

# Reasonable practicability in practice – A practical understanding of a legal concept

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## Introduction

Under the *Coal Mining Safety and Health Act 1999* (Qld) (**CMSHA**) and the *Mining and Quarrying Safety and Health Act 1999* (Qld) (**MQSHA**), the risk to persons from coal mining operations is to be at an acceptable level. An acceptable level of risk is defined as being:

- (1) within acceptable limits; and
- (2) as low as reasonably achievable.

This definition is not a technical formula which provides a simple yardstick against which risk and compliance with the law can be measured. Thus, before providing practical advice we will need to provide some context to that advice. To assist in providing this theoretical overview, we will examine the case of *Roger Billingham v Thalanga Copper Mines Pty Ltd and Anor* (**Thalanga Copper**).

We will then use the lessons learnt from the judicial analysis in this case to provide some practical tips about complying with the duty.

## Reasonably achievable and reasonably practicable

The terms “within acceptable limits” and “as low as reasonably achievable”, contained in the definition of acceptable level of risk are symbiotic, in the sense that (in normal circumstances at least) if risk is “within acceptable limits” it may well also be “as low as reasonably achievable” and vice versa.

Thus, for the purpose of this analysis we will focus on the requirement to manage risk so that it is “as low as reasonably achievable” as our yardstick.

“As low as is reasonably achievable” is an objective test, which means that the duty is viewed in light of what could reasonably have been achieved in managing the risk at the relevant time.

This requirement is not dissimilar to other pieces of legislation which deal with this issue in a slightly different way, by requiring that individuals maintain risk at a level which is as low as is reasonably achievable. For example, the new *Work Health and Safety Act 2011* (Qld) (**WHS Act**), which sets out a standard of reasonable practicability in relation to managing risks, sets out a number of factors (which are inclusive rather than exclusive) to be considered when determining whether actions taken by duty holder are or are not reasonably practicable. Those factors are:

- (1) the likelihood of the hazard or risk concerned occurring;
- (2) the degree of harm that might result from the hazard or the risk;
- (3) what the person concerned knows, or ought reasonably to know, about:
  - (a) the hazard or the risk; and
  - (b) the ways of eliminating or minimising the risk;
- (4) the availability and suitability of ways to eliminate or minimise the risk;
- (5) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the costs associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

This list, while not exhaustive, is a good representation of the sorts of factors which should be considered when determining whether risk on mine sites is “as low as is reasonably achievable”.

This general guidance should be borne in mind when considering the matter of Thalanga Copper.

## Thalanga Copper

The Thalanga Copper matter arose as the result of a mine worker being crushed by the movement of an articulated vehicle. The vehicle had two lockout devices designed to stop it from articulating. The first of those devices was a manual device that the driver had to engage and the second was a fail-safe device which stopped the loader from articulating when the door was open.

Unfortunately, for reasons unknown, the first device was not engaged when the driver left the vehicle, and the second device failed. As a result of this, the driver was crushed while standing outside of a vehicle when a movement occurred.

In its defence, the operator submitted that it should not be held to be liable for the incident on the following basis:

- (1) suggesting that the operator had an obligation to ensure that the second device was operating imposed strict liability on the defendant, rather than the duty to keep risk as low as reasonably achievable;
- (2) the defendant took reasonable precautions to prevent the contravention and that the only further action it could have taken to prevent the contravention was to undertake the maintenance functions itself, which it could not do as it is not a qualified engineer;
- (3) that another party (i.e. the relevant contractor) had responsibility for maintaining the machinery; and
- (4) that in any event, the deceased worker had deliberately attempted to defeat the safety system and thus the culpability of the operator would be removed by that action.

However, the court found that the “standard non-operational fail-safe device” (the second device described above), was non-operational despite the manufacturer specifying it be subject to daily operational testing. The court further found that notwithstanding the voluminous audits, schedules and checklists there was no requirement for daily recording of the necessary checks recommended by the manufacturer (including the check of the relevant device). The court also found that:

- (1) a tick and flick approach had been taken in relation to maintenance of other parts of the machinery, including other parts of machinery being certified as operating properly when they were not; and
- (2) other records indicated failure to properly maintain equipment including three different maintenance requirements which were to be undertaken at various times in November, which had not been completed by 10 December and were still defective after the incident.

In light of this generally poor performance, and of the fact that the defendant could not show that it had undertaken proper checks (particularly in circumstances where the manufacturer had recommended those checks), the Court said as follows:

*“The question to be asked is whether Thalanga could have and should have done more than they were doing to address safety issues so that the level of risk was within acceptable limits and as low as reasonably achievable.”*

The court then considered the state of knowledge of the defendant, which had warned the contractor about its safety performance, stating:

*“In that state of knowledge, the defendant could not rely on its contractor to perform its obligations under the Act and it should have done more. It could have engaged an independent third party to look at the entire safety system. In the circumstances that would not have been unjustified. A lower level of risk was reasonably achievable. The inadequacy*

*response to the audit report, for example... the sloppy manner of completion of checklists and the failure to recognise the need for daily operational checks of fail-safe safety devices are such that I consider a lower level of risk was reasonably achievable.”*

### **What lessons can be learnt from this?**

For the risk to have been as low as reasonably achievable in relation to this matter, the following should properly have been done:

- (1) the manufacturer’s advice should have been followed in relation to the regular checking of the safety device;
- (2) those checks should have been documented, and there should have been proper training and instruction in the requirement to undertake them;
- (3) the performance of the maintenance contractor (in relation to the checks) should have been audited;

In addition to this, there are a range of other controls which, if they had have been in place, would have likely prevented the incident.

### **What things should be considered more broadly in ensuring how risk should be brought to a level that is as low as reasonably achievable?**

There are two elements to ensuring that risk is as low as is reasonably achievable. The first of these is to ensure that hazards are properly identified and appropriately controlled and risks therefore properly managed. The second element is then ensuring that this is done in such a way as to be documented and auditable.

This includes:

- (1) relevant workers being properly consulted in the hazard identification and risk assessment process;
- (2) relevant workers being properly trained in policies and procedures relevant to the work which they undertake;
- (3) the safety and health management system being easily available to all workers on site;
- (4) procedures being written for their audience so that they are able to be fully understood by the people using them;
- (5) the implementation of procedures is properly monitored;
- (6) procedures are reviewed and re-assessed and when new hazards are identified, the risks arising from those hazards should be assessed and the hazards controlled; and
- (7) audits should ensure that procedures are properly followed and (tick and flicks) are not permitted.