Submission to Safe Work Australia re draft code of practice *Managing Risks in Forestry Operations* – John McDonald

The fundamental tool for maintaining a safe workplace is risk management. Where there are multiple parties operating in a workplace, either sequentially or concurrently, simply stating that all parties have a duty to ensure safety is trite and of limited practical value. The better approach is to have the party best equipped to deal with a particular risk, take responsibility for managing that risk. This in no way abrogates the relevant responsibilities of other parties.

The law has long recognised that it may be reasonable and appropriate, in particular circumstances, for a party to rely upon the expertise of a contractor in carrying out aspects of that party's business. Whilst the High Court has stated that often, questions of safety and practicability raise issues of common sense rather than special knowledge[1], there are also many cases where specific expertise from a contractor is required[2].

A factor in determining where the liability for a breach of safety lies is that of control. A person conducting a business or undertaking will frequently be a principal, with contractors engaged at the workplace to perform specific tasks. In the National Review into Model Occupational Health and Safety Laws – Second Report January 2009 the expert panel discussed the issue of control in some detail[3], and concluded that the common law adequately dealt with this. As no attempt was made to define control in the Act, it is to be assumed that parliament agreed.

Accordingly, Table 1 of the draft code of practice Managing Risks in Forestry Operations is flawed. The "typical activities" are not, and those set out mislead as to the real nature of the relationships between parties *vis-a-vis* risk management. The danger here is that a literal or zealous approach by regulators, based on the examples given, would unfairly prejudice many parties. Some examples may illustrate this point.

Consider 3 controllers of land – a resource management agency (eg a forestry department), a land management agency (eg a Crown lands department) and a farmer. Consider the first bullet-point in Table 1, ensuring roads are properly built and maintained. It is likely that the first-mentioned controller will have road-building expertise. However, it is unlikely that the

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[1] Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249, 260 per Dawson, Toohey & Gaudron JJ; [1990] HCA at [17] – [19]

[2] Complete Scaffold Services Pty Ltd v Adelaide Brighton Cement Ltd [2001] SASC 199 at [56] and [57] per Doyle CJ (Williams & Martin JJ concurring)(not reasonably practicable to exert control over a skilled independent contractor); R v Associated Octel Ltd [1994] 4 All ER 1051, 1063 (approved by the Victorian Court of Appeal in R v ACR Roofing Pty Ltd [2004] VSCA 215; (2005) 11 VR 187 [68] and in Reilly v Devcon Australia Pty Ltd [2008] WASCA 84 at [68]) ("It may not be reasonably practicable for him to do other than rely on the independent contractor")

[3] National Review into Model Occupational Health and Safety Laws – Second Report January 2009 at 23.71 – 23.90

second will do so, and even more unlikely that it will know what standard of road is necessary for forest harvesting and cartage for particular instances of terrain. The farmer is unlikely to have any knowledge at all, and may have to deal with (as an example) pre-existing log culverts or small timber bridges. The road architecture will be best assessed by harvesting and transport contractor, perhaps with assistance from a forest engineer, who will know what is the minimum required radius of curve, what is the likely gross tonnage the trucks to be used, and so forth.

Of course, it may be argued that the controller of land should engage an expert to make the appropriate assessment and recommendations. The simple solution is to engage the contractor who will be required to use the road, so as to better ensure a satisfactory outcome.

The second cell of the table lumps together very disparate parties; land owners or forest managers, timber business owners, and principal contractors. Taking the third bullet-point as an example, why would (or should) the operator of a retail timber yard be expected to, or even be competent to, conduct a job safety analysis in consultation with contractors? Why should a farmer? Even State forest agencies nowadays have few, if any, people who are actually competent to assess the safety of a harvesting operation – most are professional planners, conservation biologists, resource analysts and the like.

It is frankly ludicrous to suggest that farmers, sawmill operators, or timber retailers should be expected to:

- Decide on the appropriate harvesting method;
- Allocate coupe/harvesting sites and schedules according to contractor skill and equipment;
- Ensure work can be safely conducted in the allocated time;
- Establish emergency procedures;
- Develop traffic management plan; or
- Monitor and supervise contractors to ensure safe system of work.

Some years ago I was asked to assist in establishing a protocol for managing safety for harvesting and transport operations for a State forest agency. The model adopted, which I believe meets all elements of the new Act, required the following:

- All potential contractors (road construction, harvesting, transport) be registered as approved contractors, subject to a rigorous desktop audit of the contractors' safety systems together with demonstrated compliance to all relevant legislation (eg all operators to have commercial chainsaw certification);
- Approved contractors to be given a documented list of known hazards for the area to be harvested (eg power line location, mine adits);
- Contractor to make a full site inspection with an agency representative;
- Contractor to sign off on roading or harvesting plan;
- Contractor to take exclusive control of the site (workplace) for the duration of the contract activity;
- No other contractor or agency personnel to work in the vicinity without the express permission of the prime contractor (eg seed collection following harvesting may be

permitted by the contractor, on sub-areas already harvested and vacated, and not adjacent to current harvesting);

- Agency to hire independent harvesting safety auditors to assess each approved contractor, in the field, on a regular but random basis;
- Control of the site to not be returned to the agency until a hazard assessment (and any requisite remedial measures) completed, eg removal of dangerous trees;
- Annual performance reviews for contractor to maintain approved status, including assessment of all safety reports from agency personnel, contractor, auditor and regulator.

The point is that each element in the chain, from forest planner, harvesting coupe boundary marker, road locator, engineer, harvesting contractor, transport operator, to timber mill supervisor is involved in the safety planning process *to the extent of their knowledge and expertise*. This is appropriate practical risk management, not an arbitrary dictation of responsibility regardless of capacity.

Who am I?

I obtained a degree in forest science from ANU in 1975, and was employed as a professional forester in Tasmania from 1976 to 1993. My work included 4 years of operational and milling trials, and 6 years supervising native forest harvesting and regeneration in the field.

I was admitted to legal practice in 1993 and have since worked in Tasmania as a barrister and solicitor, primarily on forestry-related matters. I am an honorary fellow of the Safety Institute of Australia.

I am happy to provide any further information or explanation upon request.