

Improving corporate governance

Introduction

1. Protecting the health and safety of workers is not a peripheral business activity. It is part and parcel of an organisation's functions and should be embedded in an organisation's strategies, policies and operations.
2. This requires effective corporate governance. Governance failures have contributed to many tragedies,¹ including Pike River. This chapter considers how best to ensure that governance is effective.

The board of directors

The role of the board and directors

3. The board and directors are best placed to ensure that a company effectively manages health and safety. They should provide the necessary leadership and are responsible for the major decisions that most influence health and safety: the strategic direction, securing and allocating resources and ensuring the company has appropriate people, systems and equipment.
4. The directors should:
 - ensure the company has a comprehensive health and safety management plan;
 - ensure that plan is fit for purpose and reviewed regularly;
 - provide adequate resources and time for that plan to be implemented; and
 - obtain independent evidence of the effectiveness of that plan.

The legislative framework

5. The Health and Safety in Employment Act 1992 (HSE Act) supports effective health and safety governance by requiring companies as employers to take all practicable steps to ensure health and safety and to systematically identify and address significant hazards.
6. The act does not place an express duty on the board or the individual directors of a company. This contrasts with the situation of other groups. Employers, employees, those who control places of work, the self-employed, principals and those who sell and supply plant for use in workplaces, are required to take all practicable steps to ensure health and safety within their sphere of control.
7. By contrast, individual directors (and officers and agents of companies) can only be prosecuted, under section 56, if a company fails to ensure the health and safety of its workers, and a director 'directed, authorised, assented to, acquiesced in, or participated in, the failure.'² In those circumstances a director is liable, as a secondary party, for the breach of duty committed by the company as an employer.
8. The interpretation of section 56 can produce invidious results. In smaller companies where directors are 'hands on' and make, or participate in, operational decisions there may be scope to prosecute both the company and its directors. In a larger company the section is less likely to be applicable because the board of directors is divorced from day-to-day operational decision-making. Yet it may be health and safety failures at larger companies that cause process safety accidents leading to multiple fatalities.
9. Other countries have grappled with the problem of director liability and their experiences are informative.

The United Kingdom (UK)

10. In the UK, the Robens report identified the need for a greater health and safety focus at director (and senior management) level:

The boardroom has the influence, power and resources to take initiatives and set patterns ... if directors and senior managers are unable to find time to take a positive interest in safety and health, it is unrealistic to suppose that this will not adversely affect the attitudes and performance of junior managers, supervisors and employees on the shop floor.³

11. More recently, the UK Health and Safety Executive commissioned reviews of published research on the influence of directors on a company's health and safety performance. Professor Philip James, concluded that:

directors do exert an importance influence over their organisation's health and safety management and performance. ... while directors appear to consider that they already face considerable legal, commercial and societal pressures to take responsibility for health and safety ... their commitment to the issue is often problematic and frequently seen to be so by other managers.

Statutory health and safety requirements, including those giving rise to individual, personal, legal liabilities, serve as one of the most important drivers of director actions in respect of health and safety. However, there would seem to be scope to explore whether ... the introduction of 'positive' health and safety duties on directors would act to improve their motivation ... The evidence ... is seen to provide a strong, but not conclusive, basis for arguing that the imposition of such duties would ... usefully supplement the liability that directors currently face.⁴

12. Another reviewer, Professor Frank Wright, supported improved training of directors and promotion of health and safety leadership by them, in conjunction with issuing an approved code of practice addressing their responsibilities.⁵
13. Section 37 of the UK Health and Safety at Work Act 1974 contemplates prosecutions of directors where a health and safety offence is committed by the company 'with the consent or connivance of, or [was] attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate.'⁶ This provision is broader than its New Zealand counterpart because directors are liable where a company's wrongdoing is attributable to 'any neglect' by them that contributed to the company's breach of duty.
14. This broader provision has not been altogether successful. Neglect contemplates the existence of a duty, personal to the director, which has been breached and in a manner which contributed to the company's failure to protect its workers. If there is no such duty, then proof of neglect will be difficult and prosecution of the director unlikely.
15. In 2000 the British government published its strategy, *Revitalising Health and Safety*, which called upon the Health and Safety Executive to develop a code of practice on directors' responsibilities. The strategy also envisaged that legislation should be introduced to place directors' responsibilities on a statutory footing.⁷ The subsequent code of practice provided good guidance on the role of directors in promoting health and safety. However, some companies did not adopt the code.
16. Between 2003 and 2010 three private members' bills were introduced in the UK to place a primary duty on directors to take all reasonable steps to ensure that a company met its health and safety obligations.⁸ None was passed. The concept of neglect remains without a corresponding personal duty upon directors.

Australia

17. Australia has taken several initiatives on the health and safety duties of directors.
18. The proposal to harmonise health and safety legislation across all Australian states resulted in the Model Work and Safety Bill, which has been enacted at federal level, and in the Australian Capital Territory, New South Wales, Northern Territory and Queensland. Section 27 provides that the 'officer' of a corporate entity 'must exercise due diligence to ensure that the person conducting the business or undertaking complies with [their] duty of obligation'. Hence,

the primary duty of care placed on a person conducting a business to ensure the health and safety of workers, is supplemented by a duty of due diligence placed on officers of the company.

19. Due diligence, defined in section 27(5), requires officers to take reasonable steps to understand the business risks and hazards, and ensure that adequate resources and information, compliance and verification processes, are in place. The legislative scheme places a positive duty on officers of a company and defines the extent of that duty through the concept of due diligence.
20. Another example exists in the narrower context of mining, where some states impose positive duties on directors. The Queensland Coal Mining Safety and Health Act 1999 provides that the 'executive officers of a corporation must ensure that the corporation complies with this Act.'⁹
21. As Professor Neil Gunningham has noted, 'Deterrence is particularly effective when applied to individual decision-makers. However, it is crucial that the appropriate decision-makers are targeted, and this implies a focus on senior corporate managers and directors, rather than mine managers and surveyors.'¹⁰

Conclusions

22. The HSE Act does not place on directors shared or individual responsibility for ensuring the safety of the employees. Section 56 is ineffective, at least with reference to larger companies, where directors have normally delegated to executive management the operational decisions that give rise to breaches of health and safety.
23. What is needed, as experience in the UK and Australia indicates, is a statutory duty requiring directors to play their part at the governance level in ensuring that the company has an effective health and safety management system. This could be achieved by the addition of a duty on directors in the 'other duties' section of part two of the HSE Act. A failure to meet that duty would constitute an offence.
24. These conclusions are based on the commission's assessment of a mining tragedy, while the proposed changes are of general application to all companies. Accordingly the commission does not formally recommend the changes be made but rather that the issues should be reviewed.

Guidance available

New Zealand guidance

25. Directors have access to a wealth of guidance about good governance practice, including information produced by the New Zealand Institute of Directors,¹¹ and free guides provided by firms offering risk management services.

Australia/New Zealand standards

26. Section 5 of the HSE Act describes the object of the legislation as promoting the prevention of harm to workers through, among other things, the systematic management of health and safety. Other provisions also emphasise a systematic approach, for example in relation to the identification of hazards.¹²
27. There are three relevant standards jointly issued by Standards Australia and Standards New Zealand: AS/NZS ISO 31000:2009 on risk management, AS/NZS 4804:2001 on guidelines for setting up health and safety management systems, and AS/NZS 4801:2001 on auditable specifications for health and safety management systems.¹³
28. The Australian/New Zealand standards provide a systematic approach to developing health and safety management systems. AS/NZS 4804:2001 is comprehensive and applicable to organisations of any size and type. It is particularly relevant to high-hazard industries. The topics include:
 - how to set up a system;
 - how to continually improve the system;
 - the resources required;

- measuring performance, including the use of lead indicators;
- integration of the system with other management systems;
- employee involvement;
- internal and external audit of the system; and
- incident investigation and remedial action.

Auditing health and safety management systems

29. 'Audit' means a systematic examination against defined criteria to determine whether the activities and results conform to planned arrangements. AS/NZS 4801:2001 establishes an audit framework, principally for the use of independent auditors but the framework can also be used for internal audit or management reviews.
30. A board of directors wishing to ensure that its health and safety management system is systematically developed and reviewed could usefully start with ensuring that directors understand these standards and that its senior management is using the standards as a guide.

Some common governance principles

31. New Zealand guidance on governance describes important principles that company directors, especially those in high-hazard industries, should keep in mind when considering their health and safety risks.
32. Best practice recommended by the New Zealand Institute of Directors identifies the importance of 'holding to account'. This means that the board 'holds management strictly and continuously to account through informed, astute, effective and professional oversight'.¹⁴

International guidance

33. There is also international advice for boards of directors. A good example is the guide published jointly by the UK Health and Safety Executive and the UK Institute of Directors.¹⁵ The guide makes the following important points:
 - The board should set the direction for effective health and safety management and make it an integral part of organisational culture and performance standards.
 - The board should be aware of the significant risks faced by the business, including health and safety risks.
 - The board should ensure that health and safety is properly resourced, risk assessments are carried out, specialist advice is received where necessary, and employees are involved.
 - Health and safety is a key business risk and failure to include it in business decisions can lead to catastrophe.
 - Health and safety must be part of business decisions at all levels, not treated as an 'add-on'.
 - Board members should be trained to assess health and safety risks and promote their understanding throughout the organisation.
 - Board members should ensure that they receive adequate information on the organisation's performance, including lead indicators (preventative or process safety information) as well as lag indicators (incidents and injury rates). The board should receive immediate reports of significant failures.
 - There should be periodic audits of the effectiveness of the management structures, risk controls and performance. The auditor should have unrestricted access to the internal and external auditors.
 - The impact on health and safety of changes, such as the introduction of new processes, should be assessed and reported to the board.
 - The board should receive regular reports on the health and safety performance of contractors.
34. The New Zealand health and safety regulator could assist directors by issuing an approved code of practice on how

good governance practices can be used to manage their organisation's health and safety risks. The UK guidance would be a suitable base for that code. The regulator should work with the New Zealand Institute of Directors to produce the code.

Recommendation 5:

The statutory responsibilities of directors for health and safety in the workplace should be reviewed to better reflect their governance responsibilities.

Recommendation 6:

The health and safety regulator should issue an approved code of practice to guide directors on how good governance practices can be used to manage health and safety risks.

Recommendation 7:

Directors should rigorously review and monitor their organisation's compliance with health and safety law and best practice.

ENDNOTES

¹ See, for example, Chapter 2, 'Accident analysis – some concepts', and also the United Kingdom Health and Safety Executive, *Directors' Responsibilities for Health and Safety: The Findings of Two Peer Reviews of Published Research* (Research Report 451), 2006, pp. 4–5, <http://www.hse.gov.uk/research/rrpdf/rr451.pdf>

² Health and Safety in Employment Act 1992, s 56(1). Directors can also be parties to a health and safety offence pursuant to the Crimes Act 1961, s 66.

³ Lord Robens (Chairman), Committee on Safety and Health at Work, *Safety and Health at Work: Report of the Committee 1970–72, 1972*, HMSO, 1972, p. 15, para. 46.

⁴ United Kingdom Health and Safety Executive, *Directors' Responsibilities for Health and Safety*, pp. 37–38, <http://www.hse.gov.uk/research/rrpdf/rr451.pdf>

⁵ *Ibid.*, pp. 26–27.

⁶ Health and Safety at Work Act 1974 (UK), s 37(1).

⁷ United Kingdom Health and Safety Executive, *Revitalising Health and Safety: Strategy Statement*, June 2000, p. 26, para. 68, <http://www.hse.gov.uk/revitalising/strategy.pdf>

⁸ Company Directors (Health and Safety) Bill 2003; Health and Safety (Directors' Duties) Bill 2004–05; Health and Safety (Company Director Liability) Bill 2009–10. See also: Edward Beale, Brenda Brevitt, Sally Broadbridge, Louise Butcher and Timothy Edmonds, *Health and Safety (Directors' Duties) Bill: Bill No 22 2004-05* (House of Commons Library Research Paper 05/18), 1 March

2005, <http://www.parliament.uk/briefing-papers/RP05-18.pdf>

⁹ Coal Mining Safety and Health Act 1999 (Qld), s 262.

¹⁰ Neil Gunningham, *Mine Safety: Law Regulation Policy*, 2007, Federation Press, p. 179.

¹¹ New Zealand Institute of Directors, *Principles of Best Practice for New Zealand Directors: The Four Pillars of Effective Board Governance*, 2010. <https://www.iod.org.nz/Publications/TheFourPillarsOfGovernanceBestPractice.aspx>

¹² Health and Safety in Employment Act 1992, s 7.

¹³ Standards Australia and Standards New Zealand, *Risk Management – Principles and Guidelines* (AS/NZS ISO 31000:2009), 20 November 2009; Standards Australia and Standards New Zealand, *Occupational Health and Safety Management Systems – General Guidelines on Principles, Systems and Supporting Techniques*, (AS/NZS 4804:2001), 15 November 2001; Standards Australia and Standards New Zealand, *Occupational Health and Safety Management Systems – Specification with Guidance for Use* (AS/NZS 4801:2001), 15 November 2001.

¹⁴ New Zealand Institute of Directors, *Principles of Best Practice*, p. 3.

¹⁵ Institute of Directors and United Kingdom Health and Safety Executive, *Leading Health and Safety at Work: Leadership Actions for Directors and Board Members*, October 2007, pp. 1–8, <http://www.hse.gov.uk/pubns/indg417.pdf>