

# Health and safety governance: A board guide to the hot issues

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# In brief

In a rapidly shifting regulatory environment, boards can no longer treat health and safety oversight as a static compliance exercise. Emerging reforms, test cases and technologies are reshaping expectations—and directors are under pressure to demonstrate not only that they understand their due diligence obligations, but that their decision-making is defensible in real time.

This quick-reference guide highlights the current and emerging governance issues demanding board attention now. Framed as a tool for board preparation or committee checklists, it focuses on the 'live' questions directors should be asking to stress-test their company's approach to health and safety performance. Given the pace of change, we recommend directors revisit and refresh their oversight at least annually to ensure their approach remains fit for purpose.

## Issues demanding attention now

- 1 Indemnities and insurance for health and safety penalties
- 2 Liabilities within corporate groups
- 3 WHS for emerging technologies
- 4 Defensible decision making when cost is involved
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# Indemnities and insurance for health and safety penalties

## Why it matters now

Recent legislative changes across Australia prohibit insurance or other arrangements that indemnify directors for the monetary penalties associated with some health and safety offences. This leaves directors personally exposed in a way that cannot be offset by the company. While prosecutions have been historically rare—and often limited to directors with executive involvement in day-to-day operations—regulators are now placing greater emphasis on board-level accountability, particularly where incidents result in fatalities, serious injuries or significant near-misses.

## Can officers be personally indemnified for health and safety prosecutions?

It is an offence for an officer to take the benefit of any insurance or contractual indemnity for a monetary penalty under health and safety laws in a number of states in Australia. Officers should review what personal coverage they have under the company policy, recognising that while officers may not be able to be indemnified for penalties, they should have coverage for related costs such as public relations and legal costs associated with any successful defence.

## Can officers be personally indemnified for legal costs?

Existing provisions in the *Corporations Act 2001* (Cth) provide that a company must not indemnify a person against legal costs incurred in defending an action for a liability incurred as a director or officer of the company if those costs relate to criminal proceedings in which the person is found guilty. In other words, a company is permitted to advance defence costs to one of its directors in respect of criminal proceedings brought against them, but if that officer is subsequently found guilty then this triggers a repayment obligation.

## What other protections should officers seek?

Officers should ensure:

- they have the right to nominate their preferred solicitor to represent them. In some situations, insurance nominated defence lawyers may not be the right fit to defend proceedings.
- they have the right under the company's arrangements to intervene early to protect their personal position in the course of incident response and investigations. It is important not to wait until proceedings are commenced.

## Next steps for boards



- Ensure the company's incident response and management approach is primed to enable early protection of legal interests for the company, but also for the officers personally, and provides for separate legal representation where necessary.
- Seek to deeply understand safety performance of their company and look to drive step change in management of controls where required. Tolerance of insufficient safety systems can create a legal risk for which indemnities are not available.

# Liabilities within corporate groups

## Why it matters now

Recent case law shows that liability for health and safety offences is no longer confined to entities with direct operational control. While regulatory enforcement has typically targeted operating companies, holding companies and related entities are increasingly exposed where corporate group structures contribute to incident causation. While oversight need not extend to day-to-day operations, holding companies may be in breach of their duties if they cannot demonstrate effective governance mechanisms to influence health and safety risk within operational subsidiaries.

## How are companies managing work health and safety risk within the group?

Holding companies have duties not just for their own operations but also to minimise risks they can influence in subsidiaries. Influence can stem from board roles, funding decisions or shared services—so governance should match that level of control.

Where a holding company becomes directly involved in operations, liability risk rises. In a recent case, one such company was found liable because its embedded officer acted as the holding company's agent within a subsidiary's management team.

## What is the objective of this law?

Health and safety duties are intended to operate concurrently between many duty holders so that each manages risk to the extent of their control or influence. The goal is to ensure that health and safety risk controls are managed at the most effective level to achieve risk reduction.

## Next steps for boards



- Understand how corporate group companies share concurrent health and safety duties in managing risk. Governance arrangements need to reflect the degree of influence to manage risk to an acceptable level. Design of reporting mechanisms for health and safety within the group should be carefully undertaken. Holding company overreach into operational control can unnecessarily increase the legal risk for that company.
- Placements of officers and executives within group companies should be planned intentionally. Effective arrangements for limitations on agency and authorisations may avoid the unplanned transfer of legal risk.

# WHS for emerging technologies

## Why it matters now

Directors and their companies face significant liability—including fines up to \$20m and potential imprisonment—if health and safety risks arising from new technologies, such as AI, are not managed to an acceptable level.

While the Government is consulting on AI-specific regulation, existing WHS laws remain the primary framework for managing AI-related risks in the workplace.


Similarly in the case of other emerging industrial technologies and processes businesses are required to manage risk through a general WHS duties lens.

Further, it is also part of the duty of care to explore emerging technologies on a continuing basis to assess whether these provide control improvement opportunities for existing risk.

## How can the company manage WHS risks for emerging technologies?

WHS laws are 'performance based' and technologically neutral, provided there is a relevant connection to work or workplaces. The focus is on ensuring risk is reduced to an acceptable level in connection with work or workplaces. Emerging technologies, including AI, may introduce risks not covered by existing methodologies, requiring bespoke evaluation and control measures.

## Next steps for boards

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- **Adopt leading practice in risk management:** review and update existing WHS systems to address emerging technologies. Ensure evaluation methodologies are suitable for emerging risks.
  - **Clarify accountability:** define clear roles and responsibilities for WHS risk management, potentially shifting oversight to technical or software teams with the relevant expertise.
  - **Assess risk profile:** understand the company's exposure to emerging risks, including where new technologies may introduce or exacerbate hazards or offer opportunities.
  - **Engage regulators where needed:** seek guidance or feedback to ensure approaches align with current and emerging regulatory expectations.

# Defensible decision making when cost is involved

## Why it matters now

The cost of a safety and health risk control measure is a factor in determining whether it is reasonably practicable to implement. Companies adopting leading practices in this type of evaluation will be best placed to defend their decisions about cost affecting safety and health if the need arises.

## How can the company evaluate cost within our health and safety risk management methodologies?

A company needs to be able to demonstrate by application of its risk management processes that it has achieved a zone of acceptable risk. This is incorporated in the legislative obligation to reduce risk so far as is 'reasonably' practicable. What is reasonable takes into account the cost of potential risk controls which are suitable and available to manage the risk, but cost will only outweigh the need to implement a control where the cost is grossly disproportionate to the risk.

Courts are increasingly reviewing whether cost-based decisions are supported by adequate evidence, often requiring a detailed technical cost benefit analysis that accurately reflects the legal duties.

Often this arises in proceedings considering whether there is sufficient evidence to support a cost based rejection of a particular safety measure. In some cases companies have been successful in demonstrating that options which may have controlled risk were not reasonably practicable for the company in the industry context at the relevant time.

## What is the objective of this law?

The law requires deployment of the most effective and reliable safety controls. Duties are not absolute—application depends on what is objectively reasonable in context.

## Next steps for boards



- Government guidance around effective safety decision-making is increasing. Directors should ensure their companies are adopting leading practice in their risk management approaches when considering cost.
- Directors should also seek to deeply understand their health and safety risk profile for their critical risks and explore how cost factors have resulted in the selection of the range of controls applied. Investments in improvements should not be rejected without a strong and defensible evidential basis that is clearly documented.

# Acquisitions and WHS due diligence

## Why it matters now

Companies can unlock significant value through successful investments involving mergers and acquisitions. However, the success of a transaction can be undermined if there are unmanaged safety and health risks not visible until after completion. In our experience, unless careful and thorough health and safety due diligence is undertaken at an early stage, directors may find that assets or work systems are not adequate, or that their target has major history or regulatory risk that has not been addressed. This can leave the company facing potential business interruptions, and directors with unintended personal exposures.

## What due diligence is required

The goal of due diligence for an acquisition transaction is to seek to understand the risk involved in the target business. This can include both safety and health risks and the associated legal risks. However, in some cases it can be difficult to properly scope the right questions to get to the heart of the issues and understand what risk really exists. Lag safety performance data does not provide a clear picture regarding the prediction of future serious incidents, and the existence of a documented safety management system does not necessarily provide comfort that the system is suitable and adequate or effectively implemented on the ground.

What is needed is due diligence that considers at least the following issues:

### 1 Risk management

It is important to ask: have all the critical risks involved in the target business been identified, and have critical controls been implemented so that the managed risk profile is at an acceptable level? This type of information is not demonstrated by the certification of a management system, as certification is typically directed to governance for system design, rather than focusing on effective implementation and performance. What is needed is interrogation of relevant records of risk evaluation and monitoring, to be able to get management confirmation that comprehensive risk controls are in place and are adequate and operating effectively. Ask for risk registers showing managed risk profiles, ideally with independent verification.

### 2 Compliance

It is important to assess the legal compliance position. In some highly regulated industries, this can involve important requirements beyond basic risk management. Design requirements for certain asset types are critical and can be very expensive to address post completion. Also, missed requirements can include licensing or authorisations, regulatory notifications, establishment of statutory systems or inspection programs, and appointment of responsible management personnel. Even in smaller businesses, this will involve general delivery on the ground of other basic compliance obligations, such as defined work systems and records. Ask for evidence of legal compliance monitoring, ideally with independent verification.

# Acquisitions and WHS due diligence

## 3 Assurance

Another consideration in an acquisition is the reliability of the management assurance. Answers to requests for information or management attestations are important to review; however, they may not ultimately provide the degree of independent verification that is demanded, given the significance of health and safety risks. Ask for evidence of an implemented and comprehensive internal audit program, along with independent assurance records, for reassurance that systems as implemented are suitable, adequate and effective for their intended purpose.

## 4 Corporate criminal history

The regulatory history of any target company in which shares are being purchased is important to review. It is not enough to understand any ongoing investigations that are on foot—it is also important to understand whether the target has any relevant prosecution history. In some Australian jurisdictions, corporations do not have the benefit of spent conviction laws, meaning that any work health and safety convictions, no matter how old, will travel with the acquisition and may have unforeseen implications if there are any future compliance issues.

## What commercial protections can officers seek?

As with any risk area, warranties and indemnities are an important part of transactions, and can provide valuable commercial wrapping for unidentified risks discovered after completion. However, there are restrictions within health and safety legislation that can inhibit corporations from seeking the benefit of indemnities in so far as they touch on potential work health and safety penalties. Further, given the criminal nature of work health and safety offences, and the major implications associated with business interruptions and the required remediation, the preferred focus for health and safety due diligence should be upfront assurance, rather than post-completion compensation. Directors who focus ahead of time on their targets' health and safety capability and compliance will be best placed to ensure investments' commercial value is not undermined through ineffective health and safety due diligence.

## Next steps for boards



- Focus on critical risk management along with compliance when considering an acquisition, ensuring that due diligence explores risk monitoring and assurance data to confirm that controls are in place and effective.
- Don't leave safety and health reviews to the post-transaction stage, as the related business and legal risks are likely to be both material and personal.



# Performance monitoring as part of due diligence

## Why it matters now

Emerging case law demonstrates how officer due diligence laws apply within larger corporations. New technical guidance is setting improved standards for health and safety management at a strategic level. Boards must monitor and assure the performance, reviewing outcomes against company policy and plans. Directors may face personal liability for breaches of due diligence or company contraventions of health and safety laws.

## Is our board's WHS oversight truly strategic?

Directors should stay in the governance lane: track performance against the WHS strategy, test short- and long-term responses and ensure shifts in organisational, industry and stakeholder context are addressed.

Avoid getting pulled into the weeds. Dense incident reporting, operational data and deep dives into single risks can crowd out what matters: whether management is delivering the board-approved strategy and improvement plan and managing critical risks to the acceptable level.

Often the root cause is weak management systems—unclear executive accountabilities, 'improvement plans' that are purely operational, and backward-looking data. Past statistics or 'as-planned'

dashboards don't show whether critical processes are working in practice.

What the board should see:

- clear accountabilities: defined executive responsibilities with metrics tied to strategy.
- critical risk managed risk profile.
- leading indicators and assurance: evidence of actual execution and outcomes, not just policy intent.
- strategic reporting: concise, insights linked to progress.
- continuous improvement: demonstrable movement against plans as context changes.

## What is the benefit of these requirements?

Officers' due diligence laws are in place to drive a focus on effective health and safety management from the top down. Over time, the expectation of these laws is that directors will be demanding continuing improvement from their organisations to improve maturity in performance monitoring and evaluation to achieve strategic objectives. Companies that better evaluate performance will be best-placed to plan for strategic improvement.

## Next steps for boards



- Directors should seek to understand safety performance of their company at a strategic level. Where company planning, roles, reporting and performance data does not support this, improvements in safety governance architecture—including structures and reporting—may be requested.
- As part of due diligence, understanding emerging safety management techniques is an important part of directors remaining literate in health and safety matters. The recently released ISO 45004 Occupational health and safety management guidelines on performance evaluation may provide an opportunity to understand emerging techniques and review company maturity in performance evaluation.

# Managing psychosocial risks

## Why it matters now

Psychosocial risk management refers to the field of work health and safety management in which hazards affecting psychological health are identified and addressed.

These hazards can arise from workplace factors such as:

- the design or management of work
- the work environment
- workplace interactions and behaviours that may cause psychological harm.

Psychosocial health has been a focus for many organisations over the past few years as a result of rapidly developing legislative reform. Boards and directors have a central role in not only ensuring compliance with the reforms is achieved but also in taking advantage of the opportunities offered by good management in this area.

## Key questions for boards

### 1 How is the board overseeing psychosocial risk in the business?

Boards must firstly ensure psychosocial risks are being managed as part of the organisation's WHS strategy. This is a significant shift in approach as, historically, factors leading to psychosocial risk (eg work design and workplace conduct issues) tended to be dealt with as human resources issues, and often only in a reactive way.

At a board level, this requires:

- the approval of organisational objectives and measurable performance criteria for psychosocial risk.
- ensuring the company's strategic WHS plan addresses psychosocial risk improvements.
- ensuring sufficient resources are allocated to deliver these plans for the short and long term.
- supporting the development of additional leadership capability and competency for psychosocial risk management.

Boards will also need to closely monitor performance and assurance for psychosocial risk management, and to continuously oversee adjustment of objectives and plans as appropriate. This is likely to include:

- the development of specific indicators for psychosocial risk performance; and
- systems that are built in consultation with workers and specialists to ensure effectiveness and utility.

Boards and directors play a critical role in overseeing suitable worker and stakeholder involvement in psychosocial risk interventions. While many organisational risk management systems already (at least in theory) apply to psychosocial risk management, typically there is a need to update systems and tools to ensure appropriate collection of data in relation to psychosocial risks and hazards, and to design meaningful controls.

### 2 What is likely to need review for psychosocial risk management?

- health programs: including pre-employment, periodic health assessment and injury management programs for psychological risk management.
- work design and work planning: to address risks associated with high and low job demands (including cognitive, workload, physical, time and emotional demands) as well as job clarity, control and support needs.
- business improvement: including business process, systems and resourcing to address risks in work roles and interfaces, as well as improvements in managing change.
- workplace amenity and facilities: including physical work environments that provide appropriate measures for natural surveillance, privacy and security, and retreat.

# Managing psychosocial risks

- flexible work: including a good balance between 'work at home' and 'work in office' to enable peer support and collaboration.
- skills development: including worker competency programs to support management of high-risk hazards (such as conflict skills, emotional competencies, communication, difficult conversations, dealing with high work demands, positive behaviour expectations).
- cultural programs: including a focus on a 'speak up' culture.
- career development: including reward and recognition.
- organisational justice: including HR policies, grievance, complaints and disciplinary processes that are comprehensive, fair and human centred.
- violence and aggression: including security review and personal support tools.

- bullying and harassment: including interventions to address underlying factors and response, such as diversity programs.
- hazardous work review: including a fresh look at controls associated with high-risk work activities.
- contractor management: to ensure management of contracted psychosocial risk.

## 3 How can the board assess performance?

Many organisations are establishing specific indicators encompassing psychosocial risk management data and including benchmarking programs to demonstrate industry leadership in this field.

Indicators might previously have focused on the incidence and cost of incidents and claims but should now also consider developing additional criteria such as psychosocial risk control effectiveness, employee engagement and team performance as against industry peers.



## Next steps for boards

- Fulfil officer due-diligence duties by taking reasonable steps to verify the company's true psychosocial risk position and the adequacy of key decisions.
- Build board capability in psychosocial risk management, ensuring directors have the literacy to challenge and guide management effectively.
- Seek independent assurance once systems are in place, to confirm compliance and strengthen stakeholder confidence.

# Learning and investigations

## Why it matters now

Continuous learning is the engine of good WHS governance—but improvement activity can raise legal exposure, especially during a regulator’s investigation of a serious incident.

Boards should mandate a twin-track approach:

- Fix fast: scope operational investigations to quickly review and control risk.
- Protect the position: use clear roles, investigation scopes, privilege protocols and coordinated communications to manage external scrutiny.

The aim: sustain improvement without compromising legal risk management, while evidencing directors’ due-diligence.

Boards should ensure the company balances transparent learning after an incident with a privileged legal advice stream to inform decisions and protect the organisation.

- Don’t badge everything as 'privileged': without a genuine, dominant legal-advice purpose, privilege won’t hold.
- Avoid creating liability in the paperwork: keep improvement materials factual and necessary, and channel legal analysis through privileged processes.

Optimal health and safety learning processes are those that recognise the stages of the process likely to increase legal risk, and ensure those activities are efficiently managed in the legal domain.

## What is the benefit of this approach?

Directors and companies that deploy planned legal risk management alongside health and safety management should expect to experience better-managed liability outcomes. Information with the potential to incriminate, such as technical or compliance analysis, can be confidentially managed and then ethically applied in accordance with corporate values, in a controlled way.

## What are the risks to be aware of?

Admissions made within learning and investigations processes can be used as evidence against both companies and individuals in health and safety prosecutions and other enforcement action. This has the potential to expose both the company and the officers to liability under applicable health and safety legislation.

## Next steps for boards



- Test your processes for hidden legal risk. Ask: could our WHS systems or reporting increase liability for the company or directors? Identify gaps and optimise for both safety and legal protection.
- Adopt a structured legal risk framework. Move beyond the vague 'seek legal advice' and use a framework that balances competing priorities—commercial, reputational, WHS and legal—so decisions are informed and defensible.
- Enable legal input without blocking progress. Boards should ensure legal processes support learning and improvement, not stall it. Overcome perceptions that legal risk management is anti-safety by embedding it as an enabler, not a barrier.



# Health and safety complaints

## Why it matters now

Whistleblower and protected-disclosure volumes on WHS (including psychosocial risks) are rising. Many surface after internal channels weren't used or didn't fix the issue—signalling gaps in first-line hazard reporting and issue management.

## Are our reporting and response processes effective?

Boards should expect clear, well-used WHS reporting, escalation and issue-response processes, and review their effectiveness alongside regular WHS performance reporting. Treat whistleblower insights as systemic signals, not just HR matters, ensuring a genuine safety and health lens rather than a purely HR one.

## Why include WHS in whistleblowing laws?

Whistleblowers help expose harm and misconduct and, crucially, they are protected by law. Strengthening first-line WHS reporting and review builds trust and capability, reduces escalation to whistleblowing and ensures that when disclosures do occur, organisations learn and improve without delay.

## What are the risks to be aware of?

Mismanagement of reports, issues and complaints in the health and safety domain has the potential to escalate non-compliances to the external sphere. Information involved in these processes can be used as evidence in health and safety prosecutions and other enforcement actions.

## Next steps for boards



- Review whistleblower programs to confirm internal capacity to deal with systemic health and safety matters alongside single incidents and human resources considerations.
- Directors should, while protecting anonymity, monitor disclosures affecting health and safety matters to verify that learnings about the veracity of internal systems are captured.

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