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WA Work Health and Safety Law Update 2020

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Legal Framework

- Model Work Health and Safety (**WHS**) Legislation
 - *Occupational Safety and Health Act 1984* (WA)
 - *Occupational Safety and Health Regulations 1996* (WA)
- Criminal charges for breaches
- Duties are concurrent and not transferrable
- Risk based (not contingent on manifestation of an injury)
- Enforcement Powers (Notices, Prosecution, Production of Information)



WHS harmonised jurisdictions

Table of penalties

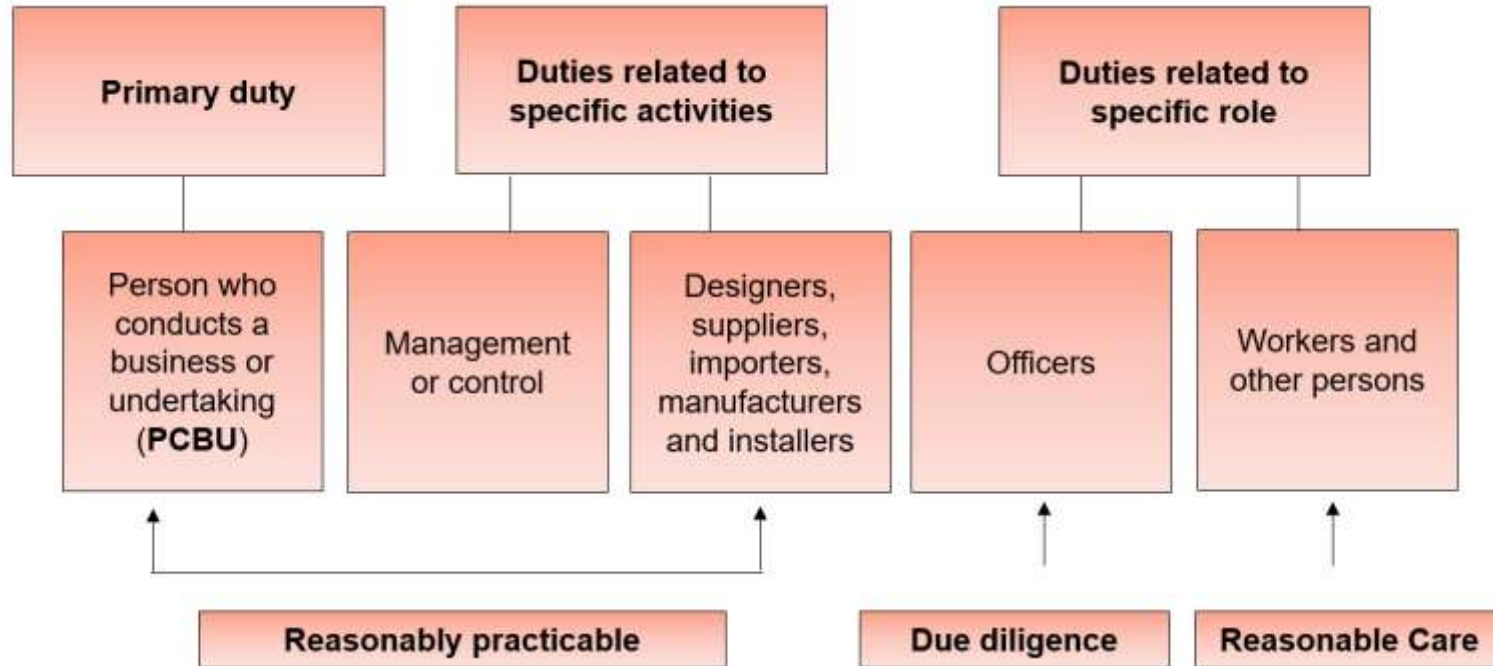
Category	Description	Maximum penalty First offence	Maximum penalty subsequent offence
Penalty level 4	Most serious cases Breach of a health and safety duty in the circumstances of gross negligence	Employer: \$2.7 million Individual: \$550,000 and imprisonment for 5 years	Employer: \$3.5 million Individual: \$680,000 and imprisonment for 5 years
Penalty level 3	Breach of a health and safety duty where the failure causes the death or serious harm of an employee, without gross negligence	Employer: \$2 million Individual: \$400,000	Employer: \$2.5 million Individual: \$500,000
Penalty level 2	Breach of a health and safety duty without gross negligence or death or serious harm to an employee	Employer: \$1.5 million Individual: \$250,000	Employer: \$1.8 million Individual: \$350,000
Penalty level 1	Breach of a health and safety regulation	Employer: \$450,000 Individual: \$100,000 Employee: \$50,000	Employer: \$570,000 Individual: \$120,000 Employee: \$60,000

Work Health and Safety Bill 2019 (WA)

Significant proposed changes include:

- duty of care obligations imposed on persons conducting a business or undertaking (PCBU) rather than employers
- due diligence obligations placed on WHS service providers and company officers
- the voiding of insurance and indemnity arrangements for the payment of WHS duty holders and insurers, and
- a two-level industrial manslaughter offence

Proposed changes to general duties



Key Principles

Must **eliminate** risks to health and safety as far as is reasonably practicable. If not possible to eliminate, must **reduce** the risks

Criminal Law Principles

Duties **cannot** be **transferred, delegated or contracted out** to another person / company

More than one person can **concurrently** have the same duty.

Must be discharged to the extent the person has capacity to **influence or control a matter**

Key Concept – ‘Reasonably Practicable’



Who is an Officer?

An individual who.....

is director or secretary of the corporation

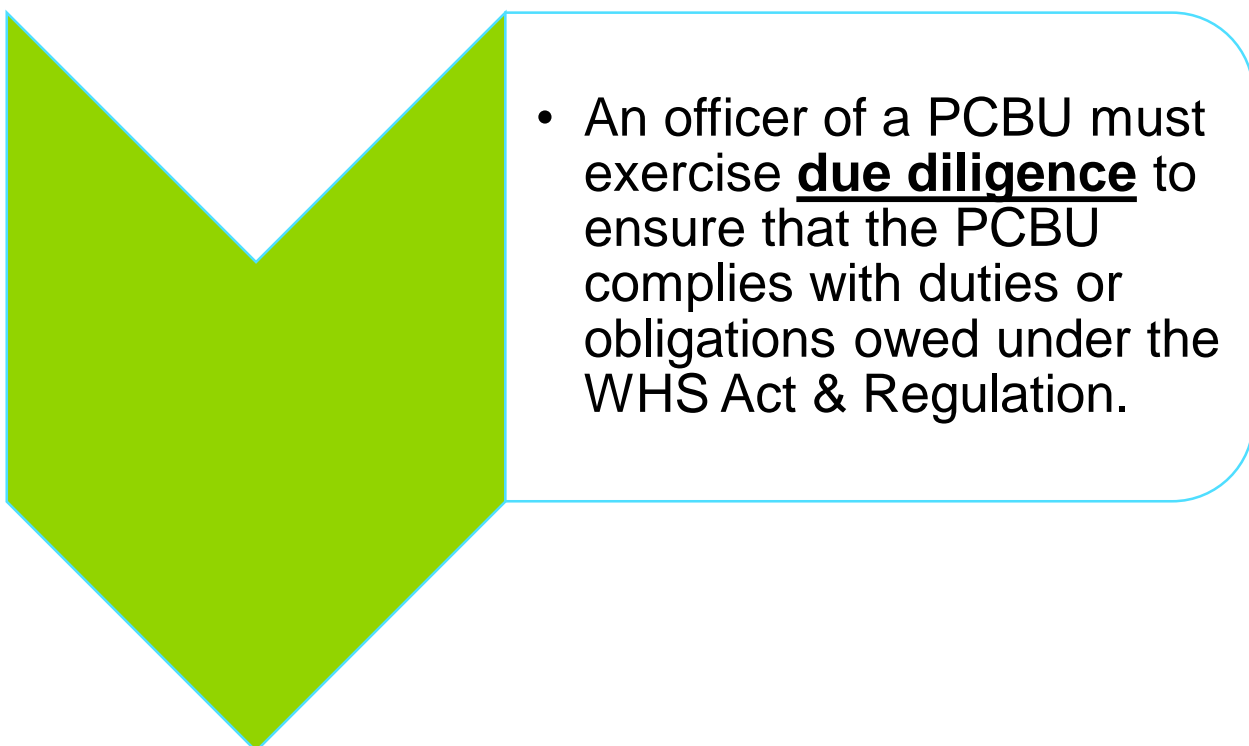
makes or participates in making decisions that affect whole/part of the business

has the capacity to affect significantly the company's financial standing

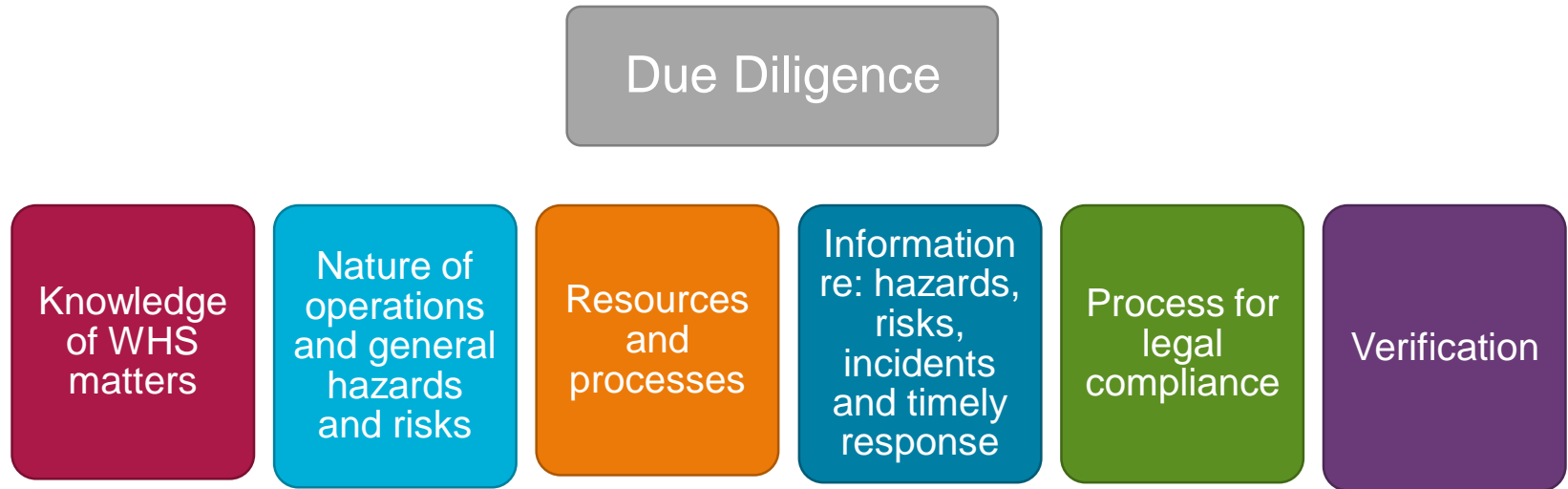
directors are accustomed to acting upon their instructions or wishes

- A person does not have to be at the highest level of the management structure to be considered an officer
- Persons who provide advice and participate in decision making processes in a managerial sense *may* be caught by the definition.
- It will ultimately be determined by the facts of a situation and may change from time to time

What is the Duty?

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- An officer of a PCBU must exercise **due diligence** to ensure that the PCBU complies with duties or obligations owed under the WHS Act & Regulation.

Components of Due Diligence



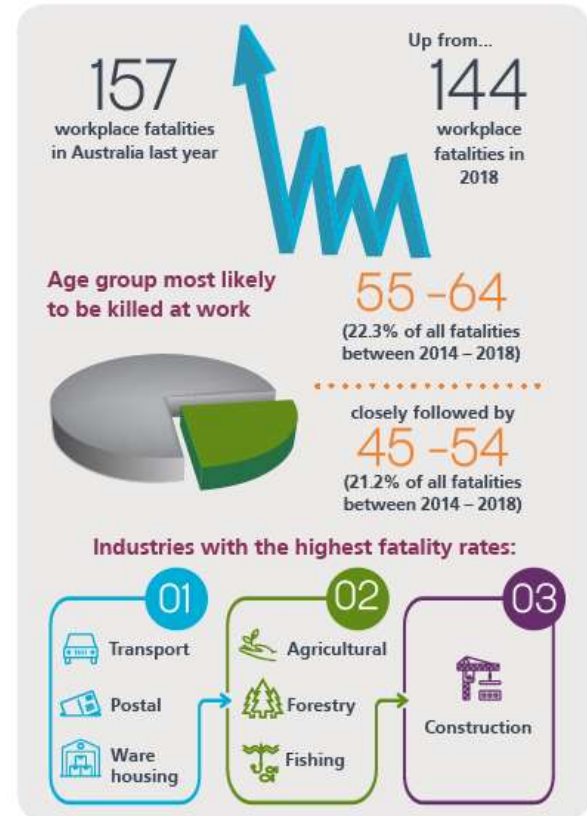
Industrial manslaughter

“**Crime offence**” – where a PCBU engages in conduct “*knowing that the conduct is likely to cause the death of an individual*” and “*in disregard of the likelihood of death*”.

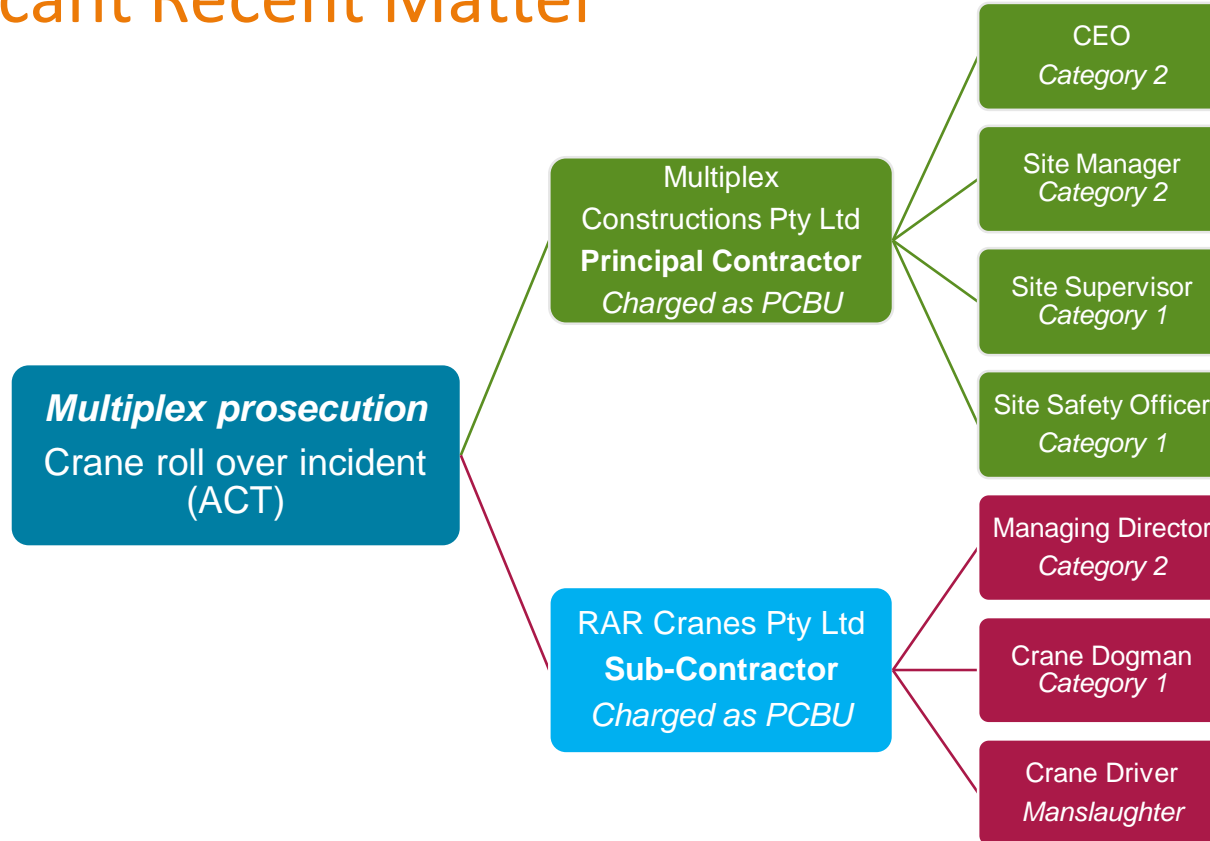
Proposed maximum penalty: 20 years’ imprisonment and \$5 million fine for an individual, \$10 million for a body corporate.

“**Simple offence**” – does not require the prosecution to establish that the PCBU knew the relevant conduct was likely to cause death, only that the PCBUs conduct *caused* the death.

Proposed maximum penalty: 10 years’ imprisonment and \$2.5 million fine for an individual, \$5 million for a body corporate.



Significant Recent Matter



Proposed changes to insurance arrangements



Proposed offence to enter into, or offer to enter into, an insurance policy or indemnity arrangement for the payment of WHS fines.



Seeks to void any insurance policy that indemnifies a person for the payment of WHS fines.



Maximum penalty: \$55,000 for an individual
\$285,000 for a body corporate

Valuable resources

Title:	Description:	Source:
SafeWork Australia Website	Detailed educational materials on WHS laws & policy objectives behind the legal framework	https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws
Department of Mines, Industry Regulation and Safety Website	Overview on applicable legislation, regulator safety alerts and recent cases	https://www.commerce.wa.gov.au/worksafe
Sparke Helmore Lawyers Website	WHS Law specialists with key contacts & regular updates (including legal developments and significant matters)	https://www.sparke.com.au/expertise/workplace/safety/

Practical tips for employers (safety)

- ✓ Conduct a review of your current WHS management and compliance systems.
- ✓ Ensure your systems are being implemented and followed by your workers.
- ✓ Consider how you will effectively consult with your duty holders.
- ✓ Consider how your 'officers' are going to meet their due diligence obligations.
- ✓ Introduce training to your management team on the legislative changes.
- ✓ Keep appropriate documentation to demonstrate compliance.
- ✓ Conduct investigation and/or enquiries in response to incidents or near misses.
- ✓ Obtain advice and audits (as appropriate).
- ✓ Encourage and foster a safety culture.

Insurance Arrangements

- ✓ No grace period.
- ✓ Legal costs still insurable.
- ✓ No significant changes to policies.
- ✓ Potential greater exposure.

Contacts



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