

CFMEU

CONSTRUCTION

Ref: 14233 WHS

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Hon Dr Sally Talbot MLC
Chairperson
Standing Committee on Legislation
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WEST PERTH WA 6005

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Dear Dr Talbot

Inquiry into the Work Health and Safety Bill 2019

The Construction, Forestry, Maritime, Mining and Energy Union, Construction and General Division – WA Branch (CFMEU) welcomes the opportunity to provide a submission to the Legislation Committee on the *Work Health and Safety Bill (WHS) Bill 2019* (WA Bill).

The CFMEU represents workers in the construction industry, one of the most dangerous industries in our community. Safety and the protection of construction workers whilst at work has been, and always will be, at the core of the CFMEU's activities. There is nothing more important to the CFMEU than seeing construction workers return home at the end of the working day in the same healthy way they left.

Sadly, the CFMEU and its members have witnessed many workplace injuries and fatalities in the construction industry. Aside from the horrific injuries suffered by those who were simply doing their job, for many years we continue to feel the devastation left behind in their loved ones.

This is pain that never goes away.

It is highly implausible that we will see less deaths and better occupational health and safety outcomes by continuing to maintain the status quo. The Western Australian Parliament should always be aiming to do what it can to improve workplace safety and achieve zero workplace deaths. It is the view of the CFMEU and its members that supporting the policy of this Bill will be a step towards achieving this aim.

Having regard to the above and in addition to our submission, we believe the CFMEU has a unique perspective on the WA Bill and health and safety in the construction industry in Western Australia. We therefore kindly request that representatives of the CFMEU appear before the Committee in due course.

If the Committee is agreeable to this request, we nominate the undersigned Mr Mick Buchan, State Secretary of the CFMEU and Mr Bob Benkesser, Head Safety Officer, CFMEU.

If you have any questions please don't hesitate to contact me at mbuchan@cfmeuwa.com

Yours sincerely

Mick Buchan
State Secretary
CFMEU WA



Summary of Recommendations

Recommendation 1

The Inquiry support the introduction of the definition of PCBU and ‘worker’ into the WA Bill.

Recommendation 2

The Inquiry supports the adoption of the harmonised duty of care provisions (with amendments) from section 19 through to section 29 as proposed in the WA Bill.

Recommendation 3

The Inquiry supports a finding that the duty of care provisions provide sufficient protection for PCBUs.

Recommendation 4

The Inquiry recommend the adoption of an expansion of duties in Part 2 of the WA Bill to incorporate psychological health.

Recommendation 5

The Inquiry support the inclusion of section 30A. Industrial manslaughter – crime and section 30B Industrial manslaughter – simple offence into the WA Bill.

Recommendation 6

The Inquiry support amendments to section 30A. Industrial manslaughter – crime and section 30B Industrial manslaughter – simple offence into the WA Bill to explicitly include:

- a) both acts and omissions which substantially contributes to death;
- b) application to corporate duty-holders and officers who have the capacity to significantly affect health and safety outcomes. The cause of action should go not just to the immediate cause of a death, but also to the root cause of it; and
- c) with respect to section 30B. Industrial manslaughter – simple offence, an increased penalty provision from 10 years to 15 years imprisonment.

1. Introduction

- 1.1. The Construction, Forestry, Maritime, Mining and Energy Union, Construction and General – WA Division (CFMEU) is Western Australia’s principal trade union in the construction industry. Safety and the protection of construction workers whilst at work, has always been at the core of the CFMEU’s business.
- 1.2. The construction industry had the third highest rate of fatalities, on average nationally in the period between 2014 – 2018¹. National Safe Work Australia data indicates that preliminary construction worker deaths from 1 January 2019 to 18 June 2019 (11) in comparison to the same period in 2020 has increased to 15, representing an increase of 26.6%.²
- 1.3. This safety record is in the context of an industry that is increasingly characterised by casualised workforces, fragmented labour-hire structures and sham contracting³. These factors, work to destabilise and obfuscate work health and safety responsibility at a practical level, but also give rise to workers being pressured not to raise safety concerns at all, for fear of jeopardising their ability to secure ongoing work. It would be fair to say that the construction industry is based on relationships and those that are seen as trouble makers because they stand up for safety often find that they are unable to find ongoing and secure employment in the industry. This has a chilling effect on a proactive safety culture.
- 1.4. Industrial injuries and deaths impose a significant cost not only on individual workers, but also on the economy and society at large, with workers’ families having the greatest burden to bear. In this context, workplace fatalities are unacceptably higher in the construction industry than can be reasonably accepted. It is the view of the CFMEU that all workplace deaths in the construction industry are preventable.
- 1.5. It is our experience that a driving down of costs, wages and conditions almost always leads to poor safety outcomes and a more dangerous work environment for workers.
- 1.6. Since their inception, the model WHS laws have been the subject of extensive review. As recently as 2018, Safe Work Australia (SWA) undertook the first national independent review of the model WHS laws by Ms Marie Boland (Boland Review). This gives Western Australia, as the latest jurisdiction to adopt the model laws (outside of Western Australia, only Victoria has not adopted the model laws), a unique perspective to better understand and consider the effectiveness of the proposed reform prior to implementation.
- 1.7. Although this submission touches on a variety of matters within Part 2 of the *Work Health and Safety (WHS) Bill 2019* (WA Bill), our submission will primarily deal with issues relating to duty of care and how related legal principles interact with the proposed industrial manslaughter provisions. We think an emphasis should be placed on this issue as a priority, principally in order to dispel myths associated with industrial manslaughter that are continually trumpeted by opponents and to make the case for why such reform, as a principle, is necessary to restore justice and drive cultural change within the Western Australian WHS framework.

1 Safe Work Australia, Fatality Statistics by Industry, <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry>

2 Ibid.

3 In 2011 the CFMEU undertook a detailed study of sham contracting in the building and construction industry and estimated that between 9 – 16% of person working in the industry were sham contractors: CFMEU Construction & General Division, *Race to the bottom: Sham Contracting in Australia’s Construction Industry*, March 2011.

2. The Person Conducting a Business or Undertaking (PCBU) v Employer

- 2.1. Although the definition of PCBU does not appear within Part 2 of the WA Bill and is not explicitly considered as part of this Inquiry, the CFMEU makes the submission that its incorporation into the Western Australian safety landscape is essential. The term is used throughout Part 2, and it therefore important to understand its context, substance and limitations.
- 2.2. A recasting of the relationship between ‘employer’ and ‘employee’ to PCBU and ‘worker’ reflects modern work arrangements in the construction industry. The construction industry is now more than ever transient, hierarchical and insecure. It is highly usual for a worker to be under the direct supervision and control of a person or entity that is not their actual employer. Further, the actual employer often has little or no practical control over the manner in which the worker, or other workers who are working with the worker, perform their work.
- 2.3. This environment, coupled with the rise of labour on hire arrangements where host employers engage the worker whilst another, un-related entity maintains ‘control’, makes tracing relationships and lines of responsibility under the *Occupational Safety and Health Act 1984* (OSH Act) notoriously difficult.

Recommendation 1

The Inquiry support the introduction of the definition of PCBU and ‘worker’ into the WA Bill.

3. General Duty of Care and Its Interaction with Industrial Manslaughter Provisions in the WA Bill

- 3.1. The CFMEU broadly supports the adoption of the harmonised duty of care provisions from section 19 through to section 29 as proposed in the WA Bill. Whilst (in our view) the WA Bill requires some further amendment, generally the duty of care provisions represent an improvement when pitched against the duty provisions in the OSH Act.
- 3.2. The inclusion of provisions relating to duties imposed for officers and due diligence requirements (see Part 2 Division 4 of the WA Bill) are also positive as they foster and drive a more proactive, consultative and substantial framework for the protection of construction workers.
- 3.3. Section 19 of the WA Bill, which is broadly consistent with the model WHS Act, sets out the principles of the primary duty of care that applies to all workplace situations. This is, in effect, a foundational duty.⁴
- 3.4. It is the CFMEU’s clear position (and the position of the parliament and the courts), that if you are engaging in business in the construction industry, an inherently hazardous industry, then that business, and the persons conducting that business, must have the requisite knowledge as to the extent of their obligations, no matter the size of the business. In effect, you must understand that you have a duty of care and take appropriate measures to discharge your obligations with respect to that duty.
- 3.5. The principles of duty of care in the WHS setting are derived from the decision of the UK house of lords in *Donahue v Stevenson* [1932]. In this landmark case, Lord Atkin derived an obligation (or a duty of care) to ‘*take reasonable care to avoid acts or omissions which you can reasonably foresee would likely injure your neighbour*’.⁵

4 Foster, N.et al., (2014). Principles of OHS Law. In Safety Institute of Australia, the Core Body of Knowledge for Generalist OHS Professionals. Tullamarine, VIC. Safety Institute of Australia. Pg. 10

5 Ibid. Pg 10; *Donoghue v Stevenson* [1932] UKHL 100 Pg.580

- 3.6. Albeit the law has developed since Lord Atkin's decision, the genesis of duty to another and its association with the principles of negligence in modern safety legislation is still consistent with the findings in *Donoghue*. Issues of reasonably foreseeability of risk, reasonable care, breach of duty and causation are all principles that have carried into the model WHS framework. These are established principles that work to provide protections and obligations for both the PCBU and workers.
- 3.7. While the principles of duty of care are well established, it is our experience that in the construction industry, those principles are not well understood, nor well accepted, nor a priority, particularly in the lower construction tiers and cottage industries.
- 3.8. A real lack of understanding coupled with safety outcomes driven on issues of cost alone, leaves a number of construction companies, or companies associated with the construction industry, susceptible to what can only be described as unqualified panic and emotion with respect to legislative safety reform (in this case the WA Bill). As an example, issues such as increased obligations (or a higher standard of duty), increased cost and an increased likelihood of imprisonment (with respect to industrial manslaughter provisions) have been associated with the introduction of the WA Bill. This is extremely concerning, particularly when at its heart, the WA Bill aims at protecting workers lives and livelihoods.
- 3.9. Further, whilst (generally) there seems to be uncertainty and hysteria around the extent to which a duty of care arises and/or is established, the effective discharge of that duty by a PCBU and how culpability will extend to PCBUs who do not discharge their duty under the proposed WA Bill, it is our view that arguments suggesting liability can vest more easily under the WA Bill as opposed to the OSH Act or that there can be additional 'unintended consequences' or additional burden associated with this reform are not well founded or at worst are baseless at law.
- 3.10. To address this issue, it is essential the Inquiry be armed with a clear understanding as to the fundamental principles of duty of care under the WA Bill. Issues such as what is a duty of care, how a duty of care arises, what is required to discharge that duty, what is the standard of the duty and how the principle of duty of care works must be considered in order to satisfy the effectiveness of the WA Bill. This is particularly true when considering provisions which carry a penalty of imprisonment such as section 30B. Industrial Manslaughter – simple offence or section 31 Failure to comply with health and safety duty – Category 1.
- 3.11. In making its findings, the Inquiry's focus must be on the primacy of duty of care in the WHS system. The Inquiry must also consider as to whether the long-established duty of care principles afford enough protection to industry participants. In circumstances where the Inquiry makes findings that it does not (say for provisions such as section 30B. Industrial Manslaughter – simple offence of the WA Bill), the Inquiry must be prepared to say that a foundational principle of duty of care is not sufficient a tool to moderate safety with respect to a fatality at the workplace due to some sort of deficiency, but that same duty of care is appropriate for less serious failures. Findings in these terms could in our view only be considered as ideological and contradictory. Put simply, the Inquiry must take a consist approach to its application of legal principles such as duty of care.
- 3.12. The inquiry must be mindful, that from a judicial perspective, in determining whether an offence has been committed for a failure of section 19 *'a court will carefully consider each separate 'element' of the offence by conducting a grammatical analysis of the clause'*⁶ This consideration is of critical importance in understanding the practical application of a breach of duty of care, noting that in the Western Australian context, establishing that a breach of duty in the courts, for employers (or what is to be known as the PCBU under the WA Bill), has been historically difficult, particularly where the facts have been causally deficient or there has not been a sufficient nexus between the harm and the alleged negligent behaviour or failure of the duty of care.

- 3.13. For the benefit of the Inquiry, we thought it useful to examine the restrictive approach taken by the courts to establish a breach of a principal duty of care. According to Foster, N. et al the court must ask itself:

“The elements of an alleged offence committed by A (the ‘accused’) are:

- 1) Is the A a PCBU?*
- 2) Has someone’s health and safety not been ensured?*
- 3) Was the person whose health and safety was not ensured (say, W) a “worker”?*
- 4) Was W either a “worker engaged or caused to be engaged,” or a “worker whose activities...are influenced or directed by the person”? W does not have to fall into both categories for an offence to have been committed. (Where A has a duty to ensure X and Y, if either X or Y are not ensured, there is a failure of duty.)*
- 5) Was W “at work in the business or undertaking” (of the PCBU) when the failure to ensure occurred?*
- 6) Even if all of the above are true, the prosecution must also prove that it was ‘reasonably practicable’ to have ensured safety; in other words, the prosecutor must show that something else could have been done that falls within the terms of ‘reasonably practicable’ as defined in section 18.*

If all of the elements of the offence can be established (to the standard of ‘beyond reasonable doubt’), then A will be found guilty of an offence.”⁷

- 3.14. Importantly the technique of highlighting key concepts (or elements) at paragraph 3.13 above can be applied to all provisions of model WHS laws⁸. It follows that such an exercise would be consistent with the approach the courts would take for the proposed provisions in the WA Bill such as section 30B Industrial Manslaughter – Simple Offence and section 31 - Failure to comply with health and safety duty – Category 1, where a primary duty of care arises.

- 3.15. The Inquiry will note that in addition to the elements to prove a failure of a duty of care as described at paragraph 3.13 (1) to (5), any claim that there has been a failure of a duty of care must prove that it was also reasonably practicable to ensure the safety of the worker (see paragraph 3.13 (6)).

- 3.16. Relevantly, under Subdivision 2 section 18 of the WA Bill, noting what is reasonably practicable must be identified in relation to the particular circumstances existing at a particular time,⁹ the courts will undertake further consideration of the following:

- 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 to reasonably know, about:*
 - i. The hazard or the risk; and*
 - ii. 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.*

- 3.17. The principle of what is reasonably practicable is well settled. We **attach** hereto and mark “CFMEU 1” for the Inquiry’s consideration, SWA’s guidelines on ‘How to Determine What is Reasonably Practicable to Meet a Health and Safety Duty’. The Inquiry will also note that the framework is readily available and sufficiently substantive in order to enable PCBUs to understand their obligations under the law.

7 Ibid. Pg12

8 Ibid. Pg 12

9 Ibid. Pg 13

- 3.18. In addition to the elements described at 3.13 (1) to (6) and 3.16, the courts will also have regard to the inherent limitations or qualifications associated with establishing a failure of a duty of care. Foster, N. et al in identifying the limitations to a standing duty of care states:

*OHS (or WHS) legislation reflects an understanding that there are practical limits to the ability of a person to eliminate the various risks associated with what they do, and that there is a need to effectively use available resources to achieve optimal minimisation of these risks. The duties of care are accordingly qualified (or limited) in several ways.*¹⁰

- 3.19. The primary purpose of such a qualification is steeped in the understanding that a workplace can be a fluid environment and the risks associated with work may not always be subject to sufficient control. That is, as Foster, N. et al suggests, that OSH (or WHS) laws only require that a duty holder must comply with duties to the extent to which they have control over relevant matters.¹¹
- 3.20. By reason of the matters raised at raised at 3.13 to 3.19, significant protections are afforded to PCBU's to enable them to effectively discharge their duty to workers. Importantly, these are the same protections afforded under the proposed section 30B. Industrial Manslaughter Offences in the WA Bill. In these circumstances, an effective argument against such a provision (section 30B) in our view is unable to be effectively sustained. Further any argument that PCBU's will be indiscriminately prosecuted is simply misleading.

Recommendation 2

The Inquiry supports the adoption of the harmonised duty of care provisions (with amendments) from section 19 through to section 29 as proposed in the WA Bill.

Recommendation 3

The Inquiry supports a finding that the duty of care provisions provide sufficient protection for PCBU's.

4. Psychological Health

- 4.1. The WA Bill is relatively limited in addressing psychological health in the workplace. Whilst definitions currently consider 'health' as including 'psychological health' (see section 5(a) of the WA Bill) and further notes have been included to further characterise health to include psychological health (see 'Note for the subsection' under section 19 of WA Bill), there are no specific references to psychological health hazards and associated risk minimisation within the body of the current regulatory structures. Similarly, existing codes tend to treat psychological health matters as issues that can be addressed through standard approaches to risk management.
- 4.2. The mental health of Fly-In, Fly Out (FIFO) workers is of particular concern to the CFMEU. Studies suggest that the prevalence rate of mental health problems amongst the FIFO workforce has been estimated to be approximately 30 per cent, which is significantly higher than the national average of 20 per cent.¹²
- 4.3. In October 2015, the Queensland Government's Infrastructure, Planning and Natural Resources Committee released a report from its "Inquiry into fly-in, fly-out and other long distance commuting work practices in regional Queensland".¹³ The report recognised that the FIFO lifestyle can, for a range of reasons, exacerbate a person's predisposition to mental health problems.

10 Foster, N. et al., (2014). Principles of OHS Law. In Safety Institute of Australia, the Core Body of Knowledge for Generalist OHS Professionals. Tullamarine, VIC. Safety Institute of Australia. Pg12

11 Ibid. Pg12

12 Western Australia Legislative Assembly, Education and Health Standing Committee, The impact of FIFO work practices on mental health, final report, p i. See also, pp 16-22.

13 <https://www.parliament.qld.gov.au/documents/committees/IPNRC/2015/FIFO/02-rpt-009-09Oct2015.pdf> accessed on 23 August 2018.

- 4.4. The multiple factors that are associated with the FIFO lifestyle that contribute to mental health problems, and which can exacerbate a worker's predisposition to mental health problems, include separation from family, transitioning between home and work, maintaining meaningful relationships while missing out on key life events, and the living conditions at camp (including the low level of control over work and life while at work).
- 4.5. The tendency of workers not to seek help, due to workplace culture or stigma regarding mental health difficulties, is a significant contributing factor. Anecdotally, the Queensland Government's Committee was advised that workers can be reluctant to go to their employer to discuss any mental health problems as they felt the service was not confidential and feared that having a problem could put their job at risk.¹⁴ Unions and organisations like Mates in Construction play a significant role in this regard.
- 4.6. One of the main sources of concern for FIFO workers is the length of rosters worked, with higher compression rosters negatively impacting on work-life balance, feelings of isolation and loneliness, higher levels of psychological distress and adverse effects on family relationships.¹⁵
- 4.7. The mental health impact on employees should be considered as a health and safety issue with legislative minimum standards for rosters and the strengthening of protections for workers.

Recommendation 4

The Inquiry recommend the adoption of an expansion of duties in Part 2 of the WA Bill to incorporate psychological health.

5. Industrial Manslaughter

- 5.1. The absence of proportional consequence for taking a life has been the focus of legal reform in many areas over recent years across almost all Australian jurisdictions. This includes the introduction of greater and more proportional penalties – including the introduction or increase in prison sentences – for causing the death of another person in the case of the unlawful use of a motor vehicle.
- 5.2. It is well accepted that if a person gets behind the wheel of a car drunk and kills someone, the appropriate charge is manslaughter, not drink driving. Conversely, operating within the law offers unqualified protection from such a charge. This is clearly the expectation of our community.
- 5.3. Indeed, most of this reform has been driven by community expectation in response to the demonstrably inadequate consequences for those who have operated outside the law and caused death. The absence of an active intent to harm has been deemed no excuse to accountability by our community and legislators.
- 5.4. The families and friends of people killed have been instrumental in the formation of these community expectations. The stories of those left behind when someone is killed offer very confronting and often undeniable evidence of the inadequacy of the consequences for those who have caused death through their unlawful actions or inactions.
- 5.5. Within the Western Australian jurisdiction, we have also recently seen the realignment of the law with community expectation around the Unlawful Assault Causing Death legislation, commonly referred to as One Punch laws. Again, in this circumstance, our community clearly believed the absence of specific intent to kill was irrelevant in the light of the unlawfulness of the act itself. Thus, the appropriate charge is manslaughter, not simply assault causing bodily harm.

¹⁴ Ibid. at Pg14

¹⁵ Ibid.

- 5.6. The bill before the parliament here, and the inclusion of the creation of a charge of industrial manslaughter contained in it, is simply the application of exactly the same community standard in relation to our workplace health and safety laws.
- 5.7. Our community has very clearly, and quite rightly, decided that operating outside laws that are there to protect life and limb is enough to make someone culpable for a death under a charge of manslaughter. West Australian workers and their families have every right to expect employers be held to this same community standard.
- 5.8. In considering safety reform, statistics are regularly cited to provide context and justification to such reform. From 2003 to 2016, at least 3,414 workers lost their lives in work-related incidents in Australia.¹⁶ This is an unacceptable figure.
- 5.9. Competitive pressures and work intensification have led to the proliferation of non-standard and precarious forms of employment, particularly in the transport and construction industries. These pressures often result in ‘corner cutting’ on WHS in order to meet deadlines, which can have fatal consequences for workers and others.¹⁷
- 5.10. Ever changing work relationships have also made establishing responsibility in the workplace much more difficult. In this environment, the current legislative framework (as proposed in the model WHS Bill) is insufficient to deter or adequately punish occupational fatalities.¹⁸
- 5.11. Many opponents to industrial manslaughter provisions cite existing legislation governing indirect death. While the Western Australian jurisdiction currently has criminal manslaughter provisions in the *Criminal Code Act Compilation Act 1913* (WA) (Criminal Code), under which an officer responsible for a workplace death could in theory be prosecuted, these provisions critically require proof of fault by a high level manager or director, which is inherently difficult to establish in large corporations with complex structures, such as in the construction industry.¹⁹
- 5.12. In these circumstances, it is particularly difficult to establish *mens rea*, otherwise known as the ‘guilty mind’ (as an essential element of criminal manslaughter) on the part of the high level manager or director in order to secure justice and drive genuine change.²⁰ Consequently, it is no surprise that successful prosecutions for workplace deaths under the Criminal Code have remained elusive ²¹(whilst we acknowledge that section 30A. Industrial manslaughter – crime in the WA Bill carries some of the same requirements).
- 5.13. The Australian Council of Trade Unions (ACTU) Review of the Model WHS Laws in 2018 considered the difficulty of securing criminal prosecutions under general criminal law provisions by referencing the ACT Standing Committee on Legal Affairs report, prior to the implementation of an industrial manslaughter offence in the ACT. The report stated:

Establishing the criminal liability of a corporation requires establishing the intent of the corporation (which cannot have a ‘mind of its own’) by attributing to it the actions, omissions or motives of a director or senior officer, being the guiding mind of the corporation. This has proven difficult in the past. Prosecutions of corporations under the current law, even if successful, have been considered unsatisfactory because appropriate penalties are not available. Imprisonment is

16 Australian Council of Trade Unions Submission into Review of Model WHS Laws 2018. 2 May 2018 Pg 55; Safe Work Australia, Fatality Statistics, accessed 20 April 2018.

17 Australian Council of Trade Unions Submission into Review of Model WHS Laws 2018. 2 May 2018 Pg 55; Underhill, E (2013) “the Challenge to Workplace Health and Safety and the Changing Nature of Work and the Working Environment” in Teicher, J, P Holland and R Gough Australian Workplace Relations Cambridge University Press Sydney 2013.

18 Australian Council of Trade Unions Submission into Review of Model WHS Laws 2018. 2 May 2018 Pg 55.

19 Ibid.

20 Ibid. and Clough, J (2007) “A Glaring Omission? Corporate :liability for Negligent Manslaughter” 20 Australian Journal of Labour Law 29.

21 Australian Council of Trade Unions Submission into Review of Model WHS Laws 2018. 2 May 2018, p 56.

the only penalty for manslaughter. This is of no use where the offender is a corporation – a legal entity is not a natural person.

- 5.14. In K Wheelwright's 2016 text "*The Prosecution of Officers under the Model Work Health and Safety Legislation*"²², considered the difficulty in achieving a successful prosecution under the criminal regime. He stated:

The difficulty of achieving a successful prosecution under the general criminal law means that they cannot possibly act as an effective deterrent. Company officers and their legal representatives know full well that the likelihood of personal liability for an occupational death is so remote as to be non-existent. Those responsible for high-level decisions around unsafe work practices must feel that they will be held accountable for negligent breaches of Model Laws which cause death, otherwise their conduct is unlikely to change. It is well accepted that the real threat of personal prosecution provides significant motivation for officers of companies to take steps to comply with their obligations.

- 5.15. An additional issue associated with the current criminal manslaughter provisions under the Criminal Code is that they do not enable the imposition of fines on the guilty party.²³
- 5.16. Anecdotal evidence (particularly in other jurisdictions where reasonably significant fines have been in force for a number of years) suggests financial penalties, on their own, are not an effective strategy or deterrent in ensuring better health and safety at work. Specifically, we consider that financial penalties:
- a) do not ensure that the offenders restructure their workplace to comply with WHS standards;
 - b) only have an impact upon the financial returns of the corporation, and not on the motivation and/or behaviour of the responsible managers;
 - c) ensure any disciplinary action is ever taken against those who should be held responsible and accountable (especially if the hazards and risks were previously known to them);
 - d) require management to review their systems of operation so that the offence will not reoccur; and
 - e) can be easily avoided by restructuring the corporate structure or identities or by moving the organisation's assets to other corporate entities.²⁴
- 5.17. The inclusion of industrial manslaughter provisions in the WA Bill are essential as the current regulatory framework has little to no application. The introduction of industrial manslaughter offences will demonstrate the significance of workplace health and safety as a matter of public policy and to help drive cultural change in those workplaces where health and safety practices are not taken as seriously as they ought to be.
- 5.18. The purpose of creating an offence of industrial manslaughter within the WA Bill is to hold duty holders responsible where such a person causes, or substantially contributes to, the death of another through a negligent act or omission.²⁵
- 5.19. The proposition that the threat of personal prosecution is a substantial motivator to ensure compliance with work health and safety obligations is well-established.²⁶ Moreover, if law is a

22 Journal of Health, Safety and Environment, 32(1).

23 Ibid.

24 Ayers, Gerard 2013, Corporate Manslaughter legislation (A Brief summary of Australia's experience. Report prepared on behalf of the Australian Council of Trade Unions; Gunningham, N., & Johnstone, R. 1999, Regulating Workplace Safety: systems and sanctions. Oxford University Press, Oxford.

25 Australian Council of Trade Unions Submission into Review of Model WHS Laws 2018. 2 May 2018, p 56.

26 Bailey, T, J Woolley and S Raftery (2015) "Compliance and enforcement in Road Safety and Work Health and Safety: A Comparison of Approaches Journal of Health, Safety and Environment, 2015; 31(2); Clough, J (2007) "A Glaring Omission? Corporate Liability for Negligent Manslaughter" 20 Australian Journal of Labour Law 29; Purse, K and J Dorrian (2011) "Deterrence and Enforcement of Occupational Health and Safety Law", The International Journal of Comparative Labour Law and Industrial Relations 27(1).

reflection of society's values, then criminal sanctions have both a moral and symbolic role to play. As renowned WHS academics Neil Gunningham and Richard Johnstone have stated:²⁷

...symbolic or moral aims of criminal sanctions seek to apportion moral blame for criminal acts, and officially demonstrate society's intolerance of harmful behavior...we use the criminal law when our sensibilities are assaulted – when, in addition to redressing the particular problem, we want both to condemn the wrongdoers' conduct, and to stigmatize them. The criminal law both reflects existing public sentiments about the heinousness of certain activities, but can also be used to shape such perceptions, particularly if used in conjunction with media campaigns showing the reprehensible aspects of the behavior, while simultaneously emphasizing society's condemnation of that behavior...

- 5.20. Gunningham has also identified that regulation and personal liability, reinforced by credible enforcement, is the single most important motivator for a CEO in relation to their responsibility in ensuring high-level WHS standards are both implemented and maintained at their organisation's workplace.²⁸
- 5.21. At this point it is important to draw the Inquiry's attention to the submissions with respect to duty of care at paragraphs 3.1 to 3.20. Any suggestion that the law allows indiscriminate prosecution of duty holders is baseless and without merit. It is well established that the courts will have regard to the practical limits to the ability of a person to eliminate the various risks associated with a task. This is of course about control.
- 5.22. Currently, other notable jurisdictions which have passed industrial manslaughter provisions are:
- a) the ACT. The relevant legislative framework can be found within the *Crimes (Industrial Manslaughter) Act 2003* (ACT), which amended Part 2.5 of the Criminal Code 2002 (ACT);
 - b) Queensland, which introduced an industrial manslaughter provision into the *Work Health and Safety Act 2011* (Qld) (Qld WHS Act); and
 - c) Victoria, which introduced an amendment incorporating an industrial manslaughter provision into the *Occupational Health and Safety Act 2004* (Vic OSH Act)
- 5.23. Relevantly, under Part 2A, specifically section 34C and 34D of the Qld WHS Act, both the PCBU and/or a Senior Officer are criminally liable if:
- a) a worker dies (or is injured and later dies) in the course of carrying out work;
 - b) the person conducting a business or undertaking (PCBU) or senior officer's conduct (either by act or omission) causes the death of a worker; and
 - c) the PCBU or senior officer was negligent about causing the death of the worker by their conduct.
- 5.24. The ACTU Review explored how these provisions will practically work and the interaction of the existing provisions of the Qld WHS Act:

As noted by the Queensland Parliament Finance and Administration Committee, while the introduction of a new offence in WHS law will overlap to some degree with the existing criminal law, it is to be expected that in practice, conduct causing the death of the worker will be pursued under the WHS law unless the Police wish to progress the manslaughter charges instead...

...There is a question about how a new offence would interact with existing Category 1 offences. Under the current (Model Act) framework, a category 1 offence is committed where a person recklessly (i.e. through a rash or careless act or omission) exposes an individual to death or serious

²⁷ Ibid, at pp.193-194.

²⁸ Gunningham, N. 1999, CEO and Supervisor Drivers: Review of literature and current practice, Report commissioned by the National Occupational Health and Safety Commission.

injury, regardless of the actual outcome. A new offence of industrial manslaughter would apply only in circumstances where the outcome of the conduct is that a worker dies, or is injured and later dies as a result of that injury. If the person's negligent conduct causes the death of the worker, the person may be prosecuted for industrial manslaughter. The standard of criminal negligence would apply, meaning that the prosecution must prove beyond reasonable doubt that the person's conduct departs so far from the standard of care expected to avoid danger to life, health and safety, and the conduct substantially contributed to the death.

- 5.24. We note that there appears to be some consistency with the operation of the Qld WHS Act and the WA Bill with respect to the proposed industrial manslaughter provisions (particularly with respect to section 30B Industrial manslaughter – simple offence of the WA Bill. In this regard, it may be useful for the Inquiry to examine the Queensland framework to get a better understanding of how the proposal will work operationally.
- 5.25. Having regard to all the above, the CFMEU generally supports the adoption of the industrial manslaughter provisions as proposed at section 30A. Industrial manslaughter – crime and section 30B Industrial manslaughter – simple offence in the WA Bill. Notwithstanding this, we have general concerns that the provisions do not go far enough to establish culpability at the board/decision making level of a given construction company. It is the CFMEU's view that this is where cultural change of a company is driven. Board directors and CEO's must have explicit liability and share the responsibility for the actions of their work force, particularly where harm has been caused. To this end, both section 30A. Industrial manslaughter – crime and section 30B. Industrial manslaughter – simple offence must provide for:
- a) both acts and omissions which substantially contributes to death;
 - b) application to corporate duty-holders and officers who have the capacity to significantly affect health and safety outcomes. The cause of action should go not just to the immediate cause of a death, but also to the root cause of it; and
 - c) with respect to section 30B. Industrial manslaughter – simple offence, an increased penalty provision from 10 years to 15 years imprisonment.

Recommendation 5

The Inquiry support the inclusion of section 30A. Industrial manslaughter – crime and section 30B Industrial manslaughter – simple offence into the WA Bill.

Recommendation 6

The Inquiry support amendments to section 30A. Industrial manslaughter – crime and section 30B Industrial manslaughter – simple offence into the WA Bill to explicitly include:

- a) both acts and omissions which substantially contributes to death;
- b) application to corporate duty-holders and officers who have the capacity to significantly affect health and safety outcomes. The cause of action should go not just to the immediate cause of a death, but also to the root cause of it; and
- c) with respect to section 30B. Industrial manslaughter – simple offence, an increased penalty provision from 10 years to 15 years imprisonment.

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

MAY 2013



safe work australia



Safe Work Australia is an Australian Government statutory agency established in 2009. Safe Work Australia consists of representatives of the Commonwealth, state and territory governments, the Australian Council of Trade Unions, the Australian Chamber of Commerce and Industry and the Australian Industry Group.

Safe Work Australia works with the Commonwealth, state and territory governments to improve work health and safety and workers' compensation arrangements. Safe Work Australia is a national policy body, not a regulator of work health and safety. The Commonwealth, states and territories have responsibility for regulating and enforcing work health and safety laws in their jurisdiction.

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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. THE MEANING OF REASONABLY PRACTICABLE

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

Factor	Relevance
The likelihood of the hazard or the risk concerned occurring	<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>
The degree of harm that might result from the hazard or the risk	<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>
What the person concerned knows, or ought reasonably to know, about the hazard or risk, and ways of eliminating or minimising the risk	<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>
The availability and suitability of ways to eliminate or minimise the risk	<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"> ■ 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 cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.	<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 after 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. STEP ONE: IDENTIFYING THE CIRCUMSTANCES, HAZARDS AND RISKS

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

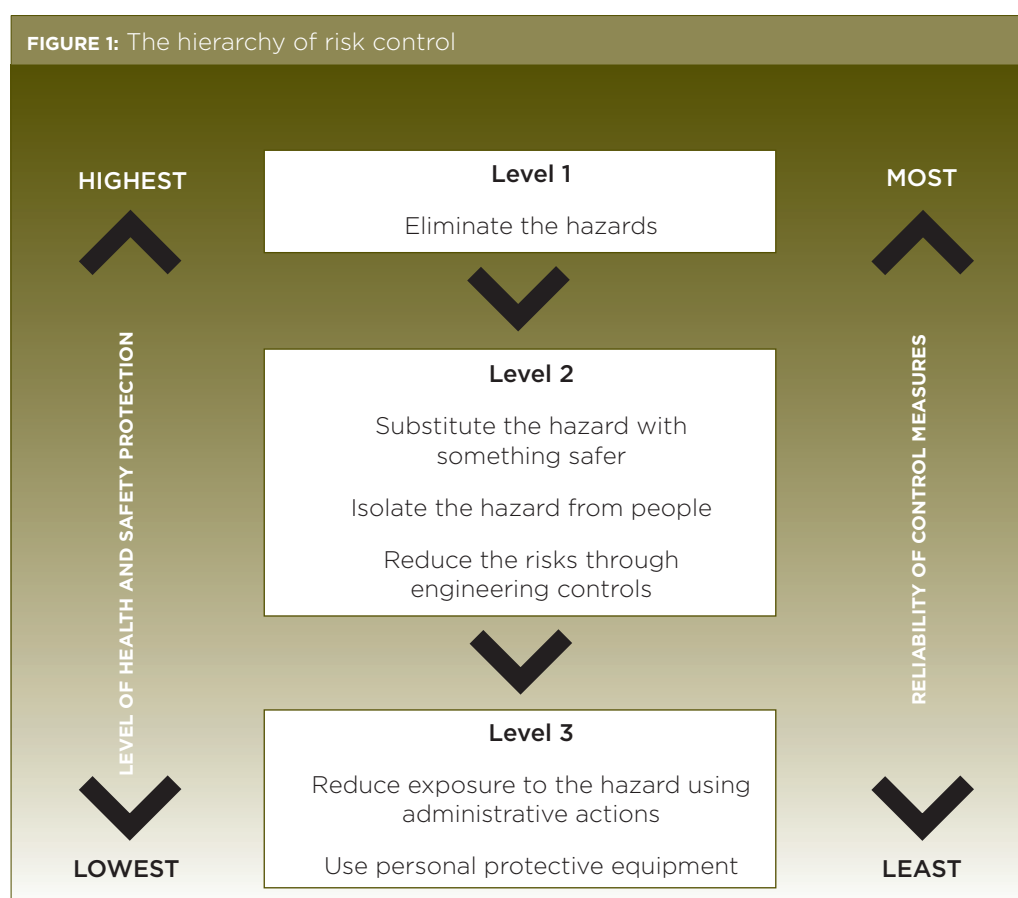
Once the duty holder understands the hazards and risks, the next step is to ask what can be done to eliminate or minimise the risks.

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

