The National Review into Model OHS Laws: A Paper Examining the ‘Specified Classes’ of Duty Holders; Reasonably Practicable and Risk Management; and Access to OHS Advice

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The paper was drafted with reference to the first and second reports of the National Review into Model Occupational Health and Safety Laws, current Australian OHS legislation (Acts, regulations and codes of practice), and peer reviewed publications. These sources are referenced through the report. Every effort was made to accurately reflect current proposals for the model OHS Act. However, final decisions relating to the model Act are not yet publicly available. Therefore, before relying on the material in this paper, readers should carefully make their own assessment and check with other sources as to its accuracy, currency, completeness and relevance for their purposes.
1. **The ‘Specified Classes’ of Duty Holders**

1.1 **Introduction – A Wide Range of Duty Holders**

The first report of the *National Review into Model Occupational Health and Safety Laws* recommends that the model Act should contain a set of principles to guide duty holders, regulators and the courts on the interpretation and application of the duty of care. The first of these would establish the principle that duties of care are imposed on those who are involved in, materially affect, or are materially affected by, the performance of work. This is reflected in the recommendation that duties be imposed on all persons who by their conduct may cause or contribute to risks to health and safety. The intention is that all those who may affect health and safety at work must accept their responsibility for health and safety at all times and no duty holder should be allowed to relinquish or pass on their duties to anyone else. To this end the report recommends that the duties of care are non-delegable; a person can have more than one duty; more than one person may concurrently have the same duty; each duty holder must comply with their duty to the required standard (eg reasonably practicable); they must comply to the extent of their control over relevant matters; and they must consult, cooperate and coordinate activities with all persons having a duty in relation to the same matter.

The basis for imposing a duty of care is that the duty holder provides, makes a specified contribution to, has involvement in or manages the activity, place of work, systems or arrangements under which the work is undertaken, things used in undertaking the work (such as plant, substances or structures), the capability (training and information), instruction, supervision or welfare of those undertaking the work, or designs, manufactures or supplies any of these elements. As such, the duties are to focus on the undertaking of work and activities that contribute to this being done.

The recommended duty holders are the person conducting a business or undertaking (the primary duty holder), officers, workers and other persons. There are also ‘specified classes’ of duty holders who are: those with management or control of workplace areas; designers, manufacturers, importers and suppliers of *plant* and of *substances*; designers, manufacturers, builders, erectors, installers, importers and suppliers of *structures*; and providers of OHS services. It is noteworthy that designers, manufacturers, importers and suppliers of other things such as work stations, work furniture or business systems would not have specific duties but would have a general duty as persons conducting a business or undertaking.

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2 First report, recommendation 1, p 18.
4 First report, paras 4.6 to 4.8, p 19.
5 First report, recommendation 2, p 20.
7 First report, recommendation 3, p 26
8 First report, recommendation 3, p 27.
1.2 Duties Qualified by ‘Reasonably Practicable’

A second principle underpinning the model Act is that all duty holders (other than workers, officers and others at a workplace) must eliminate or reduce hazards or risks so far as is reasonably practicable, and the report recommends that ‘reasonably practicable’ be used to qualify the relevant duties.\(^9\) Thus, the duties of persons conducting a business or undertaking and the duties of the specified classes of duty holders are to be qualified by reasonably practicable which the report recommends be defined (in the context of the general duties) as meaning:

That which is, or was, at a particular time reasonably able to be done in relation to health and safety, taking into account and weighing up all relevant matters including:

(a) the likelihood of the hazard or risk eventuating;
(b) the degree of harm that may result if the hazard or risk eventuated;
(c) what the duty holder knows, or a person in their position ought reasonably to know, about:
   i. the hazard, the potential harm and the risk; and
   ii. ways of eliminating or reducing the hazard, the harm or the risk;
(d) the availability and suitability of ways to eliminate or reduce the hazard, the harm or the risk; and
(e) the costs associated with the available ways of eliminating or reducing the hazard, the harm or the risk, including whether the cost is grossly disproportionate to the degree of harm and the risk.\(^10\)

In effect, complying with the duties of care so far as is reasonably practicable would require the primary and specific classes of duty holders to implement OHS risk management to identify hazards, assess risks (the degree and likelihood of harm), and eliminate or reduce the risk.\(^11\) However, the first report takes an inconsistent approach as to whether or not to explicitly include risk management in the duties of different duty holders. The report concludes that reasonably practicable should be a standard to be met rather than a process to be implemented. As such, the report says risk management should not be integrated in the definition of reasonably practicable and should not be expressly required by the duties of care.\(^12\) Nonetheless, the report recommends that the upstream duty holders should be required to implement OHS risk management (see also section 4). (For further discussion of the relationship between reasonably practicable and risk management see the presentation, ‘The Treatment of Reasonably Practicable and OHS Risk Management in the National OHS Review’).

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\(^9\) First report, recommendation 1, p 18 and recommendation 4, p 33.
\(^10\) First report, para 5.55, p 34 and recommendation 6, p 35.
\(^12\) First report, para 5.71, p 36 and recommendation 9, 37.
1.3 Specified Classes of Duty Holders are Also Primary Duty Holders

The specified classes of duty holders would have concurrent duties as persons conducting a business or undertaking and duties relating to their specific activities.\(^{13}\) As persons conducting a business or undertaking they would owe a duty of care to all persons carrying out work activities as part of that business or undertaking and to all other persons who may be affected by the conduct of the business or undertaking.\(^{14}\) They would owe this duty as the operator of the business or undertaking, whether they are a natural person, corporation or unincorporated association they would.\(^{15}\) The duty would be qualified by reasonably practicable and not by reference to control. If a duty holder does not have control over a matter relevant to health and safety, or has limited control, then this lack or limited control will be relevant in determining what is reasonably practicable for that duty holder in the circumstances.\(^{16}\)

As persons conducting a business or undertaking they would be required to ensure so far as reasonably practicable that workers engaged in work as part of the business or undertaking, and any other persons, are not exposed to a risk to their health or safety from the conduct of the business or undertaking. This would include: provision and maintenance of plant and systems of work; provision and maintenance of arrangements for the safe use of plant and substances; workplaces maintained in a safe condition; the provision of adequate welfare facilities; and the provision of information, training, instruction and supervision.\(^{17}\) It would also require monitoring of workers’ health,\(^{18}\) and notifying the regulator immediately of notifiable occurrences,\(^{19}\) but not securing the site which would rest with the person with management or control of the workplace. (The primary duty holder’s obligations are examined further in Richard Johnstone’s presentation, ‘The Primary Duty of Care of a Business or Undertaking’).

The second report of the National OHS review also recommends that the primary duty holder be required to employ or engage a suitably qualified person to provide advice on health and safety matters, with the qualifications of persons providing such advice to be addressed in the model regulations.\(^{20}\) Larger businesses or undertakings with 30 or more ‘employees’ (not workers) would be required to appoint a workplace health and safety officer (WHSO).\(^{21}\) It is understood that these recommendations are unlikely to be supported for inclusion in the model OHS Act. (See the presentation ‘Providing and Obtaining OHS Advice’ for further discussion of the reports’ recommendations relating to these issues).

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\(^{15}\) First report, paras 6.56 and 6.57, p 49.

\(^{16}\) First report, paras 6.74-6.78, p 51 and recommendation 14, p 51.

\(^{17}\) First report, recommendation 19, p 57; para 6.125, p 59 and recommendation 21, p 60.


\(^{19}\) Second report, recommendations 140, 141 and 142, p 184.

\(^{20}\) Second report, para 32.34, p 179; recommendation 139, p 180.

\(^{21}\) Second report, paras 32.34-32.35; recommendation 139, p 180.
In addition to the general duty of care of a business or undertaking, the specific classes of duty holders would have duties specific to their functions and which are not appropriate to include in the primary duty.\textsuperscript{22}

1.4 Persons with Management or Control of a Workplace Area

The duty of a person who has management or control of a workplace area would apply to any person who has, to any extent, control of a workplace (or part thereof), any area adjacent to a workplace area, fixtures, fittings or plant.\textsuperscript{23} They would be required to ensure, so far as is reasonably practicable, that these things, including means of entering and exiting them, are safe and without risks to health and safety of any person at the workplace.

The second report recommends that ‘person with management or control of a workplace area’ would be defined in the model Act as the owner of the workplace area or, if there is a lease, contract or other arrangement that provides or has the effect of providing for another person to have effective or sustained control, that other person and not the owner is the person in control of the relevant workplace area.\textsuperscript{24} An alternative definition is also provided (if the latter is not accepted) being; any person who has the ability, whether exercised or not, to influence or direct activities relating to the state or condition of the workplace (and if more than one person, then each of them to the extent to which each person has the ability).\textsuperscript{25} It is understood that such a definition is now not supported for inclusion in the model OHS Act.

The term ‘workplace’ would be defined to encompass any place at, in or upon which work is being undertaken (including during recesses or breaks in a continuing course of work) or where a worker may be expected to be during the course of work.\textsuperscript{26} To avoid doubt the definition would specifically include structures and vehicles, ships, aircraft and other mobile structures when these are used at work.

The duty of a person who has management or control of a workplace area would be to ensure that any workplace (or part thereof), any area adjacent to a workplace area, fixtures, fittings or plant, including means of entering and exiting them, are safe and without risks to health and safety of any person at the workplace.\textsuperscript{27} The duty would be qualified by reasonably practicable and would be limited to matters over which the person has management or control.\textsuperscript{28} The means of entering or exiting a work area would extend to travel to remote locations.\textsuperscript{29} Domestic premises were to have been excluded\textsuperscript{30} but it is understood the intention now is to include them to the extent that they are used for work.

\textsuperscript{22} First report, para 7.2, p 61.
\textsuperscript{23} First report, para 7.21, p 63; recommendations 25 and 26, p 65.
\textsuperscript{24} Second report, para 23.288, p 79; recommendation 95, p 81.
\textsuperscript{25} Second report, para 23.302-23.303.
\textsuperscript{26} Second report, recommendation 94, p 78.
\textsuperscript{27} First report, para 7.21, p 63; recommendations 25 and 26, p 65.
\textsuperscript{28} First report, paras 7.21-7.23, p 63; recommendation 27, p 66.
\textsuperscript{29} First report, para 7.28 and recommendation 23, p 64.
\textsuperscript{30} First report, recommendation 28, p 67.
The person with management or control of a workplace area would also be the person to whom a notice of entry by an inspector or authorised person must be given, and who is required to secure and quarantine the site in the event of a notifiable incident. 31 (They are not required to report the incident but for practical purposes would need to ensure that the person conducting the business or undertaking (if not the same person) is aware so they can report the incident to the regulator).

The issue of the use of the term ‘control’ in this duty is important to highlight. There is a clearly stated intention in the first report that control should only be used in the context of the duty of persons with management or control of workplace areas, to assist in defining the term clearly and in a manner directed to this particular use. 32 Despite this, the term control appears (in the second report) in the definition of a business or undertaking as being the activities carried out by or under the control of a person (although control is not to be defined in this context). 33 It is also included (in the first report) in the principles for determining when a duty holder must comply (to the extent of their control over relevant matters). 34 It therefore needs to be questioned whether control is to be reserved for the management and control of workplaces duty, or is it to be used more widely and, if so, with what meaning?

1.5 Persons Undertaking Activities in Relation to Plant, Substances and Structures – the Upstream Duty Holders

1.5.1 Scope of the upstream duties

There would be specific and separate duties of care based on function (design, manufacture and so on) for persons undertaking activities in relation to plant, substances and structures; in all, this will involve 15 separate duties. 35 The duties of care would be to ensure (so far as is reasonably practicable) that the health and safety of those using, contributing to the use of, otherwise dealing with or affected by the use of the plant, substances or structures is not put at risk from the construction, erection, installation, building, commissioning, inspection, storage, transport, operating, assembling, cleaning, maintenance or repair, decommissioning, disposal, dismantling or recycling. 36 Presumably these activities would be tailored to whether the item is plant, a substance or a structure. This is a more extensive coverage of the different life cycle phases than in current legislation.

1.5.2 Definitions for some items and some duty holders

‘Plant’ would be defined broadly to include any machinery, equipment, appliance, implement and tool, any component of these, and anything fitted, connected or related to any of these things. 37 The panel did not provide a definition for substances or for structures. With regard to definition of terms they adopted the approach that a term needed to be defined if its ordinary accepted meaning (or judicial interpretation in

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31 Second report, para 23.281, p 78; para 33.31, p 187; recommendation 144, p 188.
32 First report, para 7.32, p 64.
33 Second report, recommendation 83, p 44.
34 First report, recommendation 2, p 20.
35 First report, para 7.69; recommendation 29, p 70; recommendation 30, p 72.
36 First report, recommendation 31, p 72 and recommendation 33, p 74.
37 Second report, para 23.217 p 67 and recommendation 90, p 68.
similar usage) was not appropriate to its use in the model Act and needed to be modified of limited. This leaves some ambiguity. It may be of less concern for structures which have an ordinary (dictionary) definition that encompasses anything constructed including buildings, constructions, framework and arrangement of parts, although there could be some debate about whether components of structures are included. The definition of substances in OHS legislation is historically contentious as the OHS statutes defined substances broadly with reference to form and content (e.g. solid, liquid and so on; chemical entity, mixture) but without reference to the nature of any hazard. On the other hand OHS regulations, implementing national standards for hazardous substances, applied to a narrower set of substances classified according to prescribed criteria. In addition, dangerous goods legislation applied to substances defined as dangerous goods. In not defining substance in the model OHS Act can we expect that the classification criteria based on definition of hazardous/dangerous substances will prevail?

Of the activities undertaken in relation to plant, substances and structures the only one to be defined in the model Act is ‘supply’ which is to be defined as being, and occurring at the time of, passing of physical possession of a relevant item. The rationale for this definition was concern about the potential for exposure once possession is passed. There is however, a wider issue of identifying who is the supplier for the purposes of determining who owes the duty of care. There should be no possibility that a manufacturer or supplier can avoid their responsibility by consigning the item to a third party for delivery to the procurer for use at work. These issues were examined in a prosecution and appeal involving the Victorian manufacturer and supplier Lyco Industries. The company argued, unsuccessfully, that the Court had no jurisdiction to deal with charges against it because it claimed it had not supplied the machine in New South Wales, having used a series of carriers to deliver the machine.

1.5.3 Use for intended purpose

The first report discusses how far the upstream duties should apply in relation to unintended use of an item. The report recommends that the duties should apply to any reasonably foreseeable activity undertaken for the purpose for which the plant, substance or structure was intended to be used (including construction, maintenance, and so on). This stops short of requiring duty holders to contemplate any reasonably foreseeable purpose and allows duty holders to specify the intended purpose but it does require them to consider different ways the item may be used for the intended purpose. Whether this achieves the right balance will depend to a large extent upon how it is interpreted by the courts. A requirement drawing on the findings in the

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38 Second report, paras 23.2-23.3, p 32.
39 NOHSC, Approved criteria for classifying hazardous substances, NOHSC 1008, Commonwealth of Australia, Canberra, 2004 (as updated from time to time).
40 Second report, recommendation 91, p 69.
41 Second report, para 23.236, p 69.
42 Inspector Ruth Buggy v Lyco Industries Pty Ltd [2005] NSWIRComm 423; Lyco Industries Pty Ltd v Inspector Ruth Buggy (WorkCover Authority of New South Wales) [2006] NSWIRComm 396.
43 First report, recommendation 32, p 74.
44 First report, paras 7.82-7.86, p 73.
Arbor Products case might sharpen the focus on OHS by upstream duty holders. Arbor Products was found to have breached OHSA (NSW) 1983, s 18(2)(a) for failing to ensure the plant was safe and without risks to health. The key finding of the Industrial Relations Commission (IRC) in full session (on appeal) was that the statutory duty requires that plant supplied is safe, in the sense that its safety is ensured. Arbor’s wood chipping machine was not inherently safe as the chute for feeding material was too short and allowed contact with rotating blades. The IRC also found the qualification “when properly used” is intended to limit liability where the plant is safe but becomes unsafe because of misuse.

Applying the Arbor principle to the proposed requirement in the model OHS Act - that plant, substances and structures be safe for any reasonably foreseeable activity undertaken for the purpose for which the item was intended to be used - would require that the item supplied is inherently safe. The qualification ‘when used for the purpose for which it was intended’ would only limit liability where the item is safe but becomes unsafe through use for an unintended purpose. Incorporating this principle in the upstream duties would go some way towards ensuring that duty holders and the courts understand the need to ensure inherent safety, so far as is reasonably practicable, and not simply defining intended and unintended purposes.

1.5.4 Elements of the upstream duties

Apart from the overarching duty to ensure that health and safety is not put at risk, the first report also recommends that risk management should be included in the upstream duties whereas it was excluded from the other duties. The report notes that risk management is required in current OHS legislation but this is in OHS regulations (except under WHSA(Qld)). If there is no reason to include risk management for the other duties there seems to be no logical basis for including it in the upstream duties in the model Act. A consistent approach to risk management would be preferable, especially since these duty holders are also primary duty holders.

The upstream duties would also require appropriate testing and examination to identify and hazards and risks, and provision of information about hazards, risks and risk control measures. This is somewhat narrower than current requirements for information provision established variously in the OHS statutory duties and regulations, or described in approved codes of practice. For example, when considered in aggregate the statutory and regulatory provisions for plant encompass: intended use; restrictions or prohibitions on use; hazards/risks and control measures incorporated and required; conditions and systems of work to ensure the item is safe in different aspects of use (installation, maintenance, cleaning and so on); testing and examination conducted; testing and examination required and competency for this; and emergency response procedures.

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45 WorkCover Authority of New South Wales (Inspector Mulder) v Arbor Products International (Australia) Pty Ltd [2001] NSWIRComm 50.
46 Op cit 105 IR 81: para 43.
47 Ibid 105 IR 81: para 44.
48 Ibid 105 IR 81: para 43.
49 First report, recommendation 34, p 75.
1.5.5 Statute of limitations

Provision for prosecutions to be commenced within two years of the occurrence of an offence, the offence coming to the regulator’s notice, or within a year of a finding in a coronial proceeding or other official inquiry that an offence has occurred should be sufficient to enable prosecution of upstream duty holders.\(^{50}\) In the past the statute of limitations in some jurisdictions precluded prosecutions which had to be brought within two years of their occurrence.

1.6 Duties of OHS Service Providers

1.6.1 Rationale for and extent of the duty

The first report was firm in the view that providers of OHS services may materially influence health or safety by directing or influencing things done or provided for health and safety\(^{51}\) and this opinion was unchanged, despite input from different sources to the contrary, in the second report. It was also argued that service providers have obligations under current OHS laws, the common law, the Trade Practices Act 1974 and other consumer protection legislation.\(^{52}\) On this basis, persons providing OHS advice, services or products in the course of a business or undertaking, that are relied upon by other duty holders to comply with their obligations under the model Act, would have a duty of care requiring them to ensure, so far as is reasonably practicable, that no person at work is exposed to a risk to their health and safety from the provision of the services, either at the time the services are provided or some time later as a result of reliance on the services.\(^{53}\)

In further justification of the duty of OHS service providers, the second report advises that if persons are put at risk because the advice or recommendations of a service provider are not followed then it cannot be said that the risk arose from provision of the services.\(^{54}\) The duty also refers to things provided that are relied upon by other duty holders to comply with their obligations and would not lead to liability where the service was not relied upon.\(^{55}\) The intention is that service providers who do not provide services competently or provide incomplete services should be accountable for advice that was followed that was not correct.\(^{56}\) If a service provider themselves receives incomplete or inadequate instructions from the business or undertaking provided with the service then what they can reasonably be expected to do will be limited to that extent, although they would need to seek information and challenge inaccurate information where that information is significant to the service provided.\(^{57}\) The service provider might have a defence if they could not, or could not reasonably

\(^{50}\) First report, recommendation 66, p 125.
\(^{51}\) First report, para 7.105, p 76.
\(^{52}\) First report, para 7.109, p 77.
\(^{53}\) First report, recommendation 37, p 77; recommendation 39, p 78; para 7.114, p 78; second report, para 23.188-23.189, p 63.
\(^{54}\) Second report, para 23.191, pp 63-64.
\(^{55}\) Second report, para 23.192, p 64.
\(^{56}\) Second report, para 23.193, p 64.
\(^{57}\) Second report, para 23.194, p 64.
be expected to know of the inaccuracy or inadequacy of information provided to them.\textsuperscript{58}

1.6.2 Who the duty would apply to

Definitions in the second report confirm that the duty would apply to: persons providing advice or information related to OHS of any person; systems, policies, procedures or documents relevant to OHS management broadly or specific matters; training on OHS; testing, analysis, information or advice (including mechanical, environmental or biological matters).\textsuperscript{59} It would not apply to OHS officers or health and safety representatives who are employees and therefore not conducting a business or undertaking themselves.\textsuperscript{60} These people would have duties as officers (requiring due diligence) or as workers (requiring them to take reasonable care).\textsuperscript{61} The duty also would not apply to OHS inspectors, authorised persons exercising powers of entry under the model Act, emergency service personnel giving advice when responding to an incident (but it would apply to unions or emergency services if the latter are engaged to provide services in other circumstances).\textsuperscript{62} The duty would apply to legal advice except advice provided by barristers or solicitors to which legal professional privilege may apply.\textsuperscript{63}

1.6.3 Recommendation for duty not supported

All of this, at the very least, would suggest that professional associations representing service providers would have an important role to play in advising their members of the potential for liability and strategies to guard against liability. And, OHS consultants and trainers would be prudent to routinely alert and remind those they provide services to that they too have a duty of care which is concurrent with the service provider’s duty and not in any way diminished by it.

However, all of that may now be less pressing. It is understood that recommendations 37 to 39 in the first report, relating to the duty of OHS service providers, are now not supported. It is understood that the duty of persons conducting a business or undertaking is believed to sufficiently address the responsibilities of OHS service providers.

1.7. Conclusions About Specified Classes of Duty Holders

In summary, the first and second reports recommend specified classes of duty holders who would have additional duties to those otherwise required of them as persons conducting a business or undertaking. The specified classes of duty holders are persons with management or control of workplace areas; designers, manufacturers, importers and suppliers of plant and of substances; and designers, manufacturers, builders, erectors, installers, importers and suppliers of structures. They were to have included providers of OHS services but this is now not expected to be the case. The

\textsuperscript{58} Second report, para 23.195, p 64.
\textsuperscript{59} First report, para 7.112, p 77; second report para 23.198, p 64; and recommendation 89, p 66.
\textsuperscript{60} Second report, para 23.200, p 65.
\textsuperscript{61} Second report, para 23.201, p 65; and recommendation 89, p 66.
\textsuperscript{62} Second report, paras 23.203-23.204, p 65.
\textsuperscript{63} Second report, recommendation 89, pp 66-67.
specific elements of the duties vary but each one would be qualified by reasonably practicable.

Some concerns with the upstream duties are the lack of definition for substances and the definition of supply in terms of passing of physical possession, rather than placing the item on the market. The limitation of the duty of care to ensuring safety in relation to any reasonably foreseeable activity undertaken for the purpose for which the item was intended to be used may create a problem in allowing duty holders to limit their liability by specifying intended purpose, rather than ensuring, so far as is reasonably practicable, that items do not put health and safety at risk. There is an anomaly in requiring risk management of the upstream duty holders but not others, and there is some concern that the scope of their information obligation may be unnecessarily narrow.

In so far as the proposed duty of providers of OHS services was founded an assumption that they materially influence or determine OHS outcomes, it is preferable that this group owe a duty only as persons conducting a business or undertaking to ensure that no person is exposed to a risk to their health and safety arising from the conduct of the service provider’s undertaking.
2. Reasonably Practicable and Risk Management

2.1 The Legal Relationship Between These Concepts

In an article in the *Australian Journal of Labour Law* in 2005,\(^{64}\) Professor Richard Johnstone and myself examined the relationship between reasonably practicable and OHS risk management with extensive reference to statute law and case law interpreting these concepts. I will not repeat this examination of the issues here but highlight some key points. For full details of relevant cases and statute law, readers should refer to the original article.

Interpretation by the courts of the general duty provisions and reasonably practicable suggests that duty holders will need to adopt an active approach to identifying potential dangers and to assessing the severity and likelihood (probability) of risks arising. They can be expected to determine suitable preventive measures and to implement these measures unless the cost, time and trouble of doing so significantly outweigh (is grossly disproportionate to) the risk assessed. They will also need to be mindful of human limitations and inadvertence in assessing and preventing or minimising risk.

By the late 1990s, Australian courts were interpreting the general duties as requiring employers to exercise abundant caution, maintain constant vigilance, and take all practicable precautions to ensure health and safety at work, calling for a proactive rather than a reactive approach. In some cases, the courts have also stated that effective risk management is required to search for and identify all possible risks, and then to institute reasonable and practicable measures to guard against those risks. More commonly, the prosecutors in laying charges under the general duties, and the courts in determining cases, have identified failures in assessment of risks. Importantly, these cases indicate that assessment of risk should be a rigorous process of gathering information in order to understand the nature of the hazard(s), the mechanisms by which the hazard(s) could give rise to injury or ill-health and the gravity of the risk. On the basis of such an assessment of the risks, the duty holder must then determine what preventive action is required. Moreover, the assessment of risks should be undertaken on an ongoing basis.

2.2 Implications for the Model OHS Act

The approach taken in the model OHS Act (and model regulations and codes) needs to be compatible with the approach taken by the courts in determining breaches of the general duties qualified by reasonably practicable. In our submission to the National OHS Review\(^{65}\) we argued that this was best done by explicitly integrating OHS risk management into the general duties. In particular, the approach should reflect the courts’ emphasis upon:

(1) identifying, on a continuing basis, all reasonably foreseeable hazards and risks;


(2) comprehensive assessment of risks for the purpose of determining the measures necessary to eliminate or minimise risks, which requires that duty holders ‘do what it takes’ to fully understand the risks arising in particular work; and
(3) implementing the most effective risk elimination or control measures unless the cost, time and trouble of doing so would be grossly disproportionate to the risk as assessed.\(^{66}\)

Importantly, risk management should not be presented as somehow different or separate from the general duty to ensure health and safety, so far as is reasonably practicable, and it should not adopt narrower, set or formulaic approaches to risk assessment, or ranking of risks. Rather, the emphasis needs to be on rigorously identifying all reasonably foreseeable hazards, finding out about and understanding the risks that could arise from exposure to these hazards, and effectively controlling risks in order to ensure health and safety, so far as is reasonably practicable.

### 2.3 Reasonably Practicable and Risk Management in the Model Act

As discussed above, the first report recommends that the duties of persons conducting a business or undertaking, and the duties of the specified classes of duty holders, be qualified by reasonably practicable. This be defined as that which is reasonably able to be done, taking into account and weighing up: the likelihood of the hazard or risk eventuating; the degree of harm that may result if the hazard or risk eventuated; what the duty holder knows, or a person in their position ought reasonably to know, about the hazard, the potential harm and the risk, and the ways of eliminating or reducing the hazard, the harm or the risk; the availability and suitability of ways to eliminate or reduce the hazard, the harm or the risk; and the costs associated with the available ways of eliminating or reducing the hazard, the harm or the risk, including whether the cost is grossly disproportionate to the degree of harm and the risk.\(^{67}\) (See also Section 1.2 above).

Weighing up and taking into account these factors involves, in effect, a process of OHS risk management. It could not be accomplished without identifying hazards, assessing risks (the degree and likelihood of harm), and eliminating or reducing (minimising) the risk. The first report concludes that the definition of reasonably practicable should be a standard to be met rather than a process to be implemented and that risk management (as a process) should not be integrated in the definition of reasonably practicable and should not be expressly required by the duties of care.\(^{68}\) However, as discussed, weighing up factors to determine what is reasonably able to be done is a process, and that process is a form of OHS risk management – the legally accepted and required form.

The first report does recommend that risk management be included in the upstream duties.\(^{69}\) There is no clear reason why this approach is considered appropriate for the upstream duties but not for other duty holders. The report suggests that risk management is required for upstream duties in the current OHS legislation but this is

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\(^{66}\) See also E Bluff and R Johnstone 2005.
\(^{67}\) First report, para 5.55, p 34 and recommendation 6, p 35.
\(^{68}\) First report, para 5.71, p 36 and recommendation 9, 37.
\(^{69}\) First report, recommendation 34, p 75.
in OHS regulations (except under WHSA(Qld)). In fact it is exactly the same as for
the employer’s duties with risk management addressed in regulations or codes (except
under WHSA(Qld)). In my view there is no reason to treat the upstream duties
differently from the other duties qualified by reasonably practicable and to do so is
only confusing since the upstream duty holders are also primary duty holders.

Apart from the upstream duties, the second report concludes that risk management is
one method by which duty holders can meet their duty of care and questions whether:
the process is applicable in every case; adherence in and of itself satisfies the duty of
care; and failure to adhere to the risk management process should constitute a breach
of the duty of care.\(^{70}\) Further, the report argues that the focus of the model Act must
remain on achieving the outcome of safe and healthy work by eliminating or
minimising risks as far as is reasonably practicable.\(^{71}\) The second report says that as
risk management is a process for achieving compliance rather than a standard of care,
risk management should be placed in the model OHS regulations rather than the
model Act and, if suitable control measures are immediately identifiable, the risk
assessment step may not be required.\(^{72}\) The report recommends that risk management
may be addressed in both regulations and a code of practice. The latter is required in
order to clarify the nexus between the duties of care, reasonably practicable and
systematic OHS risk management.\(^{73}\)

In my view the rationale presented in the National OHS Review reports is flawed for
two reasons. On the one hand the reports fail to recognise that complying with the
general duties so far as is reasonably practicable involves a form of OHS risk
management. On the other hand they regard OHS risk management as something
separate and involving a different and optional method. The problem is then cemented
by recommending that OHS risk management be addressed, as something separate
and different, in the model OHS regulations. What we need to be aiming for in the
model OHS legislation is the understanding that OHS risk management is integral to
complying with the general duties so far as is reasonably practicable but it is a
particular form of it – the legally accepted and required form. It is the other methods
of risk management which may not comply, not risk management per se. For
example, matrix style approaches may lead to superficial and unreliable estimates of
risk, methods that encourage decision makers to determine risk control based on
numerical categorisation and ranking of risk, rather than what is reasonably
practicable, are not compatible with the legal requirement. Also, the conventional
hierarchy of control is not suitable for all types of hazards.

2.4 Proposal for an Approved Code of Practice

If the model OHS Act does not explicitly recognise that complying with the general
duties qualified by reasonably practicable is a form (the legal form) of OHS risk
management, then my view is that the problem should not then be compounded
further by setting up risk management as something separate in the regulations.

\(^{70}\) Second report, para 30.20, p 170.
\(^{71}\) Second report, para 30.22, p 170.
\(^{72}\) Second report, para 30.24, p 171.
\(^{73}\) Second report, para 30.25, p 171; recommendation 136, p 171.
Rather, the nexus between the general duties, reasonably practicable and OHS risk management should simply be explained in an approved code of practice.

This would explain that complying with the duties qualified by reasonably practicable requires identification of all reasonably foreseeable hazards and consideration of: the likelihood of exposure to the hazard or risk eventuating; the degree of harm that may result if exposure to the hazard or risk eventuated; what the duty holder knows, or a person in their position ought reasonably to know about the hazard, the potential harm and the risk; and ways of eliminating or reducing the hazard, the harm or the risk; the availability and suitability of ways to eliminate or reduce the hazard, the harm or the risk; and the costs associated with the available ways of eliminating or reducing the hazard, the harm or the risk, including whether the cost is grossly disproportionate to the degree of harm and the risk. It would indicate that for OHS, these are the essential elements of risk management. Other approaches such as described in various standards or handbooks of Standards Australia are particular methods that may be used provided they are compatible with the duty of care.

2.5 A Word About Definition of Hazard and Risk

The second report finds that the terms ‘hazard’ and ‘risk’ do not need to be defined in the model Act as they are well understood. The report says that a hazard is well understood as being any thing or situation with the potential to cause harm to people and a risk as the likelihood of a hazard causing harm and the seriousness of the potential harm. In my view the report is failing to distinguish between accepted and commonly used definitions of hazard and risk, as found in OHS regulatory instruments and OHS professional usage, and duty holder understanding of these terms. In other words, it is assumed that as these definitions are widely used in OHS regulation and by OHS professionals that they are well understood in workplaces. There is empirical evidence to suggest these terms are far from well understood by many persons with OHS responsibilities. In fact every day expressions such as ‘safety problems’ and ‘safety issues’ are in more common usage, and safety problems and solutions are often intermixed. To the extent that the terms hazard and risk are used, they are often used interchangeably. In fact, they seem to be used interchangeably in the proposed definition of reasonably practicable.

For these reasons, these terms should be defined in the model OHS Act and further explained in the proposed code of practice.

2.6 Conclusions on Reasonably Practicable and Risk Management

In summary, the case law on complying with the general duties qualified by reasonably practicable indicates that this requires an active approach to identifying potential dangers, assessing the severity and likelihood of consequences arising (assessing the risk) and determining and implementing suitable preventive measures unless the cost, time and trouble of implementing such measures significantly outweighs (is grossly disproportionate to) the risk assessed. This is a particular form of OHS risk management. ‘Risk management’ should therefore not be treated separately or differently from the general duty qualified by reasonably practicable. Rather, there is a need to convey the idea that complying with the general duties requires duty holders to rigorously identify all reasonably foreseeable hazards, find
out about and understand the consequences of exposure to these hazards and the likelihood of them occurring, and effectively control them in order to ensure health and safety, so far as is reasonably practicable. To the extent that regulations or codes or practice identify particular preventive measures, duty holders will not need to implement all of these steps but they will still need to identify the hazards in the first place.

If the nexus between the duties of care, qualified by reasonably practicable, and OHS risk management is not made explicit in the model Act (as currently recommended) it should be clearly explained in a code of practice. Risk management should not be introduced as a separate or different process in regulations. The same approach should be taken for all the duties qualified by reasonably practicable. The code should make clear the elements of the rigorous approach required indicated by case law. Key terms, including hazard and risk, should be defined.
3. Access to OHS Advice

3.1 Recommendations Relating to OHS Advice

The second report recognised that duty holders, especially in small businesses, will not always have the knowledge or experience to adequately address hazards and risks and that this need cannot be effectively met by regulators’ advisory programs. The report recommends a requirement that the person conducting a business or undertaking must, where reasonably practicable, employ or engage a suitably qualified person to provide advice on health and safety matters, with the qualifications of persons providing such advice to be addressed in the model regulations. The report also recommends that persons conducting a business or undertaking be required to appoint a workplace health and safety officer (WHSO), as required under the current Queensland OHS Act, and triggered by the presence of 30 or more employees. The report also recognised the need to consider how this requirement could be extended to non-traditional work arrangements normally involving thirty or more workers.

It now seems likely that these recommendations will not find their way into the model OHS Act. In my view this is a seriously backward step. Development of or access to OHS know-how and capability is critical to improving OHS in Australian workplaces. Also, as I outline below, provisions relating to access to OHS advice or OHS services have been included variously in some OHS statutes, regulations or approved codes of practice for many years. In particular, they are well established in the Act or regulations in the three most populous states – New South Wales, Queensland and Victoria. Moreover, when compared with arrangements in some overseas countries, the recommendations in the second report are really quite modest.

3.2 The Need for OHS Advice

In 2005, I wrote a working paper titled The Missing Link – Regulating Occupational Health and Safety Support. In that paper I examined the need for Australian workplaces to have, or to have access to, sufficient OHS knowledge and capability to be able to fulfil their legal responsibilities and to effectively protect the health, safety and welfare of people at work. The paper discussed the role, in all its diversity, of the providers of OHS ‘know-how’ and expertise, who go by an equally diverse range of names. As generalist OHS practitioners they are OHS ‘advisers’, ‘officers’, ‘coordinators’, ‘managers’ or ‘consultants’; as integrated services they are ‘occupational health (and safety) services’ or ‘units’, ‘preventive services’ or ‘OHS support’; and as specialist OHS professionals they are ergonomists, occupational hygienists, safety scientists or engineers, occupational physicians, occupational health nurses, occupational psychologists, occupational physiotherapists and occupational therapists. I used the term ‘OHS support’ to capture all of these different providers of

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74 Second report, para 32.30, p 179.
75 Second report, para 32.34, p 179; recommendation 139, pp 179-180.
76 Second report, paras 32.34-32.35; recommendation 139, p 180.
77 Second report, recommendation 139, p 180.
OHS know-how and expertise and their diverse roles. Different types of OHS know
how and capability may be needed depending on the nature of the business or
undertaking and the hazards and risks arising.

As in most developed countries, some form of OHS ‘department’, ‘unit’ or ‘service’,
staffed by OHS professionals, has been a feature of many larger organisations in
Australia, for many years. Initially, these resources were typically established in-
house but more recently, consistent with the 1980s-1990s trend to outsource non-core
business, part or all of these services may be engaged externally through some
combination of OHS consultants or corporate health services. As Ellis\(^79\) says:

Whether health and safety expertise is made available by employing people in the
workplace who have OHS qualifications or by means of subcontracting appropriate
services is not the significant issue … What is important is that organisations do have
access to sufficient and appropriate expertise.

What is needed is the active engagement of a person (or persons) who has sufficient
OHS knowledge and capability to help to lead and support preventive initiatives, and
facilitate organisational change and improvement in OHS performance. There is clear
evidence from empirical studies that having the assistance of competent and trained
personnel is associated positively with OHS performance and is a strong predictor of
success.\(^80\) Access to OHS advice and services is also particularly important in view of
the style of OHS legislation.\(^81\) The general duties central to the OHS Act, and the
process and performance-based standards incorporated in regulations offer flexibility
to address OHS as appropriate to a particular business or undertaking but present
significant challenges for any firm that lacks OHS know how and capability, and in
particular for small and medium enterprises (SMEs) which now make up most
Australian businesses and undertakings (only about 4% of Australian businesses have
20 or more employees).\(^82\)

### 3.3 Existing Provisions in Australian OHS Legislation

The Australian legislative provisions relevant to OHS advice and OHS services can
be found variously in OHS statutes (in Queensland and Victoria), in regulations (in
New South Wales and Queensland), and in approved codes of practice relating to first
aid and OHS services (in Queensland, South Australia and Western Australia).
Different approaches to providing OHS support were canvassed in my earlier working
paper together with a discussion of relevant provisions.

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79 N Ellis, *Work and Health Management in Australia and New Zealand*, Oxford University Press,
80 A Hale, J Hovden, ‘Management and culture: the third age of safety. A review of approaches to
organisational aspects of safety, health and environment’, in A Feyer and A Williamson eds,
K Nytrø, P Saksivik and H Torvatn ‘Organisational prerequisites for the implementation of systematic
Saksivik, H Torvatn and K Nytrø, ‘Systematic occupational health and safety work in Norway: a decade
81 For a discussion of types of standards see E Bluff and N Gunningham, ‘Principle, process,
performance or what? New approaches to OHS standards setting’, in E Bluff, N Gunningham and R
17-27.
82 Second report, para 32.34, p 179.
A first approach requires employers (or certain employers), to obtain or access information, or to appoint a person to perform OHS functions. This approach is taken in the OHS legislation in New South Wales, Victoria and also in Queensland (where the approach applies in tandem with the occupational health service provisions outlined below). The simplest version of this requirement applies under the NSW OHS regulation which requires that an employer must obtain information, that is reasonably available from an authoritative source, to enable him/her to fulfil the employer’s responsibilities in relation to identifying hazards, assessing risks arising from those hazards, eliminating or controlling those risks and providing information. A broader requirement applies under the 2005 Victorian OHS statute and applied for 20 years before this under the 1985 Act. This requires an employer to, so far as is reasonably practicable, employ or engage persons who are suitably qualified in OHS to provide advice to the employer concerning the health and safety of employees of the employer.

The Queensland OHS statute requires an employer to appoint a qualified person, who holds a prescribed certificate of authority, as a workplace health and safety officer (WHSO) for any workplace prescribed by regulations, if 30 or more workers are normally employed at the workplace, and a similar obligation applies to the appointment of a WHSO by the principal contractor for construction workplaces. The functions of WHSOs are: to advise on the overall state of OHS; to conduct inspections to identify any hazards and unsafe or unsatisfactory OHS conditions and practices, and report to the employer or principal contractor on these; to establish appropriate OHS educational programs; to investigate, or assist the investigation of, all workplace incidents; to help inspectors in the performance of their duties; to report any workplace incident or immediate risk to the employer or principal contractor; and any other function prescribed by regulation. The WHSO also has rights to be provided with information, to be included in any interview with a worker about an OHS issue, to be consulted about changes at the workplace, to be assisted in seeking advice on issues affecting OHS, to perform the WHSO functions in normal working hours, to have access to resources to fulfil the WHSO functions. The Queensland regulations then prescribe the industries in which WHSOs must be appointed.

Another approach, which might be termed the ‘occupational health service approach’ is found in Queensland, South Australian and Western Australian codes of practice relating to first aid. It involves extending the role of an organisation’s arrangements for first aid treatment to include some form of occupational health centre or service, organised either in-house or through an external agency that provides specialised advice or services. This typically applies to larger organisations or organisations undertaking high risk work. In addition to providing first aid, an occupational health centre or service may provide OHS advice and training, risk assessments, health

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83 OHSR (NSW), r 16(1) and (2).
84 OHSA (Vic) 2005, s 22(2)(b); OHSA (Vic) 1985, s 21(4).
85 WHSA (Qld), ss 92-94.
86 WHSA (Qld), ss 96 and 96A.
87 WHSA (Qld), s 97.
88 WHSR (Qld), r 30.
surveillance, ergonomics or occupational hygiene assessments, vocational rehabilitation or other services.

Over and above the legislative provisions, some OHS regulators also provide guidelines on selecting and using OHS consultants. WorkSafe Victoria has issued a *Code of Ethics and Minimum Service Standards* for professional members of OHS Associations.

Drawing a composite picture of provisions requiring or encouraging Australian organisations to have or engage OHS support, several things are clear. The larger jurisdictions have provisions for some kind of OHS advice or OHS service, especially for larger organisations or those conducting high risk work. However, the arrangements and their functions differ. In this regard the harmonisation of OHS legislation would provide an opportunity to recognise and build on what exists and establish clear and consistent requirements for OHS advice, and core OHS competencies for those providing these services.

### 3.4 The Situation Overseas

Internationally, almost 25 years ago the International Labor Organisation called for access to OHS services as a basic right of all working people in its Convention 161 on *Occupational Health Services*.\(^89\) Such services might include identification and assessment of risks to health, surveillance of work environment factors and practices which may affect workers’ health, advice on planning and organisation of work, programs for the improvement of work practices, health surveillance, vocational rehabilitation, information and training, and analysis of accidents and occupational disease.

More recently, a joint committee of the International Labor Organisation (ILO) and the World Health Organisation (WHO), in collaboration with the International Commission on Occupational Health, developed a model for *Basic Occupational Health Services* (BOHS).\(^90\) The BOHS model envisages a wide-ranging advisory and support role, embracing occupational health and safety; prevention activities, treatment and rehabilitation; and addressing specific hazards as well supporting organisational change in OHS.\(^91\) The activities include orientation and planning, work environment surveillance, health surveillance, risk assessment and preventive action, information and education, first aid and emergency preparedness, treatment and rehabilitation services, record keeping and evaluation.

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European Union member states have also adopted arrangements to implement Article 7 of the European Union’s *Framework Directive* 92 ‘on the introduction of measures to encourage improvements in the safety and health of workers at work’ which provides that an employer must designate one or more persons, with the necessary capabilities and means, from within the undertaking to provide protective and preventive services. Alternatively, if such arrangements cannot be made, through lack of competent personnel in the undertaking, the employer must engage competent external persons or services. In either case, the Directive calls for sufficient people to be designated or engaged to organise the protective and preventive measures for the organisation, taking into account the size of the undertaking, the type of hazards and their distribution throughout the undertaking.

I reviewed the implementation of the BOHS model and requirements of the *Framework Directive* in a number of European countries in my earlier working paper and will not repeat that here. Important findings of that review were that coverage of employees by OHS services is higher in countries with longstanding requirements for all employers to provide or use OHS services and where OHS services have enjoyed longstanding, bipartisan support from industry and unions. The services are provided through enterprise-based, industry or group, and other external services, and specific courses of education are either mandated or established in collaboration with OHS professional associations to promote and ensure professional competence.

### 3.5 Conclusions About OHS Advice

The Australian recommendations for businesses or undertakings to be required to employ or engage persons to provide OHS advice, and to have WHSOs in some circumstances, are really very modest compared with overseas initiatives. If included in the model OHS Act they would continue measures required in Victoria for nearly 25 years and in Queensland for more than 10 years, and they are not out of step with requirements in New South Wales. There is also provision for OHS services in larger and high risk organisations in South Australia and Western Australia.

Development of or access to OHS know-how and capability is critical to improving OHS performance in workplaces. The ILO regards access to OHS advice and services to be a basic right. Perhaps the latter can be a basis for restoring the recommendations about OHS advice in the model OHS Act, since there is a government commitment to include requirements in OHS legislation that would enable ratification of ILO Conventions. 93

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93 Workplace Relations Ministers’ Council April 2009, reported in *OHS Alert*, 3 April 2009.