


Safety due diligence: one size cannot fit all

With a heightened awareness of officers' WHS due diligence obligations, there is a risk that the lines between governance at the board level and management at the executive level are blurred – which is potentially bad for safety, write Steve Bell and Nerida Jessup

It has been some years since the introduction of the Model Work Health and Safety laws in nearly all Australian jurisdictions. The introduction of these laws placed a renewed emphasis on the role of company officers – for example, directors, CEO or executive – to exercise what was referred to as “due diligence” over health and safety matters.

Health and safety professionals well-know the importance of senior company “buy-in” on health and safety cultural programs, resourcing and responses to change or workplace incidents. Indeed, it is beyond doubt that senior leaders within an organisation have an important role to play in the way in which health and safety is perceived and dealt with throughout the organisation, and it is a near-universal characteristic of organisations that manage health and safety well that senior leaders, from the board of directors down, are actively expressive of the importance of health and safety management.

However, issues do arise considering the



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way in which health and safety “due diligence” can be exercised at different levels within an organisation. Unfortunately, there is little distinction drawn in guidance materials or court decisions which can assist.

Corporate governance norms in Australian business

It is an accepted feature of corporate governance in Australia that the role of the board is to exercise governance and oversight over the decisions of management. On the whole, they would not be expected in any ordinary sense to avail themselves of the close operational details that may arise throughout the organisation.

Instead, this is properly seen as the providence of management.

Accordingly, it is for a CEO to set the overarching operational strategy and structure of the organisation and to ensure that plans are properly implemented, risks understood and measures taken to ensure that the culture and expectations set by the board are in fact met by the organisation.

In turn, it is the accountability of senior executives to ensure that, so far as their executive accountability in the organisation is concerned, matters are properly executed and dealt with in respect of their teams, or across their functions.

There is no reason to break this model when it comes to health and safety “due diligence”.

Applying this model to health and safety governance

In terms of health and safety management then, it could be reasonably said that it is the responsibility of a board to understand the overarching hazard and risk profile of the business, have a general awareness of the manner in which those hazards and risks are dealt with, and satisfy themselves that management are turning their proper attention to the ongoing operationalisation of those systems.

Conversely, it is the role of the CEO and the executive team to have a more detailed understanding of the operational expectations of the business to properly manage safety risks and hazards, and to ensure that resources are applied appropriately within the organisation to guarantee that these matters are properly dealt with.

In practical terms, this is likely to be the structure in which most large organisations are approaching the accountability for WHS “due diligence” throughout their organisations.

There is a risk, in the current environment of heightened awareness of officers’ WHS “due diligence”, that the lines between governance (at the board level) and management (at the executive level) are blurred.

In our view, there is a real risk that this is bad for safety.

Safety, like all operational matters within an organisation, requires certainty and clarity about

who has accountability and ownership, and who has responsibility for exercising governance and oversight. If we are to express an expectation that all officers (that is both directors of the board, CEOs and their executive teams) are to act in the same way by undertaking the same activities, we run the risk of diluting the impact and effect of ordinary corporate governance structures.

Unfortunately, for those seeking to implement WHS leadership and governance frameworks within their organisation, there are some mixed messages from regulators and from recent case law which it may be helpful to clarify.

Interpreting guidance materials and cases

The primary guidance available from regulators regarding the effective implementation of steps to meet the personal duty of due diligence is contained in both the guidance material and the Act itself. As OHS professionals will be aware, section 27 of the Model WHS Act outlines a range of specific steps as comprising “reasonable steps” officers may take to meet personal due diligence obligations.

This legislation is further supported by guidance material, including for example the Safe Work Australia guidance material which is an “Interpretative Guideline to Section 27”.

A casual reader of the Act and the Guideline may not identify the nuanced messages contained within – which hint at a distinction between the roles of different levels of officer within an organisation. Indeed, a reading of this Guideline, and other statements produced by health and safety regulators, may seem to suggest the *same* steps that should be taken by directors, CEOs and executive officers to meet their duties.

Respectfully, we disagree

In our experience it makes no practical sense to suggest the directors of large organisations undertake a detailed management review or operational engagement with a particular health and safety system or steps taken to address particular hazards or risks. That is simply not their function or skill-set, nor is it consistent with the overarching framework for governance of corporate entities in Australia.

Rather, we would prefer a system where, properly educated about the hazard and risk profile of an organisation, the board seeks to address the overarching culture, performance and prioritisation of health and safety issues in the organisation and rigorously test management on this.

On the other hand, it is far more appropriate for those executive officers involved in management, to more closely understand the hazard and risk profile of the organisation (for example, through induction into overarching health and safety management systems, risk registers, etc) and to test and drive improvement in the business aligned to that risk profile. It is for executive

management to allocate appropriate resources within their power of delegation, although noting of course that some capital improvement works to improve safety may require board oversight and supervision.

Recent case law does not help either

The situation is further complicated by the fact that many health and safety prosecutions of “directors” in recent times have been of individuals who performed not just a nominal “director” function in a corporate law sense of a small to medium enterprise, but more practically performed an operational management role on the frontline.

When the New South Wales District Court recently concluded that compliance with section 27 of the Act required a director to satisfy themselves that a business had in place systems which were in compliance with the *Code of Practice for Falls*, this is an unfortunately confusing message when one considers the breadth of persons to whom the section 27 duty applies.

It is unworldly to expect that a director of a large corporate would be in a position to personally satisfy themselves that all of the business’ operational systems were compliant with all of the various environmental, safety or other regulatory laws, requirements and codes of practice. This is simply an impracticable standard to set.

Developing a WHS governance framework

To address this issue, more sophisticated organisations have begun to implement overarching WHS governance frameworks to ensure that clarity is provided to leaders at all levels of the organisation (including those not in the corporate “officer” class) to ensure that there is clarity about expectations regarding health and safety management.

When we advise large corporate entities on addressing this question, we recommend that a structured and thoughtful process be put in place for developing a WHS governance framework. This framework should accurately, and realistically, reflect the capacity of individuals within the organisation to address health and safety and to encourage improvement. It should reflect that the board will have an important and powerful role in setting the overarching health and safety culture of the business and holding management to account. Similarly, it should also reflect that it is the executive leadership teams who should conceive of and implement overarching strategies, supported by safety professionals, and empower their management team and workers to effectively implement those systems.

So what are officers to do?

We recommend that each officer, mindful of their existing role and ordinary level of influence and



accountability, focus on the following questions:

- What are our main hazards and risks?
Are there any new ones emerging I should know about?
- In terms appropriate to my level of involvement in the business, what do we do to control them?
- How effective does it appear that these controls are (including considering any incidents, near misses, or other metrics)?
- Are we applying the right resources, can we do more?
- What can I do, in my role, to be seen to support the safety strategy of the business?
- What steps are we taking to verify all of this is appropriate and effective at reducing risks to our people?

The level of detail required of each officer to answer these questions will necessarily change based on their role. It may be the case that an appropriately drafted WHS governance structure should provide some support for officers to receive appropriate verification, targeted at their appropriate level, in line with the questions set out above.

Horses for courses

The contentions in this note are not to dilute the importance of all officers engaging in health and safety matters, but rather to ensure that when they do so it is consistent with prevailing cultural and organisational norms regarding governance, and not to seek to act contrary to those.

To do so is to risk levels of involvement or intervention which are potentially amateur, or uninformed, and so reduce (not improve) health and safety performance within the business. ■

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