Zealand v Gibson [2024] NZDC 27975

CEO of large organisation successfully prosecuted in landmark NZ judgment

Mr Gibson was personally aware of the risk of stevedores at a container terminal being struck by objects falling from operating cranes, and had actively engaged in exploring the availability of technological controls to prevent lashers (stevedores who lash and unlash stacked shipping containers) from entering crane exclusion zones, but did not turn his mind to the need for any additional, non-technological, hard controls which might be put in place in the meantime

During a night shift, a crane operator began lifting two shipping containers from a stack without realising one of the containers was attached by a twist-lock mechanism to a third container below it, or that two lashers were standing in an adjacent walkway - with all three containers in the air, the twist-lock mechanism failed under the weight of the third container, which fell on and killed one the lashers

The company pleaded guilty, but Mr Gibson contested the charge

Due diligence failures:

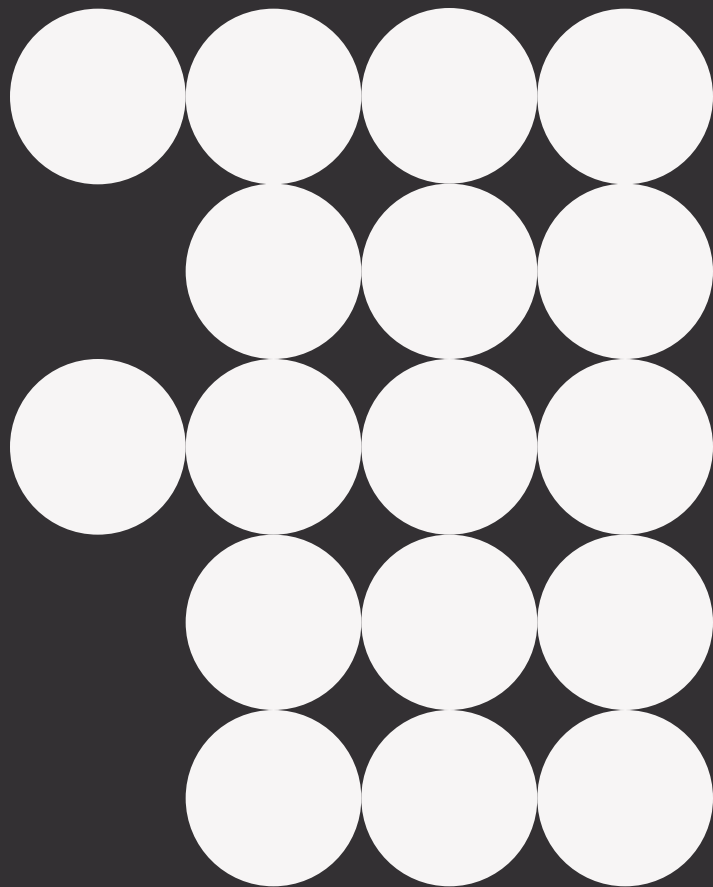
- Failed to actively test, interrogate and monitor the organisation's safety systems and personnel;
- Failed to ensure effective reporting lines were in place and that the executive and board received appropriate recommendations;
- Failed to and take active steps to obtain adequate information about the nature of the work being undertaken, the risks associated with that work, the controls which were in place to address those risks, and as to what additional steps or controls were necessary to remove or minimise those risks; and
- Relied on health and safety managers without ensuring they were skilled, supported and actually discharging their functions

Methods to minimise risk

- Anyone in a position to influence the company should assume that they are an officer and ensure compliance with their due diligence obligations
- Directors and secretaries are officers, regardless of their involvement in the business, and must comply with their obligations
- Review notices and consider whether they should be reviewed
- Responding to notices requesting information and documentation
 - Do not provide response to voluntary request
 - Only answer the question
 - Notices to a company require a signature by a competent officer - ensure this is a Director or Secretary
- Participating in interviews
 - Do not participate in a voluntary interview
 - Only answer the question

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**Successful
prosecutions**



SafeWork NSW v Whitmarsh (No. 4) [2025] NSWDC 274

Director failed to provide resources and processes and was fined \$300,000 plus costs

The company was using a crane to salvage a submerged steel yacht at a Transport for NSW facility in Rozelle Bay, when the yacht's mast broke and fell on a worker, inflicting fatal head injuries

Due diligence failures:

- Failed to ensure that the company had in place and used appropriate processes and resources to eliminate or minimise risks to health and safety for work carried out as part of the conduct of the business or undertaking, namely: undertaking an adequate risk assessment; obtaining the weight of the yacht; planning the recovery using the crane, lifting slings and a lifting point consistent with relevant safe working limits; prohibiting workers from performing work which would exceed those safe working limits; failing to use a qualified dive team to assist in putting slings underneath the yacht; providing opportunities for the operators of the mobile cranes to obtain a suitable licence; assessing the skills and competence of mobile crane operators; providing training to workers so that they were aware of the risks associated with working with the mobile crane and performing crane lifts; requiring the mobile crane to be operated in accordance with the Load Charts and in accordance with Working Load Limits; never using the mast of a yacht as a lifting point; and developing and promulgating a SWMS before work commenced;
- Did not verify by inspection or supervision that adequate PPE was available and in use during lifting operations;
- Failed to instruct workers that work was not to commence on the lift of the yacht until a risk assessment had been completed and a detailed SWMS had been prepared; and
- Did not verify by supervision or visual inspection that appropriate resources, processes and measures had been provided, implemented and maintained by the company and were being used by its workers

***Safework NSW v McCourt* [2025] NSWDC 491**

Director prosecuted after company deregistration and fined \$101,250 plus \$16,500 costs

When the apprentice and a supervisor arrived at the site on the day of the incident, the apprentice accessed the roof to take preliminary measurements to determine where solar panels could fit and where he could attach a harness bracket, as the workers did not have access to roof layout plans - several minutes later when the Director arrived at site, the apprentice stood up to wave and then slipped on the dewy roof, falling three metres to the concrete below

Due diligence failures:

- Did not sufficiently require, arrange or direct that a safe work procedure for the work was developed, implemented or enforced
- Failed to require, arrange or direct that adequate information, instruction or safety training be provided to the apprentice on the hazards and risks associated with the work and how the hazards were to be controlled, including information, instruction and training on appropriate methods of fall protection including information that temporary edge protection is the most effective means of preventing falls from roof edges

The judge also found that Mr McCourt:

- Could have required the company to obtain pre-installation documents including roof plans, sketches and aerial photographs to enable workers to determine, from the ground, where to install solar plans, edge protection and anchor points;
- Could have required, arranged or directed that supervision, or adequate supervision, be provided to workers when undertaking work at heights; and
- Did not require, arrange or direct that workers be prohibited from accessing the roof when appropriate fall protection measures weren't in place

Safework NSW v Semaan [2025] NSWIC 22

Director liable despite being "misled" and was fined \$15,000 plus \$15,000 costs

SSE Roofing Pty Ltd was engaged by F&F Smart Homes Pty Ltd to supply and install the roof on a two-storey residence when two SSE employees accessed the high roof area via scaffolding with missing planks on the working decks - a WHS inspector subsequently spotted the workers using the incomplete scaffolding

Due diligence failures:

- Failed to ensure the scaffolding was inspected prior to workers reattending the site;
- Did not require the workers to undertake a site-specific risk assessment; and
- Failed to arrange for sufficient supervision while both Mr Semaan and the general manager were unavailable

The prosecution conceded, and the justice accepted, that the conduct of F&F in advising SSE the scaffolding had been rectified was significant and operated in mitigation of the offending

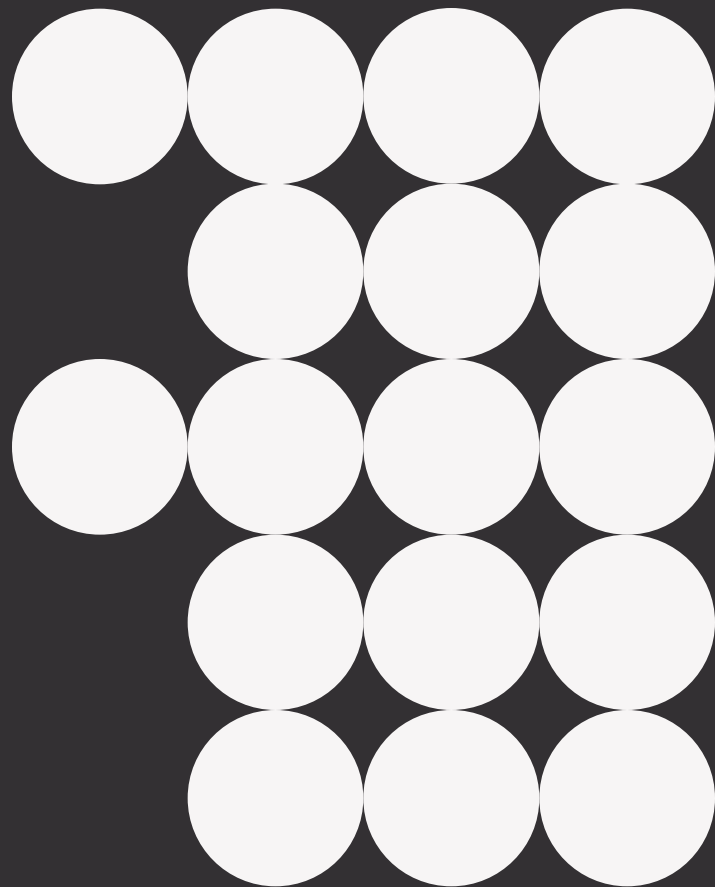
The systems demonstrated that Mr Semaan had a level of knowledge of WHS matters, understood the hazards and risks associated with roofing and had devoted resources to establishing processes to eliminate or minimise the associated risks, but the system was not foolproof, and the workers were able to largely disregard the safe work methods that were in place

Methods to minimise risk

- Main reasons for failure:
 - Don't believe they are an officer; or
 - Don't understand what their obligations are as an officer
- Conduct privileged investigation following incident
- Constantly review your safety systems, and consider whether engagement of a safety expert is necessary
- Ensure that your officers would pass a due diligence audit
 - Knowledge - what do you know about WHS, generally and specific to your industry?
 - Understanding - how have you developed your understanding of the risks and hazards specific to the business?
 - Resources and processes - what resources and processes does the business have to manage risk?
 - Obtaining information - what processes are there for receiving and considering information, and are they effective?
 - Legal compliance - what processes are there for ensuring legal compliance?
 - Verification - have you verified that your resources and processes are sufficient?
- Liquidation of company increases risk of prosecution for officers
- Cannot rely on the expertise of others, unless reasonable
- Cannot blame the mistakes of others

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Successful defences



***SafeWork NSW v Doble* [2024] NSWDC**

Officer acquitted due to sufficient resources and processes, and reasonable delegation

The Court convicted the PCBU, but acquitted the director

A worker employed by a contractor was struck by a forklift driven by another worker on the company's site and suffered serious injuries

The Court found that there was a clear risk of workers being struck by a forklift when they were loading vehicles in the workplace, and that the company recognised this risk, but the only precaution it took was to adopt a "3m rule"

The Court found that Mr Doble exercised due diligence because:

- He attended weekly management meetings where WHS was an agenda item;
- If a WHS matter needed to be dealt with, it was attended to quickly;
- He was in contact with the staff member responsible for WHS and kept himself informed about what was being done by him;
- New safety matters were raised and discussed at management meetings;
- If a safety matter was raised and a task set to address it, there was discussion at the next meeting to ensure it had been completed and the steps were minuted;
- He attended different work sites from time to time, and if he observed a problem, he asked for it to be fixed;
- He took an active interest in ensuring WHS was complied with;
- If there was an urgent matter, he would get involved; and
- There was evidence that there was no budgetary constraint to fixing WHS matters

***Guilfoyle v Walshaw* [2025] QMC**

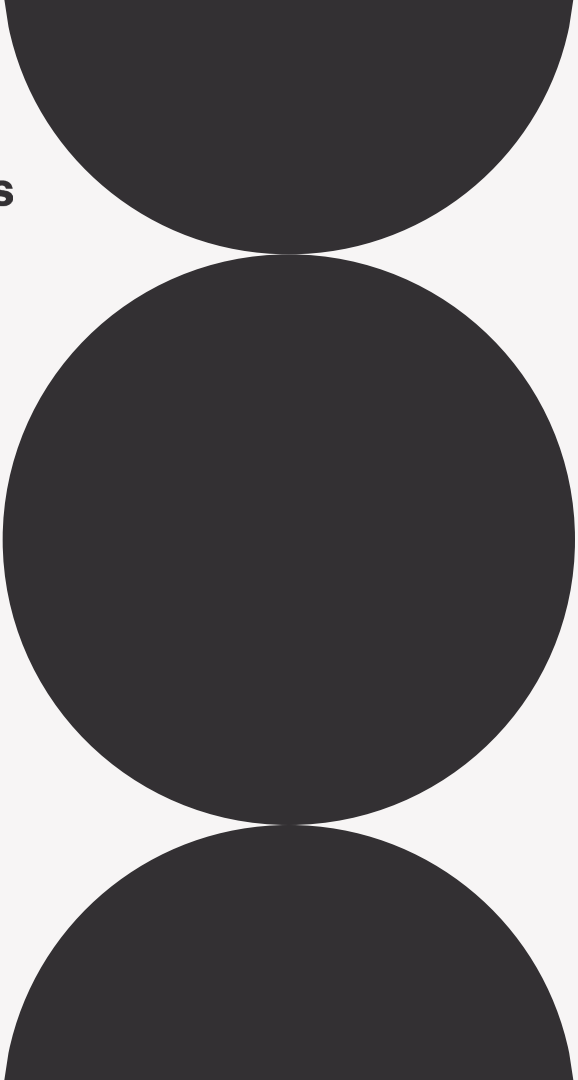
Managing Director acquitted due to lack of evidence

Two customers, a husband and wife, were riding on a zipline for tourists at Cape Tribulation when a section of the zipline failed, and they fell - the husband was killed and his wife was seriously injured

More than 12 months prior to the incident, and while Ms Walshaw was a director, changes were made to a section of the zipline, which was not in the normal course of operations of the zipline - however, the prosecution adduced very little evidence about what structures and processes were deployed, or how the project was generally managed, let alone how safety within and about the project was managed

The Magistrate found that the operations manager was solely responsible for developing WHS policies and procedures and for operationally managing the company's infrastructure projects, and there was no evidence about his experience and the way he discharged his responsibilities to indicate that Ms Walshaw's trust and reliance on him was misplaced

The Court ordered significant costs in favour of MS Walshaw after finding that the investigation did not properly examine governance arrangements, safety systems or delegation practices - the Magistrate held that the regulator had not gathered the information needed to prove a due diligence breach



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Questions

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Thank you.

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