

Practicability in occupational safety and health: a guide for local governments

By Scott Wade

Introduction

Within local government and business operations in general, the topic of occupational safety and health (OSH) or work health and safety (WHS) as it known in other Australian jurisdictions, is becoming ubiquitous.

Local governments make decisions on a daily basis in relation to risks to the safety and health of workers and those who may be impacted by their business or undertaking. These decisions typically involve a manager, supervisor or worker making a discretionary judgement with regard to the risks, and the adequacy of proposed actions to reduce or remove them.

The qualifying concept underpinning the weighing exercise required to discharge OSH statutory duties across all Australian Jurisdictions, is that of reasonable 'practicability'. Decision makers within all organisations including local governments must have a fundamental understanding of this concept to enable effective risk management and legislative compliance.

Legislative Framework

Safety and health in the workplace within Western Australia is currently regulated through the operation of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**), the *Occupational Health and Safety Regulations 1996* (WA) (**OSH Regulations**) and a wide variety of approved codes of practice.

All Australian jurisdictions with the exception of Western Australia and Victoria have undertaken a change to a nationally harmonised health and safety legislative framework, based on the model WHS laws developed by Safe Work Australia. The harmonised model WHS legislation is aimed at providing a 'balanced and nationally consistent framework to secure the health and safety of workers and workplaces' throughout Australia.

While this article deals with the concept of practicability with reference to the current OSH Act and OSH Regulations, this concept remains the qualifying element within the model WHS laws soon to be implemented in Western Australia.

Practicability

A question that organisations and individuals commonly grapple with when considering Occupational Safety and Health is, 'how far do we have to go?'. There is often a perception amongst employers that discharging OSH duties is an onerous, disproportionately expensive and time-consuming exercise. This perception may arise from a misunderstanding of the underlying principles of the OSH Act and Regulations, which require aligning the level of risk with the time, expense and

effort required for compliance.

The underlying principle of the OSH Act and Regulations is that of 'practicability'. The terminology used throughout the OSH Act and Regulations includes qualifying phrases such as 'so far as is practicable' and 'reasonably practicable', and understanding this principle is the key to the effective and compliant management of Occupational Safety and Health.

Section 3 of the OSH Act defines provides a definition for '*practicable*' which may provide some guidance when having regard to the implementation of controls for risks to health or safety.

'Practicable means reasonably practicable having regard, where the context permits, to —

(a) the severity of any potential injury or harm to health that may be involved, and the degree of risk of it occurring;

(b) the state of knowledge about —

(i) the injury or harm to health referred to in paragraph (a);

(ii) the risk of that injury or harm to health occurring; and

(iii) means of removing or mitigating the risk or mitigating the potential injury or harm to health;
and

(c) the availability, suitability, and cost of the means referred to in paragraph (b)(iii).'

While Section 3 provides a definition of 'practicable' several provisions of the OSH Act relevant to local government operations, apply practicability as a qualifying element. Those provisions include; s.19 – Duties of employers to employees; s.20 – Duties of employees; s.21 – Duties of employers (to people other than their own employees) and self-employed; s.21B – Duties of a body corporate; s.22 – Duties of persons who have control of a workplace (to any extent); and, s.23D – Contract work arrangements.

The principle of practicability imports scalability and consideration of context when having regard to proposed methods for controlling hazards and reducing risks. Effective implementation of safety measures within a workplace requires hazard controls that are in proportion to the likely potential impact of an incident or accident and that are also reasonably practicable to implement.

The requirement to have regard to these factors was summarised in *Slivak v Lurgi (Australia) Pty Ltd* [2001] HCA 6 (**Slivak Case**):

'Deciding what is reasonably practicable must involve balancing the likelihood of injury, and the severity of an injury that might ensue, against the availability of protective measures and their effectiveness and cost.'

How far should an organisation go when addressing hazards?

It is not considered reasonably practicable for an organisation to undertake every possible action available to prevent a

hazard from becoming an incident. The High Court of Australia has recognised this specifically in *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14 at [15], stating:

'The words "so far as is reasonably practicable" indicate that the duty does not require the employer to take every possible step that could be taken. The steps that are to be taken in the performance of the duty are those that are reasonably practicable to take to achieve the identified end of providing and maintaining a safe working environment.'

When addressing safety hazards in any business or local government, managers and other decision makers need to be satisfied that the likelihood and consequences of an incident, have been weighed against those options available to eliminate or reduce it.

As demonstrated above, by its very nature the assessment of practicability is a subjective exercise. It is therefore prudent to document this process of assessment, along with the outcome, in circumstances where a feasible potential consequence of an incident may be significant, e.g. a fatality or serious injury.

An appropriate assessment of practicability should result in actions and effort that are directly proportionate to the risk faced by the local government in all the circumstances.

Consideration of cost when assessing practicability

It is important to note that while the existing WA legislation includes the consideration of cost in the context of practicality, it is the final step in the process and should not be prioritised over other elements. This order of consideration is reinforced in the harmonised Work Health and Safety (WHS) legislation which has been adopted across Australia and is currently being reviewed for implementation in WA.

Legislation in all Australian jurisdictions reflects the requirement to consider cost as a final step when having regard to practicability. For example, the Work Health and Safety Act 2011 (Cth) includes the consideration of cost as a final step within the definition of 'reasonable practicability':

'(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.'

It would be incorrect to conclude that the cost of addressing safety issues is not a relevant consideration for organisations, and this is not the position proposed by the legislative framework. Rather, the cost of the elimination or mitigation of a hazard needs to be considered in the context of the risk itself.

Workplace Safety prosecutions

When a workplace safety prosecution is undertaken in WA in which it is alleged that there was a failure to maintain a safe workplace, the court is required to apply the principle of practicability.

The court must consider the outcome of the incident, the activity being undertaken at the time, the known level of risk (or

the level of risk that ought to have been known) and the risk mitigation measures that were available at the time. It is at this point that an assessment of practicability is made.

In WA, two recent WorkSafe WA prosecutions against local government illustrate the application of the concept of 'practicability' in implementing risk controls.

Control of workplace

In 2016 a regional Shire was successfully prosecuted under s.22(1)(a) of the OSH Act as a person

"...that had, to any extent, control of a workplace where persons who were not its employees worked or were likely to be in the course of their work..."

Unfortunately this matter concerned a fatality at a workplace. The incident occurred at a refuse site owned by the Shire and operated by a contractor. The uncle of the contractor (the deceased) was known by the Shire to help out at the site from time to time, although he was not formally employed by either the contractor or the Shire.

Situated on the site were five (5) plastic lined liquid waste ponds. A manually operated, portable petrol powered pump was used to transfer waste between ponds as required. The compound containing all 5 ponds was enclosed by a single 2.5m high 'Cyclone' wire fence.

In the fatal incident that occurred the deceased was found at the bottom of one of the ponds after an extensive search. The Shire pleaded guilty and was fined \$110,000 plus costs. The Court accepted the prosecution's submission that it would have been practicable for the Accused to ensure that individual fencing around Ponds 1, 2, 3 and 5 and an automated pump were installed and in place prior to 16 August 2013.

Work undertaken by Contractor

In 2014 a metropolitan local government was successfully prosecuted under ss 21B(2) and 23D of the Act for engaging a contractor and failing, so far as was practicable, to ensure that the safety or health of persons was not adversely affected wholly or in part as a result of work that was being undertaken by the contractor.

In this case a contractor was engaged by the local government to undertake landscaping works outside a community centre and a small shed used by a community group. To engage the contractor the local government first undertook a tender process that involved reviewing relevant safety documentation and processes. At the time of reviewing the tender the local government was satisfied that the Contractor had the required level of competency and procedures in place to complete the works. The works involved the use of a small bobcat in the vicinity of the shed.

On the day of the incident, an officer attended the site prior to the commencement of works to talk with the Contractor. The officer did not require the contractor to produce any job-specific hazard identification or other safety documentation at this time. The contractor set up traffic cones and signs to delineate the area of work and alert members of the public.

Later that day, while operating the bobcat, the contractor struck and fatally wounded a member of the public who was utilising the shed located near the works.

The Court accepted the prosecution's submission that it was reasonably practicable for the local government to have:

- '1. Required the contractor to have completed a JSA (job safety analysis), or similar hazard identification process, that addressed the risks of the work it was to perform, specifically risks to members of the public associated with the operation of the Bobcat; and
2. Satisfied itself that the JSA appeared to appropriately address those risks.

The court found that had the local government taken these measures, this would have eliminated or reduced the risk of harm.'

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The cases referred to above provide clear examples of the applicability of the concept of practicability under OSH Act to the operations of local governments. In each case the court accepted that it was practicable for the local government to have implemented further or alternative risk controls which may have eliminated the risk, or reduced the likelihood or the consequence of an accident.

Conclusion

In both the current Western Australian Occupational Safety and Health regime, and the new WHS legislation slated for implementation, practicability remains a key principle requiring consideration for businesses and local governments alike. Educating key decision makers on the nature and practical application of the principle, enables businesses and local government to make proportionate decisions that not only lead to safer workplaces, but also reduce the likelihood of expensive and public prosecutions.

For further information please contact Scott Wade on 9383 3133 or by email on swade@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.