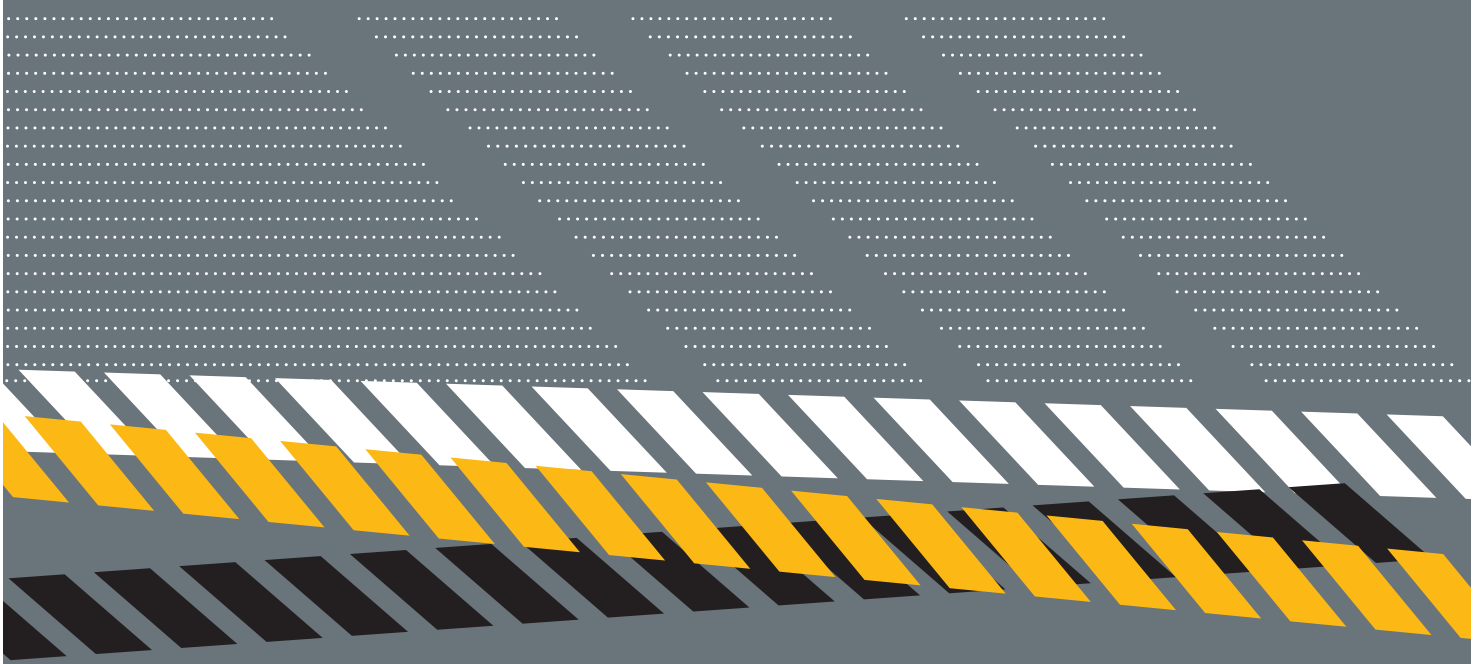
How WorkSafe applies the law in relation to Reasonably Practicable

A GUIDELINE MADE UNDER SECTION 12 OF THE
OCCUPATIONAL HEALTH AND SAFETY ACT 2004



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WORKSAFE POSITION

What this WorkSafe Position is about

This document sets out WorkSafe Victoria's position on what 'reasonably practicable' means in the context of duty-holders meeting their obligations under Part 3 of the *Occupational Health and Safety Act 2004*.

Part 3 of the Act places duties on, among others, employers (sections 21 to 23), self-employed persons (section 24), persons who manage or control workplaces (section 26), designers of plant (section 27), designers of buildings or structures (section 28), manufacturers of plant or substances (section 29), suppliers of plant or substances (section 30), and persons installing, erecting or commissioning plant (section 31), to ensure health and safety. These duties must be met so far as is reasonably practicable.

Section 20(2) of the Act provides that regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety:

(a) the likelihood of the hazard or risk concerned eventuating;
(b) the degree of harm that would result if the hazard or risk eventuated;
(c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
(d) the availability and suitability of ways to eliminate or reduce the hazard or risk;
(e) the cost of eliminating or reducing the hazard or risk.

Who does this WorkSafe Position apply to?

Any person who has duties to ensure health and safety under Part 3 of the Act.

Date

This WorkSafe Position was made on 30 November 2007.

WorkSafe Position in relation to determining what is reasonably practicable

The test for what is reasonably practicable is an objective test; that is, a person is to be judged by the standard of behaviour expected of a reasonable person in the duty-holder's position who is required to comply with the same duty and is:

- Committed to providing the highest level of protection for people against risks to their health and safety.
- Proactive in taking measures to protect the health and safety of people.

In applying the concept of reasonably practicable, careful consideration must be given to each of the matters set out in section 20(2) of the Act. No one matter determines '*what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety*'. The test involves a careful weighing up of each of the matters in the context of the circumstances and facts of the particular case **with a clear presumption in favour of safety**.

Weighing up each of the matters in section 20(2) should be done in light of the following:

(a) The likelihood of the hazard or risk concerned eventuating (Section 20(2)(a))

The greater the likelihood of a hazard or risk eventuating, the greater the significance this factor will play when weighing up all matters to be taken into account in determining what is reasonably practicable.

(b) The degree of harm that would result if the hazard or risk eventuated (Section 20(2)(b))

The greater the degree of harm that would be likely to result if the hazard or risk eventuated, the greater the significance this factor will play when weighing up all matters to be taken into account in determining what is reasonably practicable.

WorkSafe Position in relation to determining what is reasonably practicable continued

(c) What the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk (Section 20(2)(c))

Knowledge about the hazard or risk, or any ways of eliminating or reducing the hazard or risk, must be determined objectively by reference to what the person concerned actually knows and what a reasonable person in the duty-holder's position who is required to comply with the same duty should know.

What a person knows or reasonably ought to know is commonly referred to as the state of knowledge.

It is reasonably practicable for a duty-holder to proactively:

- Find within the available state of knowledge hazards before they cause an incident, injury, illness or disease. A formal process to do this is generally known as hazards identification.
- Understand within the available state of knowledge the nature and degree of harm that a hazard or risk may cause, how the harm can eventuate and the likelihood of that harm occurring. A duty-holder may have to carry out investigations or analyses to gain this understanding. These investigations and analyses are generally known as the process of risk assessment.

It is also reasonably practicable for a duty-holder to consider and understand within the available state of knowledge how the following impact on hazards and risks:

- The potential failure of plant, equipment, systems of work or risk control measures.
- Human inadvertence or error, misuse, spontaneity, panic, fatigue or stress to the extent that they affect health and safety matters relevant to the duty.
- The potential interaction between multiple hazards that may, together, cause different risks.

NOTE

Some regulations made under the Act require hazard and risk identification to be undertaken at certain times. Duty-holders must comply with these requirements. Duty-holders may not satisfy their responsibilities under the Act by conducting hazard and risk identification only when specifically required to do so by the regulations.

A duty-holder should know, within the available state of knowledge, about the ways of eliminating or reducing hazards and risks. They should know about the ways of controlling hazards and risks set out in:

- Regulations made under the Act.
- Other laws that relate to the control of hazards and risks.
- Relevant Compliance Codes and publications issued by WorkSafe.

Where the above does not provide sufficient information about controlling hazards and risks, WorkSafe expects a duty-holder to gain knowledge from other sources, including:

- Relevant reputable technical standards, such as those published by Standards Australia.
- Material published by other Australian occupational health and safety regulators.
- Industry practice and publications.
- Relevant published scientific and technical literature.

There are three broad ways of eliminating or reducing hazards and risks that can be ranked from the most effective and reliable to the least effective and reliable as follows:

1. Eliminate the hazard or risk. This involves taking action to eliminate a hazard (which eliminates all of its associated risks) or the elimination of the risks associated with the hazard if it cannot be eliminated.
2. If hazards or risks cannot be eliminated, risks may be reduced by taking action to change the risk. This can involve substituting the risk with a lesser one, engineering measures or changes to systems of work to achieve reductions, or isolating the hazard or risk from people.
3. If hazards or risks cannot be eliminated or changed to reduce them, action can be taken to reduce people's exposure to the hazard or risk. This can involve administrative actions, provision of instruction and procedures, or the use of personal protective equipment.

This ranking is known as the hierarchy of control. The objects of the Act require duty-holders to seek out ways to control risk as close to the top of the hierarchy as is reasonable in the circumstances.

The state of knowledge may provide a number of different ways to control a hazard or risk, and these should be considered when determining what is reasonably practicable in the circumstances.

WorkSafe Position in relation to determining what is reasonably practicable continued

(d) The availability and suitability of ways to eliminate or reduce the hazard or risk (Section 20(2)(d))

Equipment to eliminate or reduce a hazard or risk should be regarded as being **available** if it is available on the open market or if it is feasible to manufacture it.

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

A way to eliminate or reduce a hazard or risk should be regarded as being **suitable** if:

- it is feasible to implement in a specific circumstance; and
- it is effective in eliminating or reducing the likelihood or degree of harm from a hazard or risk; and
- it does not introduce new and higher risks, having regard to all of the circumstances; and
- it is a practical measure given the circumstances in which the hazard or risk exists.

If there are no available or suitable ways to **eliminate** a hazard or risk, it is necessary to consider all available and suitable ways of **reducing** the risk, so far as is reasonably practicable.

(e) The cost of eliminating or reducing the hazard or risk (Section 20(2)(e))

There must be a clear presumption in favour of safety. Once the likelihood and degree of harm from a hazard or risk is understood, and the availability and suitability of a relevant safety measure to eliminate or reduce the hazard or risk is established, that safety measure should be implemented unless the cost of doing so is so disproportionate to the benefit (in terms of reducing the severity of the hazard or risk) that it would be clearly unreasonable to justify the expenditure.

In determining whether a particular level of expenditure is reasonable in the circumstances, the duty-holder must have regard to the:

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

The greater the likelihood of the hazard or risk concerned eventuating, and/or the greater the degree of harm that would result if the hazard or risk eventuated, the less weight should be given to the cost of eliminating the hazard or risk.

If the degree of harm is significant, e.g. death or serious injury is highly likely, then it is extremely unlikely that the cost of eliminating or reducing the risk would ever be so disproportionate to the risk to justify a decision not to implement an available and suitable control measure.

Moreover, the question of what is 'reasonably practicable' is to be determined objectively, and not by reference to the duty-holder's capacity to pay or other particular circumstances. If two duty-holders are faced with the same hazard or risk in similar situations, one duty-holder cannot expose people to a lower level of protection simply because it is in a lesser financial position than another duty-holder.

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

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

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

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

Explanation

The case law that WorkSafe has taken into account in formulating this position includes:

- *Esso Australia Pty Ltd (DPP v Esso Australia Pty Ltd)* [2001] VSC 263
- *Holmes v R E Spence & Co Pty Ltd* [1992] 5 VIR 119
- *R v Australian Char Pty Ltd* [1999] 3 VR 834
- *Chugg v Pacific Dunlop Ltd* [1999] 3 VR 934

Effect of this WorkSafe Position

Under Section 15 of the Occupational Health and Safety Act, this WorkSafe Position does not give rise to any liability of, or claim against, WorkSafe Victoria. It does not give rise to any right, expectation, duty or obligation that a person may not otherwise have. It does not give rise to any defence that would not otherwise be available to a person.

WorkSafe Victoria will not act inconsistently with this document. WorkSafe Victoria's actions in relation to this document do not affect the operation of the *Occupational Health and Safety Act 2004* or the Regulations made under that Act.

Related WorkSafe Positions

WorkSafe Position: How WorkSafe applies the law in relation to identifying and understanding hazards and risks.

GLOSSARY

Duty-holder is any person referred to in the 'What this WorkSafe Position is about' section of this document.

State of knowledge is the knowledge that the duty-holder has, or ought reasonably to have, about a hazard or risk and about the ways of eliminating or reducing the hazard or risk.

The Act is the *Occupational Health and Safety Act 2004*.

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