

INTERPRETIVE GUIDELINE—MODEL WORK HEALTH AND SAFETY ACT
THE MEANING OF 'REASONABLY PRACTICABLE'

This document provides guidance on the interpretation and application of the term 'reasonably practicable' in considering the standard of health and safety that a person conducting a business or undertaking (the duty-holder) is expected to meet under the *Work Health and Safety (WHS) Act and Regulations*.

'Reasonably practicable' is used to qualify duties to ensure health and safety and certain other duties in the WHS Act and Regulation. This standard and what is required to meet it in relation to a health and safety duty are set out in section 18.

How is 'reasonably practicable' defined?

In this context, *reasonably practicable* means that which is, or was at a particular time, reasonably able to be done to ensure health and safety, taking into account and weighing up all relevant matters including:

- (a) the likelihood of the hazard or the risk concerned occurring
- (b) the degree of harm that might result from the hazard or the risk
- (c) what the person concerned knows, or ought reasonably to know, about the hazard or risk, and ways of eliminating or minimising the risk
- (d) the availability and suitability of ways to eliminate or minimise the risk, and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

What is 'reasonably practicable' is an objective test

What is 'reasonably practicable' is determined objectively. This means that a duty-holder must meet the standard of behaviour expected of a reasonable person in the duty-holder's position and who is required to comply with the same duty.

There are two elements to what is 'reasonably practicable'. A duty-holder must first consider *what can be done* - that is, what is possible in the circumstances for ensuring health and safety. They must then consider whether it is *reasonable, in the circumstances* to do all that is possible.

This means that what can be done should be done unless it is reasonable in the circumstances for the duty-holder to do something less.

This approach is consistent with the objects of the WHS Act which include the aim of ensuring that workers and others are provided with the highest level of protection that is reasonably practicable.

How to determine what is reasonably practicable – the process

To identify what is or was reasonably practicable all of the relevant matters must be taken into account and weighed up and a balance achieved that will provide the highest level of protection that is both possible and reasonable in the circumstances. Some matters may be relevant to what *can* be done, while others may be relevant to what is *reasonable* to do.

No single matter determines what is (or was at a particular time) reasonably practicable to be done for ensuring health and safety.

What must be taken into account and weighed up

Although section 18 sets out specific considerations, they are not the only things that may be relevant and other things may also need to be considered.

For example:

- there may be other legislation that requires or prohibits certain activities and limits what a duty-holder can do and the duty-holder must do what they reasonably are able to while complying with that other legislation; and
- whether a duty-holder can control or influence a particular thing or the actions of another person, or any limits on their ability to control or influence, may be relevant to what the duty holder *can* do, or what they may *reasonably* be expected to do. The WHS Act makes it clear, however, that a duty-holder cannot avoid responsibility by a contract giving control to someone else and through that attempting to contract out of their obligations.

The duty-holder should consider all of the facts and identify and consider everything that may be relevant to the hazards, risks or means of eliminating or minimising the risks.

The matters that must always be taken into account and weighed up are the following:

(a) The likelihood of the hazard or the risk concerned occurring

The greater the likelihood of a risk eventuating, the greater the significance this will play when weighing up all matters and determining what is reasonably practicable. If harm is more likely to occur, then it may be reasonable to expect more to be done to eliminate or minimise the risk.

(b) Degree of harm that may result if the hazard or risk eventuated

The greater the degree of harm that could result from the hazard or risk, the more significant this factor will be when weighing up all matters to be taken into account and identifying what is reasonably required (what is reasonably practicable) in the circumstances. Clearly, more may reasonably be expected of a duty-holder to eliminate or minimise the risk of death or serious injury than a lesser harm.

(c) What the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or minimising the risk

The knowledge about a hazard or risk, and any ways of eliminating or minimising the hazard or risk, will be what the duty-holder actually knows, and what a reasonable person in the duty-holder's position (e.g. a person in the same industry) would reasonably be expected to know. This is commonly referred to as the *state of knowledge*.

A duty-holder can gain this knowledge in various ways, for example by:

- consulting their workers and others in the industry
- undertaking risk assessments
- analysing previous incidents
- considering relevant Regulations and Codes of Practice and other sources of information such as:
 - the regulator and its inspectors
 - reputable technical standards, such as those published by Standards Australia
 - industry publications, and
 - published scientific and technical literature.

Knowledge about the hazard or risk

It is reasonably practicable for a duty-holder to:

- Proactively take steps to identify hazards within their business or undertaking before they cause an incident, injury or illness. This should be done before the activity is undertaken or the circumstances occur that result in the risk.
- Understand the nature and degree of any harm that an identified hazard may cause, how the harm could occur, and the likelihood of the harm occurring.

It is also reasonably practicable for a duty-holder to consider and understand, within the available state of knowledge, how the following may cause or increase hazards and risks:

- potential failure of plant, equipment, systems of work or safety measures
- human error or misuse, spontaneity, panic, fatigue or stress, and
- interaction between multiple hazards that may, together, cause different risks.

Knowledge about ways of eliminating or minimising the risk

Regulations and Codes of Practice made under the WHS Act and other relevant legislation may identify ways to eliminate risks to health and safety, so far as is reasonably practicable and if that is not reasonably practicable to minimise risks so far as is reasonably practicable (referred to as *control measures*). Control measures set out in the WHS Act and Regulations must be complied with.

While duty-holders are not obliged to comply with Codes of Practice, they are expected to identify and consider this information. A court may have regard to a Code of Practice approved under the WHS Act as evidence of what is known about a hazard or risk, risk assessment or risk control, and rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.

There may be many different ways of eliminating or minimising risks. The duty-holder should identify as many of these as they reasonably can, to give them the greatest scope to choose and apply the most appropriate means to eliminate or minimise a risk in the particular circumstances.

The ways of eliminating or minimising risks are ranked from most effective and reliable to the least effective and reliable (known as the *hierarchy of risk controls*) and are described below.

(d) Availability and suitability of ways to eliminate or minimise risks

This part requires a consideration of not only what is available, but also what is suitable for the elimination or minimisation of risk. A risk control that may be effective in some circumstances or environments may not be effective or suitable in others, because of things such as the workplace layout, skills of relevant workers, or the particular way in which the work is done.

Equipment to eliminate or minimise a hazard or risk is regarded as being *available* if it is provided on the open market, or if it is possible to manufacture it.

A work process (or change to a work process) to eliminate or minimise a hazard or risk is regarded as being *available* if it is feasible to implement.

A way of eliminating or minimising a hazard or risk is regarded as *suitable* if it:

- is effective in eliminating or minimising the likelihood or degree of harm from a hazard or risk;
- does not introduce new and higher risks in the circumstances; and
- is practical to implement in the circumstances in which the hazard or risk exists.

The hierarchy of risk controls

The ways of controlling risks are ranked from the highest level of protection and reliability to the lowest. This ranking is known as the *hierarchy of risk control*. The WHS Regulations require duty-holders to work through this hierarchy to choose the control that most effectively eliminates or minimises the risk in the circumstances.

- A duty-holder must eliminate health and safety risks so far as is reasonably practicable. If there are no available or suitable ways to eliminate a hazard or risk, then a duty-holder must consider all available and suitable ways to minimise risks, so far as is reasonably practicable by: substituting a hazard with something, or a number of things, that gives rise to a lesser risk
- isolating the hazard from any person exposed to it
- implementing engineering controls

If there is a remaining risk, it must be minimised so far as is reasonably practicable by implementing administrative controls, and if a risk still remains, then suitable personal protective equipment must be provided and used.

How far a control may minimise risk, on its own or together with other controls, should be considered when weighing up what can reasonably be done. Some of the controls may lower the likelihood of harm, others may lower the degree of harm that may result, and some may lower both.

(e) Cost of eliminating or minimising the risk

Although the cost of eliminating or minimising risk is relevant in determining what is reasonably practicable, there is a clear presumption in favour of safety ahead of cost.

The cost of eliminating or minimising risk must only be taken into account **after** identifying the extent of the risk (the likelihood and degree of harm) and the available ways of eliminating or minimising the risk.

The costs of implementing a particular control may include costs of purchase, installation, maintenance and operation of the control measure and any impact on productivity as a result of the introduction of the control measure.

A calculation of the costs of implementing a control measure must take into account any savings from fewer incidents, injuries and illnesses, potentially improved productivity and reduced turnover of staff.

In identifying whether a particular expenditure is reasonable in the circumstances, the duty-holder must consider:

- the likelihood and degree of harm of the hazard or risk; and
- the reduction of the likelihood and/or degree of harm that will result if the control measure is adopted.

The more likely the hazard or risk is, or the greater the harm that may result from the hazard, the less weight should be given to the cost of eliminating the hazard or risk.

The cost of risk control options, individually and together, may be relevant when deciding which of the available options are reasonably practicable, in a number of ways.

If there are a number of options available for eliminating or minimising a risk that achieve the same level of reduction in likelihood or degree of harm, a duty-holder may choose to apply a number of the least costly options. Using more expensive risk control options may not be required to minimise a risk that is low in likelihood or severity of harm.

Cheaper, available and suitable options may be used instead of a costlier option that may further minimise the risk or severity of harm, where the cost of the costlier option is grossly disproportionate to the risk. This will only apply where the cost is high and the likelihood or degree of harm is low (e.g. a slight chance of minor cuts or strains and the cost of replacing plant would be very high).

Choosing a low-cost option that provides less protection simply because it is cheaper is unlikely to be considered a reasonably practicable means of eliminating or minimising risk.

If the degree of harm is significant (e.g. death or serious injury is at least moderately likely) then it is unlikely that the cost of implementing available and suitable safety measures to eliminate or minimise the risk would ever be so disproportionate to the risk to justify a decision not to do so.

It may be reasonable to expect (and require) a duty-holder to eliminate the risk by ceasing the relevant activity if, after all 'affordable' control measures have been considered, there remains a significant risk of serious injury or illness.

Where the cost of implementing risk controls is grossly disproportionate to the risk – e.g. the cost of engineering changes to plant will be high and there is only a slight risk of minor sprains - then this may mean the use of those controls is not reasonable and not required. This does not, however, mean that the duty-holder is excused from doing anything to minimise the risk so far as is reasonably practicable. It may simply mean that a less expensive way of minimising the likelihood or degree of harm may instead be used.

Capacity to pay is not relevant

The question of what is 'reasonably practicable' is to be determined objectively, and not by reference to the duty-holder's capacity to pay or other particular circumstances. A duty-holder cannot expose people to a lower level of protection simply because it is in a lesser financial position than another duty-holder.

If two duty-holders are faced with the same hazard or risk in similar situations, one duty-holder cannot expose people to a lower level of protection simply because it is in a lesser financial position than another duty-holder.

If there are options available for eliminating or minimising a risk that achieve the same level of reduction in likelihood or degree of harm, a duty-holder may choose the least costly option. However, choosing a low cost option that provides less protection simply because it is cheaper is unlikely to be considered a reasonably practicable means of eliminating or minimising risk.

The costs of implementing a particular control may include costs of purchase, installation, maintenance, operation of the control measure and any impact on productivity as a result of the introduction of the control measure.

If a particular duty holder cannot afford to implement a control that is not so disproportionate to the risk as to be clearly unreasonable, the duty holder should not engage in the activity that gives rise to that hazard or risk.

The operation of 'reasonably practicable' – an example

ABC Pty Ltd manufactures metal products used as components in industrial machinery. These are stamped on a press. Different dies are used for different items and the dies must be manually changed before each product run. The dies are heavy and are difficult to reach.

In this case, the company:

- Consults its workers to assist in identifying the hazards associated with the work, which are the cutting and crush hazards associated with the operation of the machine and the hazardous manual task associated with the changing of the die.
- Identifies the potential harm to the operators, which are crush amputation injuries and musculoskeletal injuries. These are assessed as having at least a moderately high likelihood of occurring if risk controls are not implemented and maintained.
- Determines the requirements for plant under the WHS Regulations and obtains information from relevant codes of practice and machinery suppliers about the various mechanical and other ways of minimising the likelihood or degree of harm. The option of replacing the machine with another that does not have the risks, or has in place means for minimising the risks to the lowest level is considered. Another option includes retrofitting guards to prevent the crush injuries and to use mechanical aids for the extraction, lifting and movement of the dies. These various measures will need to be supported by appropriate systems of work, training and supervision.
- Identifies which of the options are available and suitable for use in the circumstances and the degree to which they will individually or together eliminate or if that is not possible minimise the risks so far as is reasonably practicable. Considers whether particular risk controls may introduce other hazards or increase other risks.

Stopping the activity would eliminate the risk of amputation, crush injury and musculoskeletal injury, however, this option is not a realistic alternative as the stamping operation is an integral and necessary step in the manufacture of the dies.

Having identified what can reasonably be done, weighed up the degree and likelihood of harm and how far a control may minimise risk, ABC decides to purchase a new computerised machine which has come onto the market that does not require manually changing the dies. This option

eliminates the hazardous manual task. The machine also includes a cut-off to stop the operation so that workers do not come into contact with moving parts during routine maintenance on the machine. It also produces less noise, which will minimise the risk of hearing loss.

Although the new machine is more expensive than retrofitting the existing machine with guarding, it provides significant health and safety benefits and also increases efficiency. Given the severity of harm and likelihood of it occurring, the costs are considered unlikely to be grossly disproportionate to the risk. If a new machine with improved design controls was not suitable or available, ABC could opt to retro-fit guards and sound minimising devices to the existing machines. This would also minimise the identified risks so far as is reasonably practicable.

ABC installs the new machine according to the manufacturer's instructions and provides its workers with relevant training on the safe operation and maintenance. The effectiveness of the risk controls are reviewed after one month in consultation with workers.

Note: this document is a general guideline only and is not a substitute for professional legal advice. The contents of this document are correct at the time of writing. However, there may be subsequent decisions of courts or tribunals on the matter covered by this guide which mean that the contents are no longer accurate.