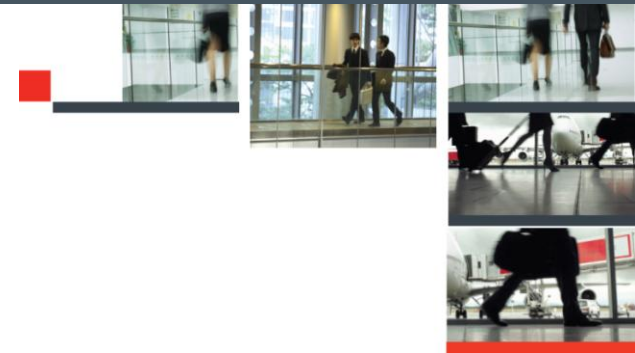


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# OHS Harmonisation

## Implications for Senior Leaders

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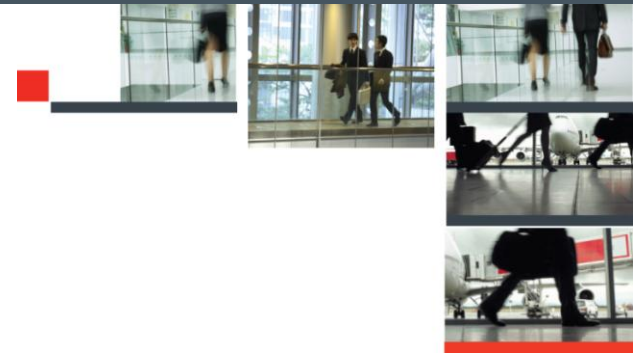
## Overview - Officers Obligations

- The existing landscape
- The model duty to exercise “due diligence”
- How is that different from the existing regimes?
- Between the Board and the Battlements
  - Implications for “middle managers”
- Practical Steps

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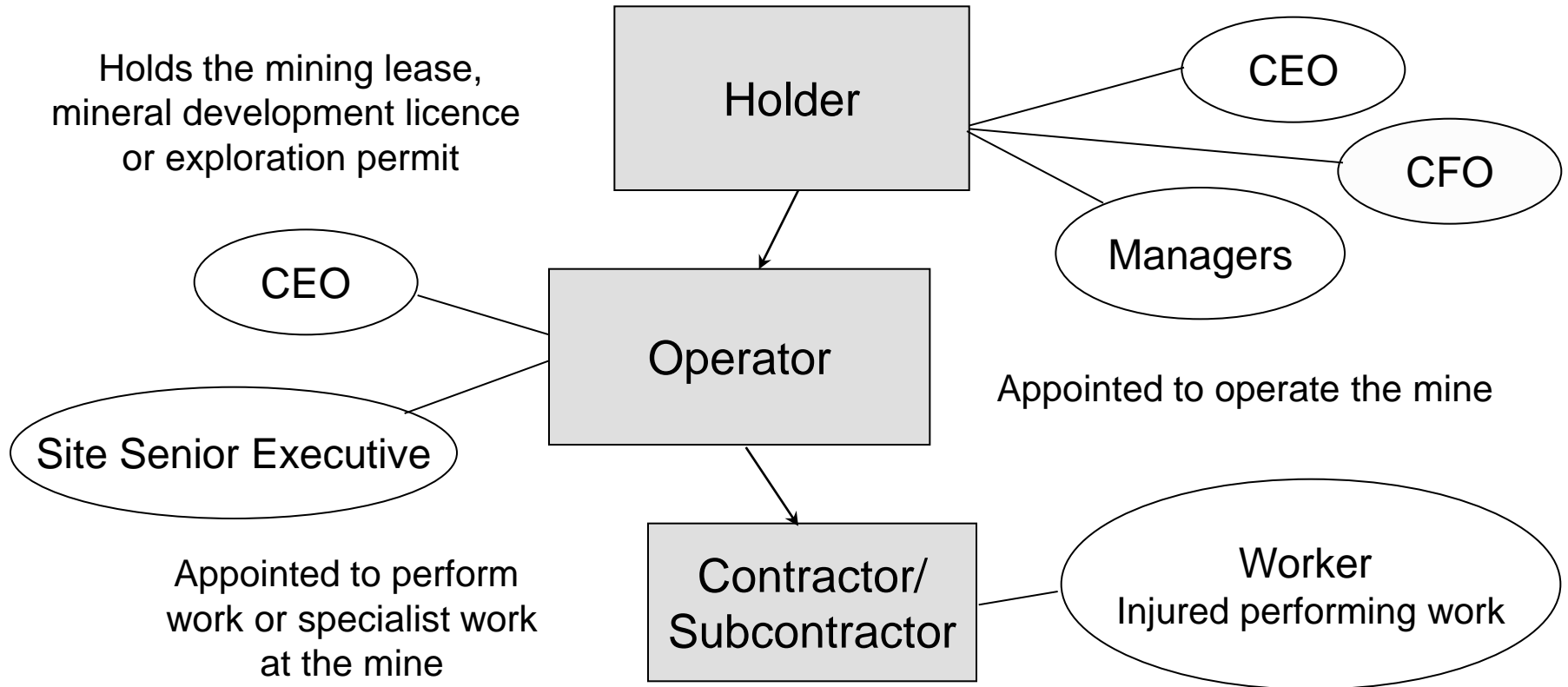


## The Existing Landscape

On site, off site – what applies now and when?

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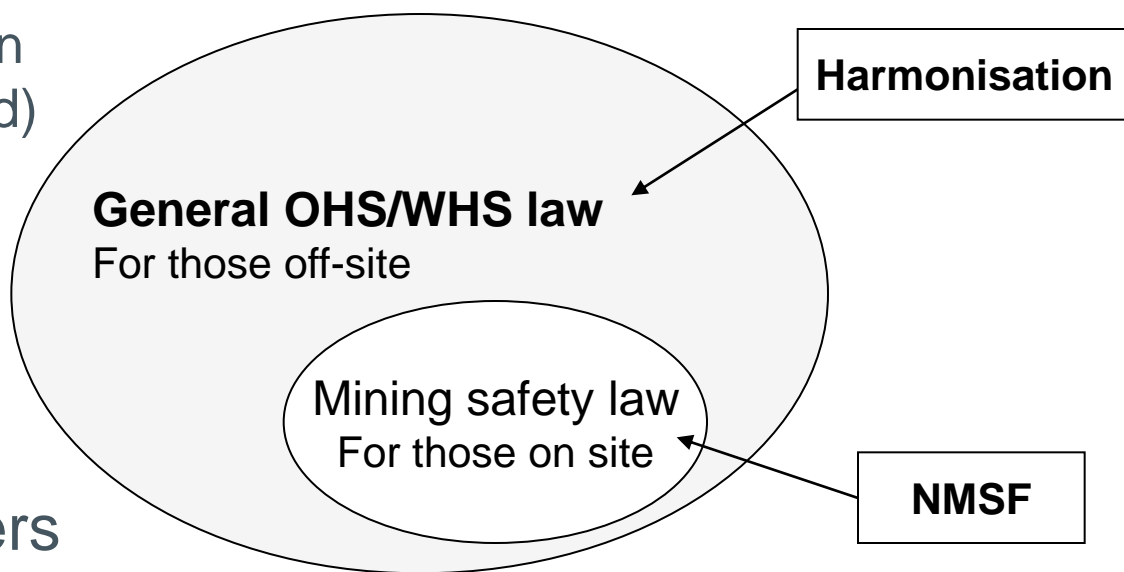
# Starting at the beginning...



*\*Subject to implementation of the model Act and NMSF*

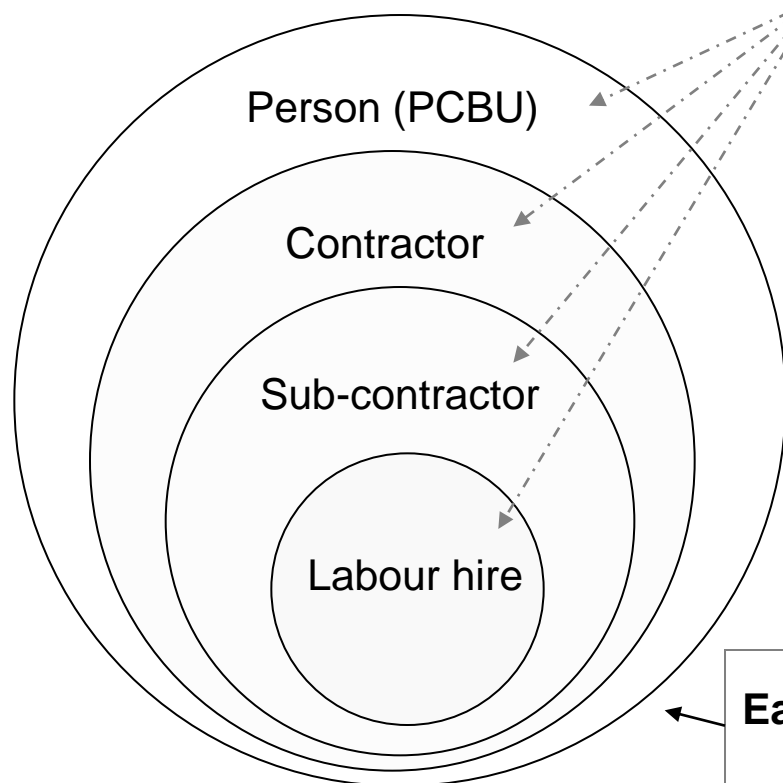
# Current structure of mining safety laws

- Each state has its own general law dealing with safety
- Some States have a *further* set of mining-specific safety laws, that apply to the operation of a mine
  - Eg – Qld, NSW and WA (coal) mining safety laws
  - May exclude operation of the general Act (Qld)
  - May operate in conjunction with the general Act (NSW)
- Implications for leaders



# Sphere of accountability

- To whom is a duty owed?



A person conducting a business/undertaking must ensure, so far as is *reasonably practicable*:

- the health and safety of:
  - workers engaged, or caused to be engaged by the person
  - workers whose activities in carrying out work are influenced or directed by the person; and
  - workers of a prescribed class, while the workers are engaged at work in the business/undertaking; and
- that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking

Each level is accountable for the safety of its own workers, and for every body “down the line”

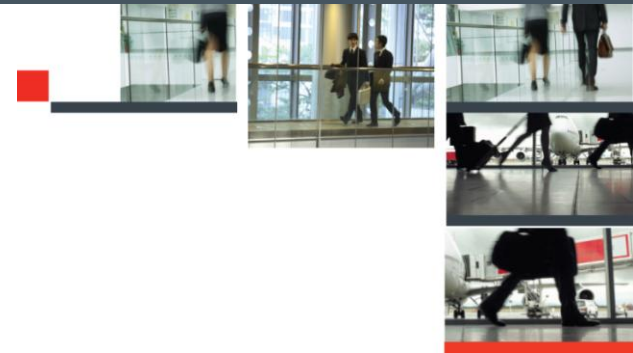
# Implications for leaders?

- Different answers in different States/Territories
  - Who is a leader (executive officer, officer, etc)?
  - How far down the line in that State?
  - Typically, legal responsibility is tied to breach by the corporation
  - To whom is the duty owed?
    - Greatest consistency – every body
- Harmonisation will fix that, won't it?

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## **What's proposed? The Duty to Exercise Due Diligence**

What it is and where it fits within the proposed mining safety framework

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# Who is an “officer” under the Model Act?

- Adopts the *Corporations Act* definition (plus an officer of the Crown and an officer of a public authority)
- a **director** of a “body” (a person other than an individual);
- anyone:
  - ... who makes decisions that affect the **whole**, or a **substantial part**, of the **business**...
  - ... who has the capacity to affect **significantly** the corporation’s **financial standing**...
  - ...directors are accustomed to act in accordance with instructions or wishes [of]
- a receiver, manager or liquidator
- **A shift in focus in Qld and (formerly) NSW, from operational to managerial responsibility**

# Who's in – and who's out?

## ■ In

- Director
- CEO
- CFO
- anyone who makes decisions that affect the **whole**, or a **substantial part**, of the **business**
- anyone who has the capacity to affect **significantly** the corporation's **financial standing**...

## ■ Out?

- Middle management  
(not on site and therefore covered by operational safety laws)

***But that's not the complete picture...***

# What is the nature of the duty?

- **Duty to exercise “due diligence” to ensure the body (PCBU) complies with its duty**
  - Guidance in the model Act
    - Inclusive definition
  - ***Practical focus***

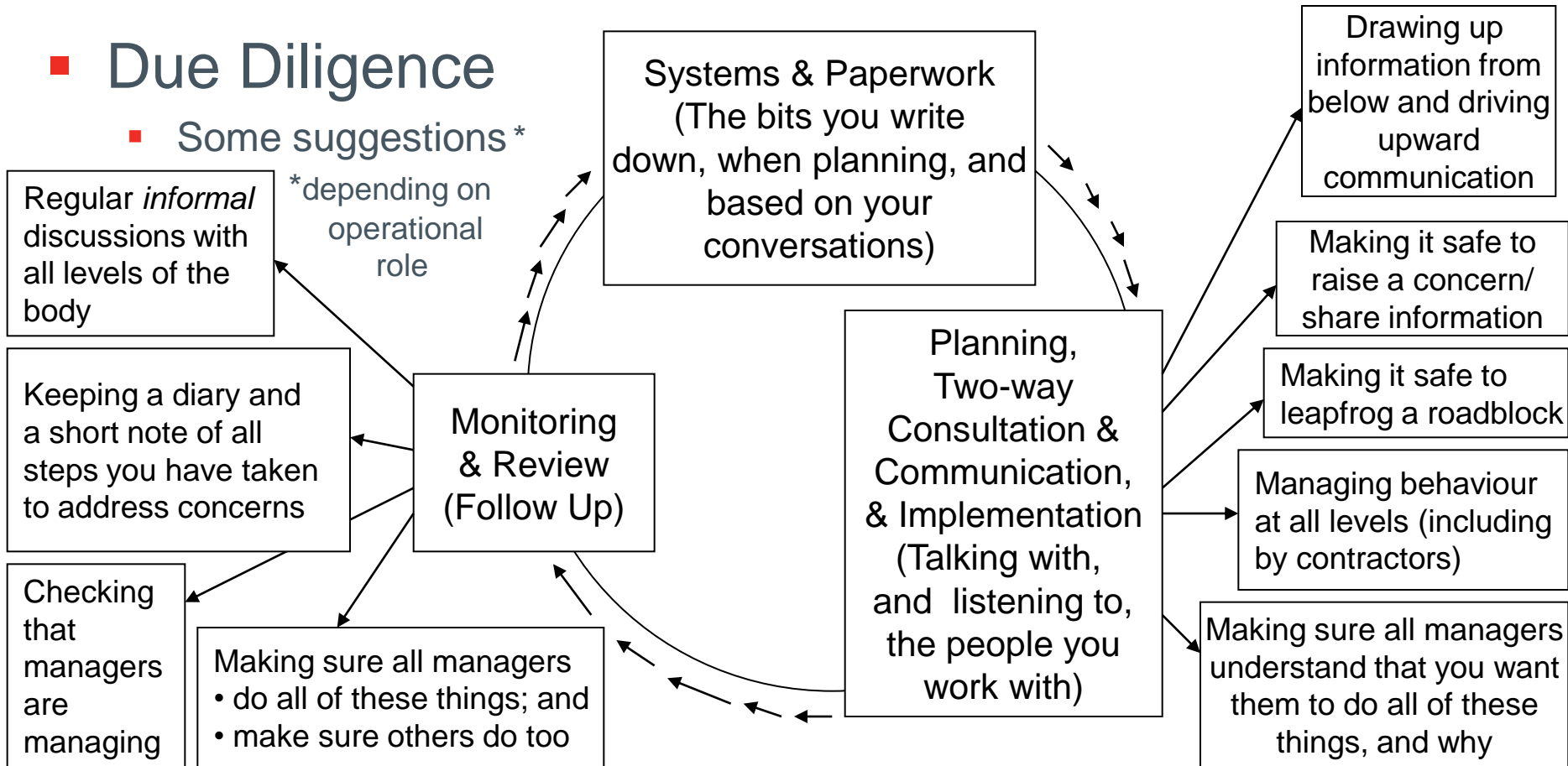
# Exercising “due diligence” includes:

- (a) Staying up-to-date with work health and safety matters.
- (b) Knowing the nature of the operations of the business or undertaking and typical hazards and risks associated with those operations.
- (c) Ensuring the business has available for use, and uses, adequate and appropriate resources and processes to eliminate or minimise risks to health and safety arising from the conduct of the business or undertaking.
- (d) Ensuring the business has appropriate processes for:
  - receiving and considering information regarding incidents, hazards and risks; and
  - responding in a timely way to that information
- (e) Ensuring the business has, and implements, processes for complying with all duties under the model Act.
- (f) Verifying the provision and use of those resources and processes.

# Guidance from the Caselaw

## ■ Due Diligence

### ■ Some suggestions\*



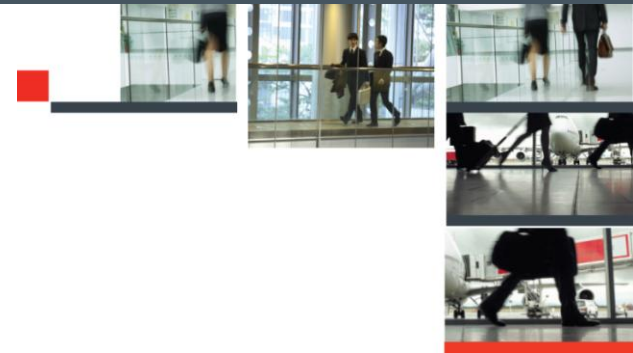
# Managing an officer's duty: the Model Act

- **Ongoing, regular, habitual behaviours before there is a problem**
  - **Due diligence, and depending on the scope of your operational role**
    - Challenging all levels of the organisation
    - Listening to all levels of the organisation, and promoting discussion of concerns
    - Following Up (promptly and effectively)
  - **How do you know what's in place, and if it's effective, in meeting your duty as a director (or other officer)?**
    - You can't be in all places at all times, so you have to rely on others, but you have to manage that reliance proactively
  - **What do you accept as safe enough?**
    - For you?
    - For your organisation?
    - For others affected by the work of your business?
  - **Are you doing enough; and how do you know?**

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## **How is that different from the existing regimes?**

An overview of the current/previous State regimes

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# How is that different from existing laws?

|                          | Qld  | NSW                          | Vic   | WA   | Model Act  |
|--------------------------|--|------------------------------|---|--|--|
| <b>Who is an officer</b> | <ul style="list-style-type: none"> <li>• in posit'n to influence conduct of corp'n in relat'n to offence</li> <li>• Model Act passed 6.6.11 but not yet proclaimed</li> </ul>  | See Model Act (since 7.6.11) | Officer of a body corp'te, including a person who participates in making decisions that affect the whole or a substantial part of the business and can affect financial standing significantly  | Director, manager, secretary or other officer  | Corps Act definition of "officer":<br>Director etc, including a person in accordance with whose instructions or wishes the directors are accustomed to act           |
| <b>Duty of officer</b>   | <p>If corp'te breach, guilty of offence if the person was in a position to influence the behaviour of the corp'n, but did not exercise due diligence</p> <p>Model Act due?</p> | See Model Act (since 7.6.11) | <p>If corp'te breach, guilty of offence if corp'te breach attributable to officer failing to:</p> <ul style="list-style-type: none"> <li>• take r'ble care; or</li> <li>• exercise r'ble care, to ensure the corp'n complied with its duty</li> </ul> | <p>If corp'te breach, guilty of offence if corp'te breach:</p> <ul style="list-style-type: none"> <li>• occurred with the consent or connivance of that person; or</li> <li>• was attributable to any neglect on that person's behalf</li> </ul> <p>Higher penalty if gross negligence</p> | <p>Exercise due diligence to ensure the corp'n complies with all duties</p> <p>Guilty of an offence if don't exercise due diligence - No need for corp'te breach</p> |



# Changes to who's an officer/duty?

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- Changes in Qld and NSW (which has already adopted this) to who owes a duty, and removal of gateway (breach by corporation)
- No change in Victoria to who is a duty holder, but some change to nature of duty
- Similar position in WA

# Changes in practice?

- May amount to little change in practice for those who exercise due diligence
- Changes will be felt most at the back end for those who do not
  - No need to show breach by corporation
  - Information sheets show the Inspectorate's intentions clearly
    - Improvement notice
    - Prohibition notice

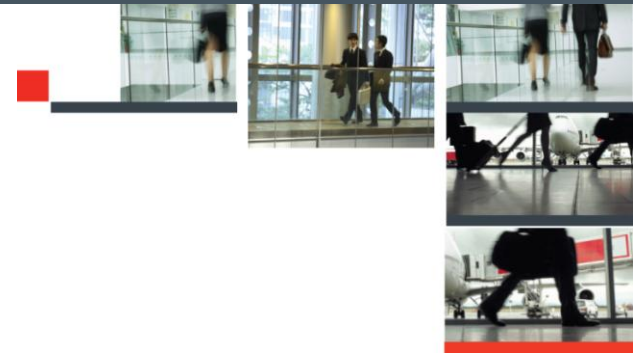
# Consultation, cooperation and coordination

- **Reasonably practicable steps to consult, co-operate and coordinate activities when multiple entities owe a duty**
  - Organisations that work together must share information and work together if they are to keep the affected people safe
    - Focus on what happens in practice
    - Checking – not assuming – that preventative practices are in place, including monitoring and review
  - Maximum penalty for failure to coordinate
    - Individual: \$20,000
    - Body Corporate: \$100,000
- **Implications for Officers**

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## Implications for middle management

What if you're not an "Officer"?

What does that mean in practice?

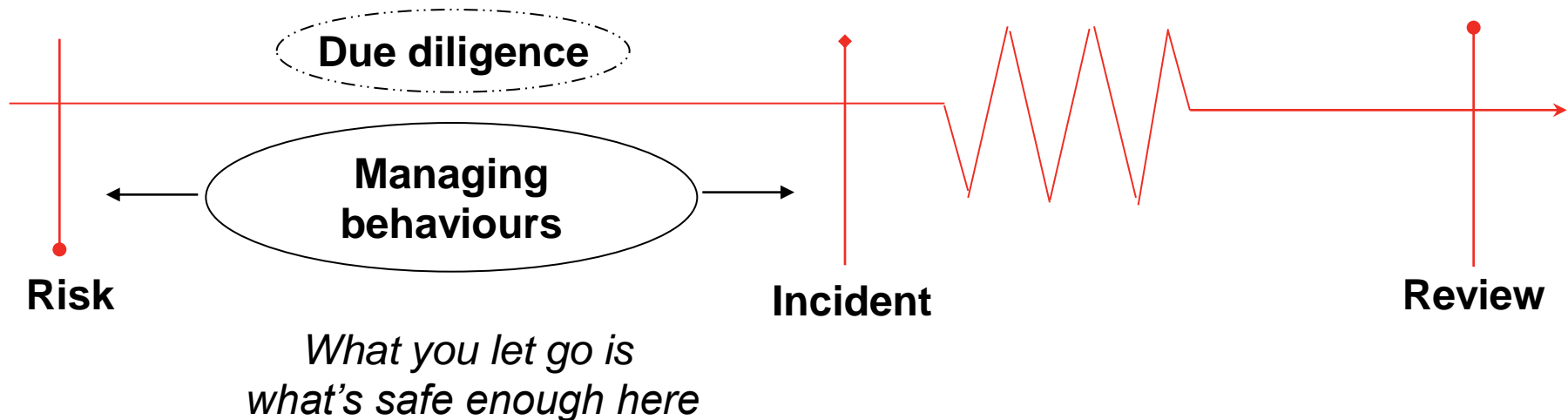
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# Officers and due diligence

- ***Critical, unwritten role of “middle management”***
  - How can those above you know what’s going on, and exercise due diligence, unless:
    - you tell them what’s going on;
    - it’s safe to do so;
    - you’re asking and following up about issues at the level/s below you; and
    - it’s safe for those below you to talk to you about issues of concern before they become problems?

# A renewed focus on preventative management of risk through due diligence

- Regular, routine, leader-level, preventative actions/behaviours before there is a problem
  - Every PCBU, every officer, every time
- A culture of safety and safe behaviours



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