

# **HOW TO DETERMINE WHAT IS REASONABLY PRACTICABLE TO MEET A HEALTH AND SAFETY DUTY**

MAY 2013



**safe work australia**



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# 1. INTRODUCTION

## 1.1 What is the purpose of this Guide?

This document provides guidance on the standard of health and safety that a person conducting a business or undertaking (PCBU) must meet under the Work Health and Safety (WHS) Act and Regulations. A PCBU must do what is 'reasonably practicable' to ensure health and safety.

The standard of 'reasonably practicable' in health and safety duties only applies to a PCBU. Other duty holders are required to meet different standards, for example officers must exercise 'due diligence' and workers and others at a workplace must take 'reasonable care'.

The 'reasonably practicable' standard is not a new one in Australian work health and safety law. The standard is intended to be a very high one. This is reflected in one of the objects at section 3(2) of the WHS Act stating that workers and other persons should be given the highest level of protection from hazards and risks arising from work, so far as is reasonably practicable.

Section 18 of the WHS Act sets out the definition of reasonably practicable in relation to a duty to ensure health and safety and the matters to be taken into account in determining what is reasonably practicable in the circumstances.

This Guide explains each of the elements of this definition and provides practical guidance on how to determine what is reasonably practicable.

## 1.2 The duties of a person conducting a business or undertaking

### Section 17

#### **Management of risks**

A duty imposed on a person to ensure health and safety requires the person to eliminate risks to health and safety so far as is reasonably practicable, and if it is not reasonably practicable to do so, to minimise the risks so far as is reasonably practicable.

Sections 19 to 26 of the WHS Act require a PCBU to ensure, so far as is reasonably practicable:

- the health and safety of workers who are engaged or caused to be engaged by the PCBU, or whose work is directed or influenced by the PCBU
- the health and safety of people who are not workers, such as members of the public, is not put at risk from work carried out as part of the conduct of the business or undertaking
- their own health and safety, if the PCBU is a self-employed person
- a workplace of which the PCBU has management or control is without risks to the health and safety of any person, including the means of entering and exiting the workplace
- the fixtures, fittings or plant at a workplace of which the PCBU has management or control are without risks to the health and safety of any person

- any item of plant, a substance or a structure the PCBU designs, manufactures, imports or supplies is without risks to the health and safety of any person described in the sections
- the way in which an item of plant or a structure is installed, constructed or commissioned by the PCBU ensures it is without risks to the health and safety of any person described in the section.

The WHS Regulations also contain requirements for meeting the standard of reasonably practicable:

- when managing health and safety risks generally under the regulations (regulation 35)
- in relation to particular types of hazards and risks, for example:
  - ensuring specified aspects of the workplace environment are without risks to health and safety (regulation 40)
  - ensuring the provision and maintenance of welfare facilities, such as washing facilities and drinking water (regulation 41)
  - minimising the risk of falling objects (regulation 55)
  - minimising the need for hazardous manual tasks to be carried out, when designing an item of plant or a structure (regulation 61)
  - eliminating or minimising the need for entry into a confined space, when designing, manufacturing, importing, supplying, installing or constructing an item of plant or a structure (regulation 64)
  - ensuring a person does not enter a confined space before specific requirements of the regulations have been complied with (regulation 65)
  - ensuring no person, plant or thing at a workplace comes within an unsafe distance of an overhead or underground electric line (regulation 166).

## 2. THE MEANING OF REASONABLY PRACTICABLE

### 2.1 How is 'reasonably practicable' defined?

Section 18 of the WHS Act defines the standard that is to be met and describes the process for determining this.

#### Section 18

'Reasonably practicable', in relation to a duty to ensure health and safety, 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; and
- b. the degree of harm that might result from the hazard or the risk; and
- c. what the person concerned knows, or ought reasonably to know, about the hazard or risk, and about the ways of eliminating or minimising the risk; and
- 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.

The process requires that all relevant matters, including those listed in the section, are taken into account and weighed up when determining what is reasonably practicable in particular circumstances.

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.

Some of the matters listed in section 18 will be relevant to identifying what *can be done*, for example if control measures that will eliminate or minimise the risk are available and suitable. Other matters will be relevant to identifying whether what can be done is *reasonable* to do, for example if the risk and degree of harm is grossly disproportionate to the cost of implementing the control measure.

To identify what would be reasonably practicable to do, all of the relevant matters must be taken into account and a balance achieved that will provide the highest level of protection that is both possible and reasonable in the circumstances. No single matter determines what is (or was at a particular time) reasonably practicable to be done to ensure health and safety.

Although section 18 sets out a number of relevant matters, they are not the only things that may be relevant. Other matters may also need to be considered. For example:

- There may be other legislation that requires or prohibits certain activities and therefore limits what a PCBU can do. In that case, a PCBU must do what it is reasonably practicable for them to do while complying with other legislation.
- A PCBU may or may not have the ability to control or influence a particular thing or another person's actions (see section 2.5 of this Guide).

The WHS Act makes it clear that a person cannot avoid responsibility for their obligations under the WHS Act by contracting them out to someone else.

## 2.2 What each of the ‘relevant matters’ in section 18 mean

Factor	Relevance
<b>The likelihood of the hazard or the risk concerned occurring</b>	<p>The greater the likelihood of a risk occurring, 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.</p> <p>The frequency of an activity or specific circumstances will be relevant to the likelihood of a risk occurring. The more a worker is exposed to a hazard, the more likely they are to suffer harm from it.</p>
<b>The degree of harm that might result from the hazard or the risk</b>	<p>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 practicable in the circumstances. Clearly, more would be expected of a duty-holder to eliminate or minimise the risk of death or serious injury than a lesser harm.</p>
<b>What the person concerned knows, or ought reasonably to know, about the hazard or risk, and ways of eliminating or minimising the risk</b>	<p>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 <i>state of knowledge</i>.</p> <p>The courts have consistently stated a duty holder must consider all reasonably foreseeable hazards and risks when identifying what is reasonably practicable.</p>
<b>The availability and suitability of ways to eliminate or minimise the risk</b>	<p>This requires 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.</p> <p>Equipment to eliminate or minimise a hazard or risk is regarded as being <i>available</i> if it is provided on the open market, or if it is possible to manufacture it.</p> <p>A work process (or change to a work process) to eliminate or minimise a hazard or risk is regarded as being <i>available</i> if it is feasible to implement.</p>

## 2. THE MEANING OF REASONABLY PRACTICABLE

Factor	Relevance
	<p>A way of eliminating or minimising a hazard or risk is regarded as <i>suitable</i> if it:</p> <ul style="list-style-type: none"> <li>■ is effective in eliminating or minimising the likelihood or degree of harm from a hazard or risk</li> <li>■ does not introduce new and higher risks in the circumstances, and</li> <li>■ is practical to implement in the circumstances in which the hazard or risk exists.</li> </ul>
<p><b>The cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.</b></p>	<p>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.</p> <p>The cost of eliminating or minimising risk must only be taken into account <b>after</b> identifying the extent of the risk (the likelihood and degree of harm) and the available ways of eliminating or minimising the risk.</p> <p>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.</p> <p>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 staff turnover.</p>

### 2.3 A risk management process helps to determine what is reasonably practicable

The process for determining what is reasonably practicable is consistent with the risk management process, as described in the Code of Practice: *How to manage work health and safety risks*.

Risk management involves a systematic process to:

- identify hazards associated with the activity or environment
- if necessary, assess the risks associated with the hazards
- identify and implement available and suitable control measures to eliminate or minimise the risks
- review the effectiveness of the control measures.

Regulation 36 sets out a hierarchy of control measures which apply if it is not reasonably practicable for a duty holder to eliminate risks to health and safety, in the following order:



## 2. THE MEANING OF REASONABLY PRACTICABLE

- substituting (wholly or partly) the hazard giving rise to the risk with something that gives rise to a lesser risk
- isolating the hazard
- implementing engineering controls
- implementing administrative controls
- ensuring the provision and use of suitable personal protective equipment.

By identifying particular types of control measures in terms of their effectiveness and reliability, regulation 36 requires a duty holder to step through a process by which risks can be minimised so far as is reasonably practicable.

### 2.4 What is 'reasonably practicable' is an objective test

The courts have on numerous occasions noted that what is 'reasonably practicable' is to be 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.

This objective test is demonstrated by the requirement in section 18 to take into account what the person *ought reasonably to know*.

As part of the objective test, the courts will look at what was reasonably foreseeable by someone in the position of the duty holder at the particular time.

### 2.5 The relevance of control

Control is not explicitly stated in the model WHS Act's definition of what is reasonably practicable. The capacity to exercise influence and control over a relevant matter is, however, something which is taken into account when determining what is reasonably practicable.

A person may be found to have control over a relevant matter if they have the capacity to do so, whether that capacity is exercised or not.

Control may arise from the legal ability to take control of the work activity, for example, under the terms of a contract, or from the practical ability to do so, for example, by being able to direct people on site and have those directions followed. That is, what a person does and what they are able to do will determine if they have control.

## 2. THE MEANING OF REASONABLY PRACTICABLE

### Section 16(3)(b):

If more than one person has a duty for the same matter, each person must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.

This clearly sets out that a duty holder is expected to comply with their duties only so far as they have the capacity to influence and control relevant matters.

The more control or influence over the work, the greater the steps that need to be taken by the PCBU to discharge the duty. It may not be reasonable to require a person to do things that are beyond their control or to require them to acquire the necessary control. An inability to control relevant matters must necessarily imply that it is either:

- not possible for duty holders to do anything, or
- it is not reasonable to expect them to do so.

Control is therefore an implied element in determining what is reasonably practicable.

### ***Control has been considered by the courts as a relevant factor***

The intention that control is implicit in identifying what is reasonably practicable is consistent with the decisions of courts in Australia. Most of these decisions have assumed the relevance of control and have dealt with questions about whether, in the particular circumstances, the duty holder had control or whether the duty holder should have exercised the control they had.

## 3. STEP ONE: IDENTIFYING THE CIRCUMSTANCES, HAZARDS AND RISKS

The first step in determining what is reasonably practicable is to identify the relevant circumstances, hazards and risks.

### 3.1 What are the circumstances?

What is reasonably practicable to do will depend on a number of factors present at the particular time in question, for example:

- the physical environment in which the activity occurs as this can affect:
  - how activities may be carried out
  - the hazards and risks that may arise
  - the availability of things necessary to minimise risk (e.g. energy sources or communication systems)
- the suitability of particular control measures (e.g. whether plant can be moved to ground level to eliminate the need to work at a height)
- the people involved in the activity, including whether there are multiple parties
- the processes that are already in place or need to be in place
- legislation that limits or directs how an activity may be carried out (e.g. conditions on licences or requirements to comply with regulations or by-laws relevant to the particular activity or place)
- the time allowed for the activity to be undertaken.

### 3.2 What are the hazards arising from the work or the environment?

A hazard is a situation or thing that has the potential to harm a person. Hazards at work can include: noisy machinery, a moving forklift, chemicals, electricity, working at heights, bullying or violence at the workplace.

The PCBU must identify each hazard that is associated with particular work, the work environment and things used to carry out the work. Hazards can be identified through various means, including:

- workplace inspections
- consulting with workers
- obtaining and considering information about the work, including from:
  - relevant codes of practice
  - work health and safety regulators
  - reputable technical standards, for example those published by Standards Australia
  - industry publications
  - published scientific and technical literature.

The Code of Practice: *How to manage work health and safety risks* provides further guidance on hazard identification. Other codes of practice provide guidance on identifying specific hazards, for example the Code of Practice: *Hazardous manual tasks*.

## 3.3 What are the risks associated with those hazards and how serious are they?

Having identified the hazards that may cause harm, it may be necessary to identify and assess the risks associated with each hazard to determine what control measures should be used.

Each hazard may cause different types of harm, each of which may be more or less likely.

Section 18 requires the likelihood and degree of harm to be weighed up when identifying what is reasonably practicable. This is commonly known as assessing the risk. The risk will be higher the more likely the harm is to occur and/or the greater the degree of harm that may occur. The higher the risk the more a duty holder should do to eliminate or minimise the risk.

#### **Example**

Keeping cash on premises provides the potential for a robbery to occur (a hazard) and this may cause physical harm (e.g. being shot) or psychological harm (e.g. post-traumatic stress disorder). The work environment, including physical barriers, may mean the likelihood of death or serious injury from being shot is low. The likelihood of psychological trauma may be much higher.

Each of the types of harm and the likelihood of them occurring should be considered when identifying what should be done to control the risks.

Eliminating or minimising the potential for exposure to the hazard will lower the likelihood of harm. Implementing control measures may lower the degree of harm that might result.

#### **Example**

Removing the need to work at height will eliminate the risk of a fall. Providing perimeter protection will lower the likelihood of a fall occurring. The placement of nets or other devices will lower the degree of harm that may be suffered if a fall occurs.

A risk assessment may not be necessary for all risks, but will be needed in most cases to allow the duty holder to consider what steps may reasonably be required to eliminate or minimise the risk.

A risk assessment should be done when:

- there is uncertainty about how a hazard may result in injury or illness
- the work activity involves a number of different hazards and there is a lack of understanding about how the hazards may interact with each other to produce new or greater risks
- changes at the workplace occur that may impact on the effectiveness of control measures.

A risk assessment is mandatory under the WHS Regulations for high risk activities such as entry into confined spaces, diving work and live electrical work.

#### 3.4 The importance of consultation

Consultation with workers and others who are or may be involved in the particular work or workplace is an important means of obtaining relevant information. This is one of the reasons why consultation is a requirement under the WHS Act.

Section 47 of the WHS Act requires a PCBU to consult, so far as is reasonably practicable, with workers who carry out work for the business or undertaking and who are, or are likely to be, directly affected by a matter relating to work health and safety. A PCBU must consult with a health and safety representative if the workers are represented by one and should also consult with any health and safety committee established for the workplace.

Section 46 of the WHS Act requires that a duty holder consult, co-operate, and co-ordinate activities, so far as is reasonably practicable, with all other persons who have a work health and safety duty in relation to the same matter.

It should never be assumed that someone else is taking care of a health and safety matter. A PCBU must find out which duty holders are doing what and work with them in a co-operative and co-ordinated way so that risks are eliminated or minimised so far as is reasonably practicable.

When entering into contracts, a duty holder should review the job to be undertaken, discuss any safety issues that may arise and how they will be dealt with and communicate their safety requirements and policies. Remember that a duty holder cannot transfer their responsibilities to another person.

Further guidance on consultation is available in the Code of Practice: *Work health and safety consultation, co-operation and co-ordination*.

## 4. STEP TWO – DETERMINE WHAT YOU CAN DO

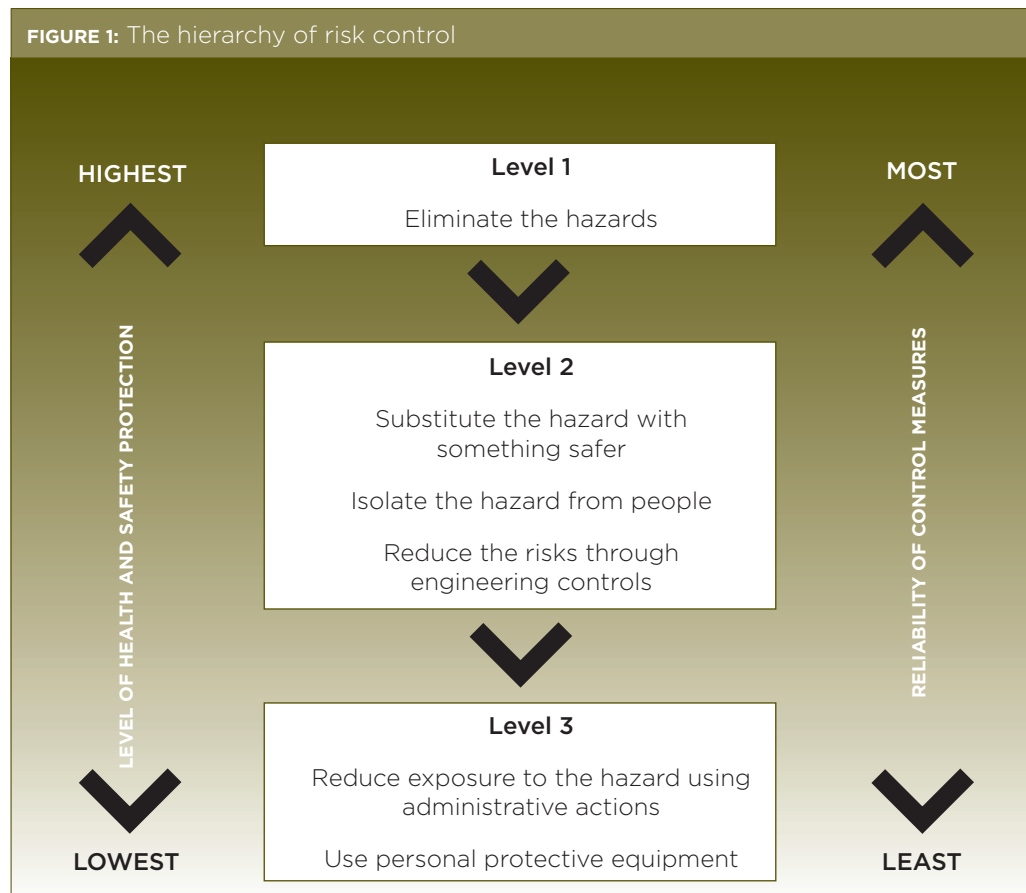
Once the duty holder understands the hazards and risks, the next step is to ask what can be done to eliminate or minimise the risks.

Section 18 requires a duty holder to consider the ways of eliminating or minimising risks. There may be a number of different ways to minimise a risk, each of which may reduce the likelihood or severity of harm to a different degree. Some of these control measures may operate effectively on their own, while others may need to be used in combination.

It is therefore necessary to identify options for eliminating or minimising risk, in order to determine what can reasonably be done in the circumstances. The duty holder should identify as many control measures as possible, to give them the greatest scope to choose and apply the most appropriate means to eliminate or minimise a risk in the particular circumstances.

### 4.1 Deciding how risks can be eliminated or minimised

The hierarchy of risk controls identifies the various types of control measures that should be used and is set out in the following diagram:



Regulation 36 requires a duty holder to start at the top of the hierarchy and move down through it, considering at each stage whether any risk remains and whether further control measures will minimise the risk.

## 4. STEP TWO – DETERMINE WHAT YOU CAN DO

The hierarchy commences with the Level 1 control measures. They are the measures most likely to eliminate the risk or hazard. Each subsequent level in the hierarchy refers to control measures that are less likely to minimise the likelihood, or the degree, of harm.

WHS Regulations require specific control measures for some types of risks. These include removal of people from lead risk work, fall arrest systems, guarding on plant, provision of air supplied respiratory equipment for emergency entry into confined spaces and instruction and training.

Codes of practice also include detailed information about control measures that may be applied to specific hazards. 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, associated risk assessments and control measures. They may rely on the code in determining what is reasonably practicable in circumstances to which the code relates.

There are numerous other sources from which a duty holder may obtain information on control measures, for example:

- work health and safety regulators
- reputable technical standards, such as those published by Standards Australia
- industry publications
- published scientific and technical literature.

### 4.2 Is the control measure available and suitable?

Investigations and inquiries may identify many ways to eliminate or minimise a particular type of risk. Some of these may, however, not be available to the PCBU or may not be suitable in the particular circumstances.

#### **Examples:**

- A device may not have been introduced into the Australian market, or may be incompatible with Australian operating conditions.
- Radio communication to minimise for from people working in isolation or in remote locations may not be suitable in areas where there is no signal or a poor one.
- Mechanical lifting aids may not be able to operate in areas where there is insufficient room to move them around.
- Equipment may not be able to be used in areas where the necessary energy source, such as electricity or gas, is unavailable.
- Particular processes may not be able to be used if they rely on circumstances, including the behaviour of others, over which the duty holder has no control.

A duty holder is only required to do what they are reasonably able to do at the particular time and in the particular circumstances. In determining whether a person has breached a duty, a court will consider the control measures that were available at the particular time of the activity or event, not those that may have subsequently become available.

It is also important to ensure a particular risk control will work before relying on it. In some cases additional control measures may be needed to minimise the risk so far as is reasonably practicable.

## 5. STEP THREE – DETERMINE WHAT YOU ARE REASONABLY ABLE TO DO

A PCBU is not required to do all that can be done in the circumstances, only what they are *reasonably able to do*.

### 5.1 Start by considering the highest level of protection

The WHS Act requires a PCBU to first eliminate the risk if it is reasonably practicable to do so. If not, the risk must be minimised so far as is reasonably practicable. The hierarchy of controls in regulation 36 demonstrates how this process should be managed, as covered earlier in this Guide.

After identifying available and suitable control measures, the duty holder should consider whether the control measure that is most likely to eliminate the risk, or minimise it the most, is able to be applied.

If the control measure that will provide the highest level of protection is possible, a duty holder should implement that control measure, unless it is not reasonably practicable to do so in the particular circumstances.

### 5.2 How to determine what is reasonable

Just because something can be done does not mean that it is reasonably practicable for the duty holder to do it. What is required is an assessment of what a reasonable person in the position of the duty holder would do in the circumstances, taking a careful and prudent approach and erring on the side of caution.

As indicated above, to determine what is reasonably practicable the PCBU must take into account all relevant matters, including those in section 18. Other matters which might be relevant are:

- the duty holder's ability to rely on the skill and expertise of others and what is required for that reliance
- the extent to which each possible control measure or combination of control measures lowers the likelihood or degree of harm
- the capacity to influence and control the particular activity.

The aim must be to keep trying to lower the likelihood and degree of harm until further steps are not reasonable in the circumstances. Questions a PCBU should ask to identify if they are doing enough are:

- Is there more I can do to either
  - minimise the risk myself; or
  - ensure another party with the relevant skills and expertise can properly implement health and safety measures and minimise risks?
- If the answer is yes to either question, is it reasonable for me not to do so?

The more likely the risk, the more that is required to be done to eliminate or minimise it. The greater the degree of harm, the more that is required to be done to eliminate or minimise it. If there is at least a moderate likelihood of death or serious injury, then the highest level of protection should be provided. If there is a high likelihood of repeated or multiple injury (even of a low degree, such as strains and cuts) then a high level of the risk controls should be applied.



## 5. STEP THREE - DETERMINE WHAT YOU ARE REASONABLY ABLE TO DO

It may not be reasonable to require expensive and time consuming controls, for example engineering controls, to be applied to minimise or further minimise a low likelihood of minor harm. It may, however, be reasonable to apply less expensive controls (e.g. training and supervision) to further lower the likelihood of the risk.

When considering each control or combination of controls, a duty holder must take into account the likelihood of a particular control being effective. Guards may be removed, systems of work may not be understood and followed, and personal protective equipment may not always be worn. Further controls, such as signs or supervision, may be needed to make a control more likely to be effective.

### 5.3 Cost

While cost is specified in section 18 as a matter to be taken into account and weighed up with other relevant matters to identify what is reasonably practicable, this must only be done **after** assessing the extent of the risk and the ways of eliminating or minimising it.

The cost of implementing a particular measure may include the 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 cost of implementing a control measure should also take into account any savings it will yield in reductions in incidents, injuries, illnesses and staff turnover, as well as improvements in staff productivity.

Before determining whether expenditure to eliminate or minimise a risk is reasonably practicable in the circumstances, the PCBU must consider:

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

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

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

It may not be reasonable to require control measures that are expensive to apply, in terms of time and/or money, such as engineering controls, to minimise or further minimise a risk that has a low likelihood of occurring and would cause minor harm. It may however be reasonable to apply less expensive controls, such as training and supervision, to further lower the likelihood of the risk.

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.

Where the cost of implementing control measures is grossly disproportionate to the risk, it may be that implementing them is not reasonably practicable and therefore not required. This does not mean however that the duty holder is excused from doing anything to minimise the risk so far as is reasonably practicable. A less expensive way of minimising the likelihood or degree of harm must instead be used.

## 5. STEP THREE - DETERMINE WHAT YOU ARE REASONABLY ABLE TO DO

### **Example:**

The cost of engineering changes to plant will be high and there is only a slight risk of minor sprains. The engineering changes may therefore not be reasonably required. What may be required instead are detailed instructions on how to safely use the plant, provision of training and a higher level of supervision to ensure the system of work is followed. Each of these measures will lower the likelihood of the risk occurring and may lower the degree of harm that may be suffered.

If the degree of harm is significant, for example where death or serious injury is at least moderately likely - then it is unlikely the cost of implementing available and suitable control measures to eliminate or minimise the risk would ever be so disproportionate as to justify not doing so. In these circumstances, 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.

### **Capacity to pay is not relevant**

The question of what is reasonably practicable is determined objectively, not by reference to the particular PCBU's capacity to pay or other individual circumstances. A PCBU cannot expose people to a lower level of protection simply because it is in a lesser financial position than another PCBU facing the same hazard or risk in similar circumstances.

If a PCBU cannot afford to implement a control measure that should be implemented after following the weighing up process set out in section 18 of the WHS Act, they should not engage in the activity that gives rise to that risk.

## 5.4 Can you rely on someone else to take the necessary action?

While the duties prescribed by the WHS Act require the PCBU to ensure certain health and safety outcomes, they do not necessarily require the PCBU to provide everything necessary to achieve these outcomes. For example, a PCBU must ensure the provision of safe plant, but does not need to provide the safe plant itself if someone else is doing so.

It is common practice for a PCBU to engage a specialist or technical expert to carry out work. In these situations, the PCBU is entitled to rely on the expertise of the specialist or technical expert.

However the PCBU still carries some responsibility for ensuring the requirements of the WHS Act are met. For example, it is still incumbent on the PCBU to ensure, so far as they are reasonably able, that the specialist or technical expert:

- does in fact have the required expertise to ensure the work can be carried out safely
- has in place the systems, processes and procedures to ensure the work can be carried out safely
- is carrying out the work in a manner which does not create a health and safety risk for the PCBU's own workers or others at the workplace.

## 5. STEP THREE - DETERMINE WHAT YOU ARE REASONABLY ABLE TO DO

There may be situations where a duty holder has no option but to rely on someone else.

**Example:**

Rules relating to rigging require a rigger who is competent and properly authorised to do the work to have exclusive control over a lift. Other duty holders involved in the activity may have no option but to rely on the rigger to carry out this task safely.

To demonstrate it is reasonably practicable to rely on the rigger to eliminate or minimise risks associated with use of the lift, a PCBU must be able to show they have, so far as they are reasonably able, checked the rigger:

- has the relevant skills, experience and license (if required)
- has systems, procedures and equipment that will enable them to eliminate and minimise risks
- is applying those systems to the particular task, for example applying processes for risk assessment, induction or inspection.

The duty holders may have control over other aspects of the activity such as the work environment in which the lift is operating, including where their workers are situated on the ground during the lift and the scheduling of the lift's operation. The duty holders must still do what is reasonably practicable to eliminate or minimise the risks associated with those things over which they have control.

## 6. STEP FOUR - REVIEWING RISK CONTROLS

The duties in the WHS Act and Regulations are ongoing and must be complied with at all times.

Circumstances can change over time and this may result in a change in the hazards and risks or in the ways in which they may be eliminated or minimised. This may mean that what was reasonably practicable at an earlier time is no longer so and something more or different may need to be done to control the hazards and risks.

Relevant changes include:

- a change in a work process
- a change in the physical environment
- different people undertaking the work, with different skills or means of co-ordination of activities
- new hazards are identified through advances in science or through experience, and
- new ways to eliminate or minimise risks are identified or invented.

Therefore, the control measures a duty holder puts in place must be reviewed regularly to make sure they continue to meet the standard of what is reasonably practicable.

### 6.1 When should risk controls be reviewed?

There are certain times when a duty holder must review control measures and revise them if necessary. Reviewing a control measure is required under the WHS Regulations:

- when the control measure is not effective in controlling the risk
- before a change at the workplace that is likely to give rise to a new or different risk that the control measure may not effectively control
- if a new hazard or risk is identified
- if the results of consultation indicate a review is necessary, and
- if a health and safety representative requests a review.

# APPENDIX - LIST OF CASES RELEVANT IN DETERMINING REASONABLE PRACTICABILITY

*Chugg v. Pacific Dunlop Ltd* [1990] HCA 41; (1990) 170 CLR 249

*Holmes v. R. E. Spence & Co. -Pty Ltd* (1992) 5 VIR 119

*R v. Associated Octel Co. Ltd* [1994] 4 All ER 1051

*R v. Australian Char Proprietary Limited* [1995] VSC 168

*Stratton v. Van Driel Ltd* (1998) 87 IR 151

*McMillan Britton and Kell Pty Ltd v. WorkCover Authority (NSW)* (1999) 89 IR 464

*Slivak v. Lurgi (Australia) Pty Ltd* [2001] HCA 6; (2001) 205 CLR 304

*Complete Scaffold Services Pty Ltd v. Adelaide Brighton Cement Ltd* [2001] SASC 199

*Workcover Authority of New South Wales (Inspector Byer) v. Cleary Bros (Bombo) Pty Ltd* [2001] NSWIRComm 278

*R v. ACR Roofing Pty Ltd* (2004) 142 IR 157

*Reilly v. Devcon Australia Pty Ltd* [2008] WASCA 84; (2008) 36 WAR 492

*Tobiassen v. Reilly* [2009] WASCA 26; (2009) 178 IR 213

*Baiada Poultry Pty Ltd v. The Queen* [2012] HCA 14

*Kirwin v. The Pilbara Infrastructure Pty Ltd* [2012] WASCA 99

*Candetti Constructions Pty Ltd v. Fonteyn* [2012] SAIRC 24

