

# News

Safety, Health & Environment

January 2009



## Introduction

In this edition of SHE News we:

- Introduce the **Health & Safety (Offences) Act** which comes into force on 16 January 2009.
- Consider the **Environmental Damage (Prevention and Remediation) Regulations**, which introduces a statutory duty to notify which Defra have now advised now likely to come into force on 1 March 2009.
- Consider where responsibility lies for **gas safety**.
- **Consider the Consumer Protection from Unfair Trading Regulations 2008** which came into force on 26 May 2008 and what this means for business.
- Consider the issue of **carbon commitments** and what this means for business.
- Consider the topical issue of **driver tiredness** and introduce the **Road Safety Act 2006**.

- Look at the health and safety and environmental regulatory landscape including **statistics, prosecutions and legislation** that impacts on regulation.
- We welcome our newest member of the SHE Group, **Claire Harvey** who is a welcomed addition to our nuclear capabilities and an expert in the transportation of radioactive and other hazardous waste.

We trust you find the selected topics news worthy and of interest. The information covered in this SHE News bulletin is correct as at the time of going to publication.

### FURTHER INFORMATION

If you require further information, please contact:

**Russell Fitzpatrick**  
Professional Support Lawyer  
Safety, Health & Environment  
T: +44 (0)20 7655 1643  
E: [russell.fitzpatrick@hammonds.com](mailto:russell.fitzpatrick@hammonds.com)

Illegal operators have incentives to undercut honest businesses, because penalties imposed often do not reflect the commercial advantage.

## The Health and Safety (Offences) Act 2008: Imprisonment for Directors

"Illegal operators have incentives to undercut honest businesses, partly because penalties are low absolutely, but more worryingly because penalties imposed often do not reflect the commercial advantage a business has gained from non-compliance" (Phillip Hampton).

The Hampton Review on regulation and enforcement in 2005 concluded that there was little deterrent for businesses under existing regulatory enforcement legislation and that the courts needed the ability to hand down greater fines and increased sentences.

The Health and Safety (Offences) Act 2008 (the "Act") aims to address this for health and safety

offences by amending Section 33 of the Health and Safety at Work Act 1974 ("HSWA"). The Act inserts a new Schedule 3A into HSWA, which provides new enforcement measures in relation to the offences set out in the HSWA. The key new provisions under the Act are designed to:

- Raise the maximum fine which may be imposed in the Magistrates' Court to £20,000 for most health and safety offences;
- Make imprisonment an option for more health and safety offences in both the Magistrates' and Crown Courts; and



- To view a copy of the Health & Safety (Offences) Act 2008 [click here \(Explanatory Note\)](#)
- For those interested in the Parliamentary Debate [click here.](#)
- To view the HSE's Enforcement Policy Statement [click here.](#)
- The Magistrates Court Sentencing Guidelines (updated to 9 December 2008) can be viewed by [clicking here.](#)
- Hammonds LLP SHE Group have produced a more detailed News Bulletin on the Health & Safety (Offences) Act 2008, which can be viewed by [clicking here.](#)

- Make certain offences, which are currently tried only in the lower courts, triable in either the Magistrates' or Crown Courts.

This Act has been through several readings in the House of Commons and the House of Lords and received royal assent on 16 October 2008. The Act comes in to force on 16 January 2009 and will apply to Great Britain and Northern Ireland.

In a House of Commons Second Reading on 1 February 2008, the Labour MP Keith Hill, who introduced the Health & Safety (Offences) Bill, emphasised the importance of proportionality in the application of the new penalties. He also stated that the Bill came about in response to remarks made by the Judiciary on the lack of imprisonment as an option for health and safety offences. He argued that increased penalties set out in the Act, would bring about a tougher, more commensurate punishment, more effective deterrents and greater efficiency in the dispensation of justice. Whether it does, remains to be seen.

One concern is that many of the offences under the HSWA have a reverse burden of proof for the defendant and that such offences would be better handled at a Crown Court with a jury rather than by lay magistrates. Under section 40 HSWA, where an offence stipulates that a duty is owed (for example to an employee) the onus is on the defendant to prove that they took all reasonably practicable steps to comply with that duty. However, whether a defendant has taken all reasonably practicable steps is a question for a Jury in the Crown Court, there is no reason why lay magistrates should not be able to deal with such a question. Further the option of imprisonment by the lower courts is available under other regulatory legislation, such as The Environment Protection Act 1990.

The Government hope that the Act will make businesses more accountable for failing to apply fit and proper health and safety practices. Whilst businesses need to be aware that health and safety offences could now mean much larger financial penalties, it is the possibility of Directors, Managers and employees receiving prison sentences that is the key change.

The HSE Chair Judith Hackitt has said: "The new Act sends out an important message to those who flout the law. However, good employers and good managers have nothing to fear. In fact, they have much to gain.

"I want to remind businesses that there are no changes to their existing legal duties and that important safeguards are in place to ensure these new powers will be used sensibly and proportionately.

"Our enforcement policy targets those who cut corners, gain commercial advantage over competitors by failing to comply with health and safety law and who put workers and the public at risk."

This suggests that only those showing a complete disregard for health and safety are likely to face imprisonment and there are strict guidelines that are to be observed by the regulators in their approach to the prosecution of health and safety offences. The HSE Enforcement Policy Statement makes it clear that prosecutions should be in the public interest and only be sought where one or more of a list of circumstances apply, including:

- where death was a result of a breach of the legislation;
- there has been reckless disregard of health and safety requirements;
- there have been repeated breaches which give rise to significant risk, or persistent and significant poor compliance; or
- false information has been supplied wilfully, or there has been intent to deceive in relation to a matter which gives rise to significant risk.

Legal duties have not changed but directors and managers will need to be aware that the consequences of getting health and safety wrong may cost their liberty.

For more information on how the penalties for health and safety offences will change under the Act please [click here.](#)



**FURTHER INFORMATION**

If you require further information, please contact:

**Rob Elvin**

Partner  
National Head of Safety, Health & Environment  
T: +44 (0)161 830 5257  
E: [rob.elvin@hammonds.com](mailto:rob.elvin@hammonds.com)

**Chantal Cain**

Associate  
Safety, Health & Environment  
T: +44 (0)207 655 1174  
E: [chantal.cain@hammonds.com](mailto:chantal.cain@hammonds.com)

# Polluter Pays: The Environmental Liability Directive

To return to the Index [click here](#)

The Environmental Liability Directive (“ELD”), adopted by the European Union in 2004, is currently being implemented across Europe, creating a pan-EU framework for environmental liability. Based on the ‘polluter pays’ principle, ELD requires operators of certain activities (see below) to identify and prevent environmental threats. These include damage to protected species in their natural habitats, water damage and land contamination.

Whilst the implementing regulations, the Environmental Damage (Prevention and Remediation) Regulations (“Regulations”), were expected to come into force on 31 December 2008, Defra have advised that this is now more likely to be 1 March 2009 - final Regulations and guidance should be made available on the Defra website during January 2009. The EU implementation deadline was 30 April 2007 but the UK is one of many Member States yet to implement the legislation.

Key points under the Regulations are summarised below:

**INTERACTION WITH CURRENT REGIME**

The current UK regulatory regime, which includes Part IIA of the Environmental

Protection Act 1990 (“Part IIA”), the Water Resources Act 1991, and the Wildlife and Countryside Act 1981, already covers aspects of damage to land, water and habitats respectively.

**WHAT IS ENVIRONMENTAL DAMAGE?**

Not all damage is covered under the new Regulations. The definition of ‘environmental damage’ will be limited to:

- damage to protected species, natural habitats or sites of special scientific interest if this is caused by a designated activity (see below), or an activity where the responsible operator intended to cause damage or was negligent as to whether such damage was caused;
- damage to surface water and groundwater (the damage must be linked to a designated activity and affect water quality values as described in the Regulations); and
- contamination of land by substances, preparations, organisms or micro organisms that results in a significant risk of adverse effects on human health.

**Not all environmental damage is covered under the new Regulations.**



---

## The Regulations trigger a positive duty on the operator to notify the relevant regulatory authority.

---

### WHO IS AFFECTED?

The Regulations apply liabilities to operators of activities, whether public or private and whether or not carried out for profit. An operator of an activity includes any person or company, who operates or controls the activity.

### A NEW DUTY TO NOTIFY

The Regulations require that operators take immediate action to prevent damage when:

- there is an imminent threat of 'environmental damage';
- there are grounds to believe the damage will become 'environmental damage'; or
- there is actual environmental damage or reasonable grounds to believe the damage is or will become environmental damage.

Where such damage is contemplated, the Regulations trigger a positive duty on the operator to notify the relevant regulatory authority. This new duty may require operators to revise their operational policies accordingly.

Under the Regulations, a responsible operator must immediately take all practicable steps to prevent the damage and unless the threat has been eliminated, he must notify all relevant details to the appropriate enforcement authority. The Regulations do not provide a list of criteria for operators to judge whether the actions they take are sufficient. It is therefore not clear whether a subjective or objective test will be used to decide whether an operator has absolved itself of the duty to notify.

### NOTICES SERVED

Where damage or the threat of damage has been notified, an enforcement authority can serve a notice to the responsible operator. The notice will describe the threat; specify measures to prevent the damage; and require the responsible person to take measures or measures equivalent within a specified period.

Where an authority becomes aware of possible environmental damage, it must assess the damage and identify the responsible operator. The authority then notifies him that damage is environmental damage.

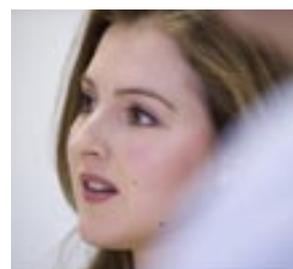
### APEALS

An operator can appeal against an authority's notification of environmental damage within 28 days. Grounds of appeal might include: the absence of a causal link between activity and damage; that the damage is not 'environmental damage'; or that the damage resulted from compliance with compulsory instructions from a public authority. The government has also decided to include a 'permit defence' in the grounds for appeal under which it is a defence for damage to be caused under an express authorisation for one of the activities listed in Schedule 3 of the Regulations. Schedule 3 contains examples of permits for work that may cause environmental damage such as such as work with waste, landfill, water abstraction, incineration plants and genetically modified organisms ("GMO's") (this defence is not available in relation to GMO's in Wales). The appeals provisions also include a 'state of the art defence', which allows environmental damage to be judged according to the state of scientific and technical knowledge at the time. The Directive allowed for Member States to derogate from the 'permit' and 'state of the art' defences but the UK has taken the decision to include them.

Once an environmental damage notification is issued, the authority must consult the responsible operator and interested parties. Interested parties are in general, anyone who is likely to be affected by the damage. The responsible operator can submit proposals and the authority will decide what measures will be required. The authority then serves a formal remediation notice on the responsible operator detailing the objectives of the remediation; primary, complementary and compensatory actions to be taken; results required; timescales and reporting arrangements. The responsible operator can appeal this type of notice within 28 days, but only to suggest more appropriate methods of remediation.

### WHAT IS A THREAT OR IMMINENT THREAT?

This is not defined in the Regulations. The draft guidance produced by the UK environment ministry Defra states that this is where 'sufficient likelihood that environmental damage will occur in the near future'.



Defra have confirmed that more examples of what constitutes 'imminent threat' of 'environmental damage' will be issued with the final guidance. The draft guidance currently gives two examples:

- Where an event is likely to occur in the future that will cause environmental damage if nothing is done. For example, a storage tank, in poor condition, containing dangerous substances, situated near an aquifer, may require action by the operator in charge of the tank to secure its contents and prevent a leak from occurring.
- Where an event has already occurred, but no damage has been sustained but could occur if nothing more is done. For example, the same tank above has started to leak, the substances have entered the soil and are likely to seep into the aquifer if nothing is done. This may require action by the operator to repair the tank and clean up the contamination of the soil to minimise contamination of the aquifer.

### DESIGNATED ACTIVITIES

Schedule 2 of the Regulations list designated activities, which include:

- the operation of an installation subject to a PPC (pollution prevention and control) permit (now an Environmental Permit);
- waste management operations, including collection management and treatment, and trans-boundary shipments;
- discharges into surface waters and groundwaters that require prior authorisation;
- water extraction and impoundment subject to prior authorisation;
- the manufacture, use, storage, processing, filling, release into the environment and on-site transport of dangerous substances, dangerous preparations; plant protection products; and biocidal products;
- the transport by road, rail, inland waterway, sea or air [or] dangerous goods or polluting goods;

- the operation of installations combating air pollution from industrial plants; and
- any contained use, including transport of genetically modified organisms GMOs or placing on the market of GMOs.

There is strict liability for operators carrying out designated activities. An operator can be found liable for environmental damage stemming from such activities, irrespective of intention. Operators of other occupational activities may be liable only for biodiversity damage (not water or land damage) caused intentionally or through negligence.

### EXEMPTIONS

The Regulations are not retrospective and will not apply to damage caused by incidents occurring before they come into force. However, it is envisaged that ongoing impacts will be covered. For example, if as a result of an operator's activity before the Regulations come into force, the foundations underneath a chemical tank next to an aquifer are disturbed, which leads to a crack later forming when the Regulations are in force, the operator may not be culpable for the activity in question under the Regulations, but may be for the eventual environmental impact.

The Regulations will not apply if it is not possible to establish a causal link between diffuse pollution damage and the activities of individual operators.

Finally, the Regulations will not apply to damage caused by an incident that took place 30 years or more before the damage.

### REMEDATION

Once an authority has notified an operator that damage is 'environmental damage', the authority will decide whether to impose remedial measures on the operator by way of a remediation notice. The authority will take into account the operator's proposals for measures and the opinions of other interested parties.

Land remediation under the Regulations requires that all contaminants are removed, controlled, contained or diminished to the extent that the damage no longer poses any significant risk to human health. "Significant

There is strict liability for operators carrying out designated activities.



- To view the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [click here](#).
- To view the Draft (England) Regulations as at 27 May 2008 [click here](#).
- To view the Draft (Wales) Regulations as at 27 May 2008 [click here](#).
- To view the Draft Guidance as at 27 May 2008 [click here](#). To view Defra's "Quick Guide: The Environmental Damage Regulations" [click here](#).

Risk" is not defined in the Regulations but the draft guidance to the Regulations suggests that this is ultimately a matter of judgement. "Human health" is also not defined; the list of what is potentially a risk to human health is wider under the Regulations than under Part II A. The draft guidance to the Regulations provide a list of what may constitute 'adverse effects on human health', these include, gastrointestinal disturbances (nausea, vomiting, diarrhoea), respiratory tract effects (cough, sore throat) and central nervous system effects (headache, lethargy, drowsiness)

Water remediation under the Regulations can include the following:

- Primary remediation: If some or all of the damage at the site is reversible, measures are imposed to return the damaged resources or impaired services back to the condition they would have been in had the damage not occurred in the first place;
- Complementary remediation: If primary remediation will not return resources to their previous condition, complementary remediation will be imposed. This means taking measures at an alternative but geographically linked site instead; and
- Compensatory remediation: This consists of stop gap measures to compensate for the shortage of natural resources or services until primary and complementary remediation have been completed. Compensatory remediation can take place at the damaged site or an alternative site.

### OFFENCES

The Regulations create a number of offences, which include failure to comply with a notice to prevent damage, failure to take all practical steps to prevent further damage where environmental damage has occurred, or failure to notify all relevant details to the authority. If a responsible operator fails to comply with a notice to provide further information about the imminent threat or incident, or fails to comply with the remediation notice, it will also be guilty of an offence. Providing false or misleading information to an authorised officer or failure to provide information, are also offences. An offender can be tried in the Magistrates' Court, which can lead to a maximum penalty of £5000

and up to three months imprisonment if he is found guilty. Alternatively, he can be tried in the Crown Court and a sentence of up to two years imprisonment and an unlimited fine can be imposed. Under the Regulations, where an organisation is found guilty of an offence, a director, manager or secretary may also be found guilty if it can be proved that the offence was committed with their consent connivance, or due to their negligence.

### PRACTICAL APPLICATION

Organisations and businesses in highly regulated industries (such as the chemical industry) are likely to already have systems in place to minimise the risk of non-compliance under the Regulations. However, given that the new duty to notify the regulator for potential breaches of the Regulations, could trigger investigation and resultant prosecution under other environmental law (despite the threshold for environmental damage not being reached), businesses should ensure that they have coherent management systems in place and give practical consideration to the following:

- Rethinking their operational practices and strategic decision making in light of the new duty to notify. If there is an event and the organisation decides not to notify, it may wish to record reasons for this decision in case the authorities decide to investigate;
- Internal reporting procedures and environmental management systems will need to be reviewed and take into account what steps need to be taken if authorities have to be notified;
- Consideration should be given to the environmental sensitivity of any area, which could be affected by an operator's activities. If an operator's activities could affect areas such as sites of special scientific interest, water bodies or if the activities carry potential risks to human health, this should be looked at as a matter of priority;
- An organisation may want to review the terms of their insurance and verify appropriate insurance coverage. As highlighted by the recent case of *Bartoline v Royal Sun & Alliance*, it is unlikely that standard public liability insurance will suffice. The case held that remediation



costs owed to the Environment Agency and costs incurred in relation to compliance with statutory notices were outside the scope of standard public liability insurance. General liability policies may cover some of the liabilities under the Regulations but coverage is uncertain and will depend on individual policy wording.

We hope that the scope and impact of Regulations will become even clearer once the results of the consultations are published and the final Regulations and guidance are published in early 2009.

Further details on the Regulations and court cases cited are available on request.

#### FURTHER INFORMATION

If you require further information, please contact:

##### **Paul Bratt**

Partner

Safety, Health & Environment

T: +44 (0)161 830 5043

E: [paul.bratt@hammonds.com](mailto:paul.bratt@hammonds.com)

##### **Chantal Cain**

Associate

Safety, Health & Environment

T: +44 (0)207 655 1174

E: [chantal.cain@hammonds.com](mailto:chantal.cain@hammonds.com)

## Gas Safety: Whose responsibility is it?

To return to the Index [click here](#)

According to statistics published by the Health and Safety Executive, in 2006/7 there were 150 gas-related incidents, 82% of which involved carbon monoxide exposure caused by gas appliances and flues that had not been properly installed or maintained. Most of us will have a gas appliance in our own home, for example a gas fire or boiler, and most of us will know that we should get these appliances checked every so often to ensure that they are safe. This is not a legal requirement - as it is our own private home and our own appliance, the only person exposed to any risk is ourselves, and so it is up to us to ensure our own homes are safe. However, in the case of certain other domestic and commercial premises, and rented accommodation, control of gas appliances is subject to regulation by statute - specifically the Gas Safety (Installation and Use) Regulations 1998 (the "Regulations").

The Regulations cover gas systems, appliances and flues in:

- certain domestic premises (eg, rented accommodation);
- commercial premises such as office buildings;
- public premises such as shops, hotels and public houses;

- holiday homes e.g. chalets, caravans, mobile homes and boats on inland waterways.

This is because, unlike private domestic accommodation, members of the public (including tenants) are put at potential risk from fire, explosion or carbon monoxide poisoning if any gas appliance in the premises is faulty. The law therefore imposes certain duties on landlords to carry out annual gas safety checks and ensure that appliances are maintained in good working condition in order to avoid such incidents.

#### **THE LAW ON GAS SAFETY: WHO HAS A DUTY?**

The Regulations are complex, but essentially aim to prevent injury to consumers and the public from carbon monoxide poisoning, fire or explosion. The Regulations place duties on installers, landlords and some gas suppliers, which exist in addition to the general health and safety duties under other legislation such as the Health and Safety at Work etc Act 1974 ("HSWA 1974") and the Management of Health and Safety at Work Regulations 1999. As will be seen below, no duties are imposed upon tenants, but it should be noted that certain



- To view INDG285 (Landlords: A Guide to Landlords' duties: Gas Safety (Installation and Use) Regulations 1998) [click here](#).

- L56 (Safety in the Installation and Use of Gas Systems and Appliances) can be purchased from the HSE by visiting their website at [www.hse.gov.uk](http://www.hse.gov.uk).

tenants would be accountable for gas safety in circumstances where the landlord is not legally responsible.

There are specific requirements within the Regulations regarding gas safety checks; who should carry these out, and how often. With leasehold premises, this will depend upon the type of lease agreement that exists between the tenant and landlord. Essentially the Regulations state that landlords will be responsible for gas checks and maintenance for short term leases, where the policy is that the burden of repairs and maintenance should fall on the landlord rather than the tenant. A short term lease is considered to be a lease of less than 7 years' duration, or a periodic tenancy, such as a tenancy at will. On the other hand, where a tenant is in occupation under a long lease (i.e. of more than 7 years' duration), or there is an option in favour of the tenant to renew for a period which, when aggregated, takes the tenancy to over 7 years duration, then the landlord is not responsible for carrying out gas safety checks and maintenance under the Regulations, and therefore this should be carried out by the tenant. Landlords will also be responsible where premises are occupied under a licence. The table below summarises the position.

Landlords cannot contract out of their statutory obligations under the Regulations, and neither can they delegate to the tenant their legal duty for ensuring gas safety. This is analogous to the non-delegable employer's general duty of care owed under HSWA 1974.

The Regulations are accompanied by HSE Guidance (INDG285 "Landlords: A Guide to Landlords' duties: Gas Safety (Installation and Use) Regulations 1998"), as well as a comprehensive Approved Code of Practice (L56 "Safety in the Installation and Use of Gas Systems and Appliances"), both of which should be borne in mind when considering application of the Regulations and the practical steps required to comply with these.

#### **WHERE GAS SAFETY IS THE LANDLORD'S DUTY (REGULATION 36)**

If the premises and lease are of the type that is caught by the Regulations and the landlord is therefore responsible for gas safety (as

identified by the table below) then the landlord will be legally responsible for:

- arranging for annual gas safety checks to be carried out on each gas appliance (including flues to the appliances) that is provided for the tenant's use;
- ensuring that the gas appliances installation pipe work, appliances and flues provided for tenants are maintained in a safe condition;
- ensuring maintenance and annual safety checks are carried out by a competent, CORGI registered installer;
- ensuring that a record of each safety check is kept for 2 years, and issuing a copy of the safety check to each existing tenant (within 28 days of the check being completed and to any new tenant before they move in); and
- ensuring that all gas equipment (including any appliance left by a previous tenant) is safe or otherwise removed before re-letting.

Landlords are entitled to use a managing agent to assist in complying with their duties under the Regulations, although in such circumstances the management contract should set out clearly who is responsible for making the necessary arrangements for statutory testing and maintenance, and for keeping records. It is important to note that, as the duties under the Regulations are non-delegable, employing a management agent or other contractor to arrange and carry out testing will not exempt the landlord from their overall responsibility for gas safety under the Regulations.

Whilst in these circumstances tenants need not be concerned with gas safety per se, landlords should nevertheless ensure that the tenant has a general understanding of the arrangements surrounding the testing of appliances within the premises so that they can assist, e.g. by ensuring engineers have access to the property to carry out any maintenance or safety checks.

#### **WHERE GAS SAFETY FALLS TO THE TENANT**

If the premises and/ or lease arrangement is such that the landlord is not legally responsible for gas safety under the Regulations, then it will remain for the tenant to assume such



responsibility, and they should therefore make their own arrangements to have regular gas safety checks and maintenance carried out on all appliances in the premises. This is not a legal requirement under the Regulations (as these only apply to landlords, installers and suppliers) and so tenants would not be liable to prosecution if they did not carry these out; however, this is something that should be part of the tenant's overall responsibility in relation to the safety of the premises.

Landlords may therefore consider it appropriate to include provisions regarding gas testing within lease agreements where they are not legally responsible for gas safety, thus making it a contractual, rather than legal duty of the tenant to carry out regular gas safety checks and maintenance as part of the upkeep of the premises. In this way, whilst the landlord is not legally responsible, they will nevertheless be demonstrating a responsible attitude to gas safety and ensuring that this does not go unmonitored.

As the Regulations do not apply to tenants, there is no statutory period of time for when they should carry out gas safety checks, although it is suggested that the same 12-month period is adopted as in the Regulations. Again, to be safe, tenants should also ensure that appliances are maintained in safe working order; that testing is carried out by a CORGI registered engineer; and that a copy of the gas safety certificate is retained.

#### WHAT SHOULD LANDLORDS DO?

As discussed at the beginning of this article, the Regulations apply to a number of different premises, and therefore will permeate a variety of industries, particularly the leisure, pub and hotel sector. The Health and Safety Executive takes enforcement of the Regulations very seriously; an individual landlord who owned and rented out 12 houses was recently fined nearly £25,000 for failing to carry out gas safety checks and provide in-date gas safety certificates to his tenants. Had there been injury resulting from fire or carbon monoxide poisoning, this sum would have been much higher, and in the event of a death could have resulted in an investigation for gross negligence manslaughter.

Corporate enterprises, on the other hand, that own and operate large portfolios of public premises to which the Regulations may apply - such as pub or hotel chains - will face much greater scrutiny and, consequently, much higher fines should they fail to comply with their duties regarding gas safety. Where a death occurs, companies can be investigated for corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007. Accordingly, it is crucially important for such businesses to review their gas safety procedures, satisfy themselves that these comply with the Regulations, and ensure that such procedures are being adhered to in practice.

Steps to take if the Regulations may affect your business:

- As discussed above, review the company's gas safety policy and procedures and ensure this is drafted in accordance with the Regulations.
- Review all lease agreements and relevant provisions regarding gas safety - and consider imposing contractual duties on the tenant if gas safety is not your responsibility for certain premises.
- For premises where gas safety is the landlord/ company's responsibility, review existing gas safety records and ensure all gas safety certificates are in-date (i.e. within the last 12 months). Commission gas safety checks immediately for any premises where the gas safety certificate is more than 12 months' old.
- Pay particular attention to premises which undergo frequent tenancy changes and/ or amendments to the term of the lease: landlords have the potential to be caught out if premises that previously were held on a long lease (and therefore were not covered by the Regulations) change hands and revert to a short-hold tenancy - thus falling within the Regulations for the first time and whereupon the landlord will become responsible for gas safety. On this basis, procedures regarding tenancy changeovers should also be reviewed to take account of such situations, and to ensure an in-date gas safety certificate is in place before the new tenant enters into occupation.

The Health and Safety Executive takes enforcement of the Regulations very seriously, an individual landlord who owned and rented out 12 houses was recently fined nearly £25,000.



**FURTHER INFORMATION**

If you require further information, please contact:

**Rob Elvin**

Partner  
 National Head of Safety, Health & Environment  
 T: +44 (0)161 830 5257  
 E: [rob.elvin@hammonds.com](mailto:rob.elvin@hammonds.com)

**Catherine Henney**

Lawyer  
 Safety, Health & Environment  
 T: +44 (0)161 830 5330  
 E: [catherine.henney@hammonds.com](mailto:catherine.henney@hammonds.com)

TYPE OF LEASE/ AGREEMENT	DO THE REGULATIONS APPLY?	WHOSE RESPONSIBILITY?
Long lease of more than seven years' duration	NO	Tenant
Short term lease of less than seven years	YES	Landlord
Short term lease of less than seven years with no option to renew, or renewable for periods of one year at a time (and still less than seven years)	YES	Landlord
Short term lease of less than seven years with a block renewal option, taking tenancy to more than seven years' duration (e.g. five year lease with a renewal option for a further five or more years)	NO	Tenant
Periodic tenancies, such as a "Tenancy at Will" agreement	YES	Landlord
Licence	YES	Landlord



# The Consumer Protection from Unfair Trading Regulations 2008: The Man on the Clapham Omnibus has a Central Role to Play

To return to the Index [click here](#)

The Consumer Protection from Unfair Trading Regulations 2008 came into force on 26 May 2008 with the dual aims of modernising and simplifying the consumer protection framework in the UK and harmonising consumer protection legislation across the European Community with the objective of making it easier for traders based in one member state to market and sell their products to consumers in other member states. The Regulations implement the Unfair Commercial Practices Directive in the UK, and replace several pieces of consumer protection legislation that were in force prior to 26 May 2008.

The Regulations are supplemented by guidance issued in May 2008 by the Department for Business Enterprise and Regulatory Reform and the Office of Fair Trading.

## OVERHAUL OF LEGISLATION IN THE UK

The implementation of Regulations provided an opportunity to overhaul consumer protection legislation. The Regulations have partially or wholly repealed provisions in 23 laws - refer to [Schedule 2](#) of the Regulations.

## SCOPE OF THE REGULATIONS

The Regulations apply to any act, omission or other conduct by businesses directly connected to the promotion, sale or supply of products to or from consumers before, during or after a commercial transaction. Whilst in most cases the commercial transaction in question will involve a direct relationship between the business and consumer, the Regulations also cover situations where a trader does not deal directly with consumers, but there is a sufficiently close connection so as to bring the indirect relationship within the scope of the Regulations.

## AN OVERVIEW OF THE REGULATIONS

There is a general prohibition of unfair commercial practices.

A commercial practice is unfair if:

1. The trader's practice is inconsistent with the standard that a reasonable person would expect.
2. It is a misleading action or omission.
3. It is aggressive.
4. In addition to 1, 2 and/or 3 above, the practice causes the average consumer to change his behaviour in relation to the product. Therefore there has to be a cause and effect relationship between the practices set out at 1 to 3 above and the consumer's behaviour in relation to the transaction.
5. It is one of 31 commercial practices set out in [Schedule 1](#) of the Regulations, which are specifically prohibited. In respect of those 31 practices, there is no need to establish a cause and effect relationship between the practice and the consumer's resultant behaviour. If one or more of the 31 prohibited practices can be shown to be established that is sufficient to prove a breach.

## PRODUCT

"Product" is given a wide definition, which includes any goods or services, immovable property and rights and obligations. The definition includes conventional business to consumer transactions of goods and services, but would also include transactions on line, sale or lease of land to consumers and the provision of credit to consumers.

The Regulations apply to businesses directly connected to the promotion, sale or supply of products.



### THE CONCEPT OF THE “AVERAGE CONSUMER”

This essentially involves asking the man on the Clapham omnibus whether he believes that a commercial practice is unfair in the particular circumstances of the case. Where the average consumer is either a targeted or vulnerable consumer the man on the Clapham omnibus determining whether the commercial transaction is unfair will be deemed to be an average targeted or average vulnerable consumer in terms of applying the objective test. The man on the Clapham omnibus test will not apply to the list of 31 commercial practices set out in Schedule 1, which are expressly prohibited.

### INVITATIONS TO PURCHASE – REGULATION 6(4)

An invitation to purchase has the following three elements:

- it is a commercial communication, and
- it indicates characteristics of the product concerned and the price, in a way appropriate to the communication medium used, and
- it thereby enables the consumer to make a purchase.

Where a commercial practice is an invitation to purchase, certain specific information must be given to consumers, unless apparent from the context. In the event that the specified information is not given, that may constitute a misleading omission.

### OFFENCES

A trader is guilty of an offence if he engages in a commercial practice:

- which is a misleading action – Regulation 9.
- which is a misleading omission (Regulation 10).
- which is aggressive (Regulation 11).  
A commercial practice is considered aggressive if, in its factual context, taking account of all of its features and circumstances it significantly impairs (or is likely to significantly impair) the average consumer's freedom of choice or conduct in relation to the product concerned through

the use of harassment, coercion or undue influence and it thereby causes (or is likely to cause him) to take a transactional decision he would not have taken otherwise (Regulation 7).

- set out in paragraphs 1-10, 12-27 and 29-31 of Schedule 1 (Regulation 12).

### PENALTY FOR OFFENCES

In the Magistrates' court the maximum fine is £5,000 per offence.

In the Crown Court the fine per offence is unlimited and there is provision for a term of imprisonment not exceeding two years.

### DIRECTORS, MANAGERS, SECRETARY OR OTHER SIMILAR OFFICER

There are consent, connivance and neglect provisions allowing a Director, Manager, Secretary or other similar officer to be prosecuted and convicted of an offence where it is proved that the company committed an offence under the Regulations by virtue of the individual's consent, connivance or neglect.

### DEFENCE

There are two potential defences:-

- Due diligence defence – it is for the defendant to prove firstly that the commission of the offence was due to:
  - (a) A mistake;
  - (b) Reliance on information supplied to him by another person;
  - (c) The act or default of another person;
  - (d) An accident, or
  - (e) Another cause beyond his control.

And secondly, that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or any person under his control.

- Innocent publication of advertisement – in any proceedings against a person for an offence committed by the publication of an advertisement, it is for the Defendant to prove that:



- (a) He is a person whose business it is to publish or to arrange for the publication of advertisements;
- (b) He received the advertisement for publication in the ordinary course of business; and
- (c) He did not know and had no reason to suspect that its publication would amount to an offence.

#### SUMMARY AND CONCLUSION

The Regulations are wide-ranging in their application and in particular they are media neutral which has ramifications in respect of website content.

Companies should carry out a review of their trading practices to ensure firstly that they do not contravene one or more of the 31 expressly prohibited practices and secondly whether they could constitute breach of Regulations 9-11 inclusive.

Directors, Managers, marketing departments and sales teams need to have a practical awareness of the new Regulations.

External marketing and advertising agencies need to have a practical understanding of the Regulations in order to avoid committing an offence.

Companies and individuals who have the potential to commit an offence under Regulations 9-11 inclusive should, when considering commercial practices put themselves in the shoes of the man on the Clapham Omnibus in terms of assessing whether the intended commercial practice is likely to fall foul of the Regulations.

#### FURTHER INFORMATION

If you require further information, please contact:

**Gary Lewis**  
Senior Associate  
Safety, Health & Environment  
T: +44 (0)161 830 5373  
E: [gary.lewis@hammonds.com](mailto:gary.lewis@hammonds.com)

**Rob Elvin**  
Partner  
National Head of Safety, Health & Environment  
T: +44 (0)161 830 5257  
E: [rob.elvin@hammonds.com](mailto:rob.elvin@hammonds.com)

---

The Consumer Protection from Unfair Trading Regulations 2008 can be viewed by [clicking here](#). The Explanatory Memorandum that accompanies the Regulations can be viewed by [clicking here](#).

The Department for Business Enterprise and Regulatory Reform and the Office of Fair Trading have issued the following Guidance:

- "Consumer protection from Unfair Trading: Guidance on the Consumer Protection from Unfair Trading Regulations 2008" (May 2008), which may be accessed by [clicking here](#).
- "The Consumer Protection from Unfair Trading Regulations: A basic guide for business" (May 2008) may be accessed by [clicking here](#).



## Carbon Commitments

To return to the Index [click here](#)

**CARBON abatement is a key concern for businesses around the world.**

Carbon abatement is a key concern for businesses around the world – all the more so since governments in the UK and many other countries have committed to significantly cutting emissions of greenhouse gases (GHG) by 2050.

In January 2008, the European Commission proposed EU-wide targets which for the UK would set a mandatory target to reduce GHG emissions by 16% by 2020, based on 1990 levels.

Cutting GHG emissions requires robust policy at all levels of energy use; hence the introduction of the Climate Change Levy (CCL) and the EU Emissions Trading System (ETS). The UK government's third major climate change instrument, the Carbon Reduction Commitment (CRC), is designed to produce secure and cost-effective carbon savings from large non-energy intensive businesses and public sector organisations. As part of the CRC, the draft Climate Change Bill (which is currently under consultation and due to become law in the UK later in the year) will pave the way for a further ETS for non-energy intensive businesses and the public sector.

### WHAT IS THE CARBON REDUCTION COMMITMENT?

The CRC will be a mandatory GHG emissions cap-and-trade scheme that will apply to GHG emissions in the public and private sector not covered by Climate Change Agreements (CCAs) or the EU ETS. Through financial incentives and corporate social responsibility drivers, the scheme will force participants to reduce their carbon emissions.

### WHO IS AFFECTED?

Subject to exemptions, any organisation that used more than 6000 MWh in 2008 through half-hourly metering in Great Britain and 70kW metering systems in Northern Ireland must participate in the scheme as a CRC Organisation (CRCO). The proposed definition

of 'half-hourly metering' is wide and may be subject to further review during the autumn consultation. Presently, this includes all meters that monitor electricity consumption on a half-hourly basis, voluntary automatic meters that produce half-hourly data and pseudo half-hourly meters (i.e. irrespective of whether the half-hourly metered electricity is settled on the half-hourly or non-half hourly markets).

Where an organisation has one or more subsidiaries, the emissions of such subsidiaries will be added to the parent organisation's figures and this parent will be the representative CRCO, with responsibility not just for calculating and reporting on its own emissions, but those of its subsidiaries too. The CRC is expected to apply primarily to organisations such as large retail organisations, banks, large offices, universities, large hospitals, large local authorities and central government departments - between 2000 and 5000 organisations in all.

### WHAT DUTIES WILL CRC ORGANISATIONS HAVE?

The UK's environment department (Defra) plans to publish guidance on scheme registration later in 2008 and will issue information packs to organisations registered as having half-hourly meters in early 2009, which will contain details relating to the annual electricity consumption of each individual half-hourly meter for 2008. Subsidiaries will need to identify the relevant CRCO to which they must submit their data and the CRCO must calculate emissions data for the whole UK corporate group. This data must account for energy use from all 'core sources' or at least 90% of the CRCO total group-wide emissions and must be submitted to the respective regulators by July 2011. Of this 90% figure, emissions not already covered by the CCA or EU ETS schemes will be regulated under the CRC scheme. Participants will then be responsible for recording their GHG emissions per calendar year, purchasing the correct number of allowances in April and surrendering such



allowances to the Environment Agency (EA) as scheme administrator in October each year. Each CRC organisation must submit annual data statements to the EA and prepare a self-certified evidence pack.

Evidence packs divide into three parts:

- Structural records - to define the scope of the organisation, sites (important for non-metered supplies such as street lighting) and the types of energy used;
- Data records - to show the annual consumption and convert this into GHG emissions, including records to support any exemption or the application of a de minimis threshold based on a proportion of energy use (i.e. for CCAs or the EU ETS). A record of the organisation's annual turnover should also be retained; and
- Special event records should be maintained to keep an audit trail of unusual events e.g. the actions taken following a meter failure.

CRCOs will have to produce more detailed data reports at the beginning of each new five - year phase.

#### INTERACTION WITH CURRENT REGIME

The current UK regulatory regime monitors and incentivises the reduction of carbon emissions through the Climate Change Levy and the EU ETS. The CRC will cover emissions outside these schemes and is not intended to alter them, although Defra intends the schemes to dovetail into one another. For example, where an organisation or subsidiary ceases to participate in a CCA, it will automatically be required to participate in the CRC. The phases and administrative milestones of the CRC align with those of the EU ETS. Furthermore, to safeguard against potential volatility in the price of the new CRC allowances, a 'safety valve' mechanism will enable CRC participants to purchase (but not sell) more established and, theoretically, stable ETS allowances to swap these for CRC allowances. With regard to environmental regulation, it is envisaged that the energy efficiency element of Europe's Integrated Pollution Prevention and Control (IPPC) regulation will be revised to be more

'light-touch', analogous to the approach taken in relation to CCA organisations with IPPC reporting requirements.

#### ARE THERE ANY EXEMPTIONS?

CRCOs or subsidiaries with more than 25% of their energy use emissions covered by a CCA will be completely exempt from the CRC, until such time as they withdraw from such CCA or their CCA energy use falls below the 25% threshold. However, Defra has noted the unintended consequence that this will leave some energy intensive firms with potentially up to 75% of their emissions unregulated. This loophole may yet be dealt with in the draft regulations. Rail traction energy will not be included in the scheme.

#### HOW WILL THE CRC OPERATE?

From 2011, CRCOs will have to pay, through the purchase of allowances, for each tonne of carbon which they emit, proportional to their energy use. Such allowances will be surrendered by the CRCO to the EA in July each year. Because the CRC is not a revenue-raising instrument and is purely designed to incentivise energy efficiency and carbon reduction measures, the money used to purchase CRC allowances will be recycled amongst the scheme participants in accordance with a performance 'League Table'; those who have reduced their emissions will receive a financial bonus, while those who have increased their emissions will pay a penalty.

The scheme will be introduced in three stages:

- **2008-2010: preparation**

Regulations are due in October 2009. Potential CRCOs will be sent registration packs and must assess whether or not their energy use for the 2008 calendar year exceeded the threshold figure of 6000 MWh; if so, they must register with the scheme by the end of December 2009.

- **2010-2013: introductory phase**

The first scheme compliance year will start in 2010. However, the first allowances will not be sold until April 2011. This sale will

From 2011, CRCOs will have to pay, through the purchase of allowances, for each tonne of carbon which they emit



be unique in that participants will be able to buy both 2010/11 allowances for actual emissions made during this period and allowances for anticipated emissions in the 2011/12 financial year. All subsequent sales and auctions will be for the year ahead only. During this phase, allowances will be sold rather than auctioned to CRCO at a proposed fixed rate of £12 (\$22)/t CO<sub>2</sub>. Allowances may be bought and traded on the secondary market.

- **2013: first capped five year phase begins**

The fixed price of £12/tCO<sub>2</sub> ends and CRCOs may bid for allowances through an annual auction, held throughout April. Under current proposals, each participant will submit a simple bid schedule specifying the number of allowances they would like to buy according to their predicted energy use, their carbon abatement strategy and the market price for emissions in that particular year. The benefits of this method mean that CRCOs do not need to take part in a live auction process and that participation costs are relatively low. There is no legal requirement to take part in the auction; technically, an organisation could choose to only buy allowances on the secondary market or the buy-only 'safety valve'.

The key point to note is that emissions are calculated per calendar year, whereas it is proposed that sales, auctions and recycling payments will run on a financial year basis.

### THE LEAGUE TABLE

At the end of each emissions year, the EA will publish a performance League Table ranking participants based on their respective 'performance' within the scheme, rather than the quantity of their emission reductions. A proposed bonus or penalty of +/-10% (increasing by 10% each year (i.e. the rate will be +/-50% in year five) of the cost of the past year's allowances will be awarded to organisations based on their position in the table, in accordance with the following metrics:

- The core absolute carbon reduction metric: the main driver used to calculate league position, this measures the percentage of absolute emissions reductions relative to the organisation's annual emissions since the

start of the scheme;

- A possible 'early action' metric: for example, extent of roll out of automatic metering above and beyond the legal minimum and voluntary membership (as a proxy to recognise those more pro-active organisations who have taken early action before the start of the scheme);
- A possible relative carbon efficiency metric ('growth metric'): for example, percentage reduction in carbon emissions per unit turnover since the start of the scheme (suggested in light of concern over organisational growth). This would not rank organisations in terms of energy intensity, but focus is on improvement over time.

### REGULATION AND OFFENCES

The CRC will be regulated by the EA, Scottish Environmental Protection Department, and Department of the Environment for Northern Ireland. These bodies will be responsible for the registration, audit and enforcement of the CRC for participants in their respective jurisdictions. However, the EA will also be responsible for day-to-day administration of the CRC registry, distribution of allowances and recycling payments, the operation of the auction and safety valve mechanism, and construction and publication of the performance league table.

As the reporting and auditing requirements follow a light touch approach, based on self-certification rather than third party verification, Defra believes that strong penalties will be needed to deter abuse and secure compliance. Failure to provide information to government or to comply with an enforcement notice will be treated in the standard way that the relevant regulator uses to enforce environmental regulations and penalties will in general be analogous to those used under the EU ETS. Penalties will fall into 3 overall categories: participation in the scheme, reporting and surrender, and sale/auction.

### HOW WILL CRCOS MITIGATE THEIR COSTS UNDER THE CRC?

Perhaps the most controversial area of Defra's proposals is the proposal to treat electricity purchased under a green tariff (regardless of whether or not Renewable Obligation



Certificates (ROCs) are also purchased), or from on-site renewable generation (where ROCs are claimed) no differently to any other electricity imported from the grid. The UK government states that this is to ensure that the measures taken by CRCOs are in addition to obligations already imposed upon the energy sector and UK business. Its reasoning is that:

- Green electricity generation is already subject to upstream incentives. Licensed electricity suppliers are obligated under the Renewables Obligation to source a percentage of the electricity they supply from renewable sources, in return for which they receive credits in the form of tradable ROCs.
- Given this context, special treatment under the CRC for grid imported 'green' electricity would undermine the CRC's focus on action by end users of energy and would potentially fail to deliver any additional renewables supply.
- Renewable energy is also exempt or zero-rated in the EU ETS, which means that a tonne of CO<sub>2</sub> saving through fuel switching in power stations is accounted for upstream. Zero-rating green electricity from the CRC would imply that end users of green electricity had generated an additional tonne of CO<sub>2</sub> saving. This is not the case and it would be incorrect to credit end users with this additional saving.
- End users already benefit from the use of green electricity to the extent that Climate Change Levy Exemption Certificates from renewable generation are passed on to them by electricity suppliers.

### **THREAT TO MICROGENERATION?**

The UK government believes that while its treatment of CRC will not create additional incentives to purchase green grid electricity, neither will it penalise or create disincentives for its purchase. Although it is recognised that green tariffs may be open to double-counting abuse, stakeholders have sought to separate the treatment of on-site renewables generation, as this policy would place a business generating and using renewable electricity (and selling the associated ROCs) in a situation where it would have to pay for an allowance for the use

of such electricity! The government's desire to encourage microgeneration could be seriously thwarted by such a policy if it were to be implemented.

### **PRACTICAL APPLICATION**

Businesses may wish to rethink their operational practices and consider cash-flow and strategic decision making in light of the new duty to report energy use and purchase allowances. It may be useful to discuss with agents who have experience of trading under the EU ETS how to maximise the opportunities and reduce the risks presented by the early action metric and the purchase and trading of allowances particularly on the secondary market.

Those businesses, which have subsidiaries, may need to strengthen group-wide reporting procedures in line with government guidance on registration and reporting, once this is published.

Organisations which are considering on-site supply as a potential carbon abatement method should take steps to ensure that such measures will deliver commercially viable returns, whilst complying with Defra's 'additionality' principles, and may wish to delay such projects until the CRC regulations are in force.

Those businesses that have invested in green tariffs may decide that other carbon reduction methods yield a greater return.

The scope and impact of CRC policy should become clearer after the results of the consultation are published later this year.

### **FURTHER INFORMATION**

If you require further information, please contact:

#### **Paul Bratt**

Partner  
Safety, Health & Environment  
T: +44 (0)161 830 5043  
E: [paul.bratt@hammonds.com](mailto:paul.bratt@hammonds.com)

#### **Adam Langridge**

Partner  
Energy (Corporate Strategy & Finance)  
T: +44 (0)20 7655 1516  
E: [adam.langridge@hammonds.com](mailto:adam.langridge@hammonds.com)



If a tired driver causes death he can be charged with causing 'death by dangerous driving' if there is sufficient evidence available.

## Driver Tiredness

To return to the Index [click here](#)

Driver tiredness is one of the main causes of death on our roads. It causes one in every five crashes. Research suggests that more than three hundred people are killed each year as a result of drivers falling asleep at the wheel.

Tired drivers can be charged with careless driving, when the driving has fallen below the standard expected of a careful and competent driver and dangerous driving when the driving has fallen far below the standard expected of a careful and competent driver. If a tired driver causes death he can be charged with causing 'death by dangerous driving' if there is sufficient evidence available. The maximum penalty for death by dangerous driving is fourteen years in prison.

### ROAD TRANSPORT (WORKING TIME) REGULATIONS 2005

The Road Transport (Working Time) Regulations 2005 ("the Regulations") came into force on 5 April 2005. The Regulations implement the European Road Transport (Working Time) Directive 2002/15/EC and apply to all mobile workers, mainly drivers, crew and other travelling staff, who are travelling in vehicles that are subject to Regulation 561/2006/EC (Tachograph Rules).

The main provisions of the Regulations are:

- Weekly working is limited to an average of 48 hours, calculated over a four-month reference period. The working week must start at 00.00 on Monday morning.
- Working time is limited to 60 hours in any single week.
- Working time is defined as any time when the worker is at their workstation and any time the worker is carrying out road transport activities.
- Rest and breaks when no work is done, evening classes, day-release courses, voluntary work and 'periods of availability do not count as working time.

- Working time at night is restricted to 10 hours in any 24-hour period.
- Employers must monitor working time and keep records for two years. If tachograph records are used to monitor and record working time, drivers should be instructed to use a different switch for periods of work other than driving, which are still counted as working time.
- Statutory paid annual leave and sick leave cannot be used to reduce the average working time.
- If a driver works for more than one employer, their working time includes that performed for all employers who undertake road transport activities under EC drivers' hour's rules.

### EMPLOYERS' LIABILITY

Employers have responsibilities under road traffic law and under the Health and Safety at Work Act 1974, which requires them to ensure, so far as is reasonably practicable, the health and safety of all employees while at work and to ensure that others are not put at risk by work-related activities.

Company managers and directors can be prosecuted for failing to exercise their duty of care, for example if they set unrealistic driving schedules, require drivers to drive for excessive hours or if they pressurise drivers to continue driving when they have previously notified employers that they are too tired to continue.

Under the Corporate Manslaughter and Corporate Homicide Act 2007 companies and organisations can be prosecuted if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

Juries will consider how the fatality was managed or organised, including any systems and processes for managing safety and how



these were operated in practice. A substantial part of the failure within the organisation must have been at a senior management level. Senior management refers to those who make or play a role in making significant decisions about the organisation or substantial parts of it. This includes both centralised, headquarters functions as well as those in operational management roles. As such one can expect the activities of senior management to be closely scrutinised by the regulators.

#### EXAMPLES OF INDIVIDUALS' LIABILITY

##### Roy Bowles Transport

Stephen Bowles and his sister Julie Bowles, directors of Roy Bowles Transport, were convicted of manslaughter in 1999 after an accident two years earlier in which one of their drivers fell asleep at the wheel and crashed into another lorry, killing two people. The directors were found guilty of ignoring the excessive working hours of the driver involved. Both were given suspended prison sentences and a condition was placed on the company's operating licence, preventing them from acting as directors.

Both Stephen Bowles and his sister applied to be re-instated as company directors however these applications were rejected by the Western deputy traffic commissioner, Fiona Richards. In her written decision, Richards stated that the combined positive evidence presented before her did not outweigh the fact that the pair's convictions were not spent.

##### Keymark Services Limited

In December 2004, Melvyn Spree a director of haulage firm, Keymark Services, based in Kent was sentenced to seven years in prison as a result of a fatal accident involving one of the firm's drivers. The driver fell asleep at the wheel and consequently killed himself and the drivers of two other vehicles. The driver was part way through an eighteen-hour shift when he crashed through a central reservation on the M1 motorway.

It was shown that Melvyn Spree had shown drivers how to falsify their records, alter the tachograph and immobilise the speed

limiters. Drivers were encouraged to work grossly excessive hours with the incentive of participating in a profit sharing scheme. Melvin Spree pleaded guilty to two charges of manslaughter and a count of conspiracy to falsify driving records.

Another director of Keymark Services, Lorraine March was sentenced to sixteen months, after pleading guilty to conspiracy to falsify records. Company secretary Claire Miller was ordered to serve 160 hours community service for the same charge. The company itself was fined £50,000. Judge Charles Wide QC said it was "hard to imagine a more serious case of this type."

#### WHAT DOES THIS MEAN IN PRACTICE FOR COMPANIES WITH TRANSPORT FUNCTIONS?

The success of the Melvyn Spree prosecution acts as encouragement to other police forces to take action against hauliers and other transport managers etc who are implicated in similar incidents. The introduction of the Corporate Manslaughter and Corporate Homicide Act 2007 does not alter the position in relation to the prosecution of individuals. and such prosecutions will continue to be taken where there is sufficient evidence and it is in the public interest to do so.

It is the responsibility of employers that require employees to drive as part of their employment to ensure drivers' safety and the safety of other road users. Amongst other things, operators must ensure that drivers are not working excessive hours, are taking required breaks and all tachograph charts are inspected regularly.

It is thought that it will no longer be sufficient to send tachograph records off to an outside agency for analysis in an attempt to prove that drivers are not working excessive hours. The records should be checked against delivery notes to ensure operators are not giving drivers unrealistic schedules.

The maximum penalty for death by dangerous driving is fourteen years in prison.



- The Royal Society for the Prevention of Accidents (**RoSPA**) has produced a number of Guides for those who drive during the course of their employment.
- "Driver Tiredness: An information sheet for fleet managers" produced by Fleet Safety Forum, Brake and the Department of Transport can be viewed by [clicking here](#).
- For general guidance on driving legislation visit the Department for Transport at [www.dft.gov.uk](http://www.dft.gov.uk). For more specific guidance issued by the DfT on "Driving for Work" ([click here](#)).
- For more information on the Corporate Manslaughter and Homicide Act 2007 please read our SHE Alert article '[Corporate Manslaughter Bill Finalised: management systems to come under scrutiny](#)' or [click here](#) to access guidance issued by the Ministry of Justice.



#### RECOMMENDATIONS

- Employers should regularly screen and check that drivers are not affected by any circumstances or conditions (e.g. sleep conditions like sleep apnoea), which are likely to increase the risk of falling asleep at the wheel;
- Employers should ensure that drivers and their families are educated in how to minimise driver tiredness.
- Employers should manage Drivers' schedules to ensure that they have enough time away from work to obtain sufficient sleep.

#### FURTHER INFORMATION

If you require further information, please contact:

**Rob Elvin**

Partner

National Head of Safety, Health & Environment

T: +44 (0)161 830 5257

E: [rob.elvin@hammonds.com](mailto:rob.elvin@hammonds.com)



## The Road Safety Act – Can you afford not to know?

To return to the Index [click here](#)

On a related topic to driver tiredness, it seems at present that there is a constant barrage of articles in the media regarding road transport. Whether it is congestion charging or speed cameras the subject of road transport is never out of the news.

The phased implementation of the Road Safety Act 2006 brings with it a further raft of requirements and offences for the private motorist and organisations operating fleets of vehicles.

The Department for Transport's aim to reduce road traffic casualties is the primary objective behind the Act. Excess speed, alcohol and driver behaviour make up a significant proportion of road collisions and the Act attempts to address this. The Act allows the police to issue graduated fixed penalty notices for various offences including speeding. Therefore, in the future it will be possible to receive more penalty points depending on certain criteria applicable at the time of the offence. These may well include the time of day, the weather conditions, and the location in question. A new fixed penalty has already been introduced for using a vehicle without insurance which carries 6 penalty points and a £200 fine; much more onerous sanctions than previously.

The Act also creates new offences such as causing death by careless driving. Historically, imprisonment was reserved for the most serious offences such as causing death by dangerous driving. Imprisonment can now be a sentence for offences committed due to a lower standard of driving that results in death.

A new offence of inconsiderate driving has also been created. This allows for an endorsement of between 3-9 penalty points and a substantial fine. Examples of what constitutes inconsiderate driving could be overtaking on the inside lane, tailgating other drivers in an effort to overtake or pulling out from a side road/slip road forcing other drivers to slow down. It is clear to see that the Government are criminalising poor driving behaviour in its effort to stop the incidents of

'road rage' and the causes of road traffic accidents.

The Government's concern regarding the 3 million vehicles they believe to be using the roads in the UK without insurance is also tackled in the legislation. The authorities are given greater powers to seize and destroy uninsured vehicles. Therefore organisations operating fleets of vehicles need to ensure employee drivers fully comply with the conditions of the insurance policies, as otherwise organisations can be prosecuted as well as individual drivers.

Fleet operators should also be concerned with a change in the law regarding the way traffic commissioners assess operators' licences. The good repute of an operator is an essential part of securing and keeping an "O" licence. The new legislation states that if the organisation or an employee is convicted of an offence where the fine payable could be over £2,500, then there is an automatic loss of good repute. In practical terms, this means if an employee were to be prosecuted for careless driving and convicted whilst driving a company vehicle, it would automatically remove the good repute of the organisation when the traffic commissioner considers revoking or renewing an "O" licence.

Accordingly, it is more important than ever that employees are aware of their obligations whilst driving on business as their actions not only have practical ramifications for themselves but their employer's ability to conduct its business.

The Act is being introduced gradually in a phased manner. The key to compliance with this and other road traffic legislation is a clear understanding of your obligations.

If you require further information, please contact:

### **Rob Elvin**

Partner

National Head of Safety, Health & Environment

T: +44 (0)161 830 5257

E: [rob.elvin@hammonds.com](mailto:rob.elvin@hammonds.com)

**A new fixed penalty has already been introduced for using a vehicle without insurance which carries 6 penalty points and a £200 fine.**



- To view the HSE's Health & Safety Statistics for 2007/2008 (October 2008) [click here](#).
- To view the Environment Agency's 'Spotlight on Business 10 years of improving the environment' (July 2008) [click here](#).

## Safety, Health & Environment Regulatory and Sentencing Review

To return to the Index [click here](#)

Since our June 2008 Insight publication, there have been a number of well-publicised health and safety and environmental prosecutions that have seen high level fines. We have also seen the passage of the Health & Safety (Offences) Act, The Regulatory Enforcement and Sanctions Act 2008 and The Environmental Damage (Prevention and Remediation) Regulations.

A selection of health & safety and environmental penalties imposed by the Courts since May 2008 can be viewed by clicking on the related link: [health & safety prosecutions](#) or [environmental prosecutions](#).

### HEALTH AND SAFETY PROSECUTIONS

The provisional 2007/2008 HSE prosecution figures demonstrate a high prosecution success rate with 1028 prosecutions resulting in 839 convictions at a rate of 82% - 2006/2007 saw 1051 prosecutions resulting in 852 convictions at a rate of 81%. These figures can be broken down as follows – for comparison purposes the figures in square brackets reflect the 2006/2007 final figures:

- Extractive & Utility Supply Industries saw 16 [21] prosecutions resulting in 12 [18] convictions at a rate of 75% [86%] with an average penalty of £14,533 [£16,896] being imposed per conviction.
- Agriculture, hunting, forestry and fishing saw 28 [37] prosecutions resulting in 23 [31] convictions at a rate of 82% [84%] with an average penalty of £5,881 [£4,321] being imposed per conviction.
- Service Industries saw 205 [202] prosecutions resulting in 183 [157] convictions at a rate of 89% [78%] with an average penalty of £8,549 [£14,386] being imposed per conviction.
- Manufacturing saw 362 [350] prosecutions resulting in 310 [309] convictions at a rate of 86% [88%] with an average penalty of

£15,233 [£8,493] being imposed per conviction.

- Construction saw the highest number of cross-sector prosecutions being brought with 417 [441] resulting in 311 [337] convictions at a rate of 75% [76%] with an average penalty of £7,519 [£7,172] being imposed per conviction.

### ENVIRONMENTAL PROSECUTIONS

The Environment Agency has also released statistics in relation to the prosecutions that they made in 2007. During this period the Environment Agency handed out £3 million in fines, as well as almost 8 years of prison sentences and more than 170 days community service. Of the companies they prosecuted waste companies accounted for a quarter of all fines, the water sector 10 per cent and other industries accounted for 57 per cent. In total 284 companies were fined an average of £10,508, there were also 6 custodial sentences and 11 suspended custodial sentences.

- In the Chemical sector there were 12 serious breaches with 3 companies fined a total of £17,000.
- In the Energy sector there were 6 serious breaches with 3 companies fined a total of £35,000.
- In the Farming sector there were 10 serious breaches with 20 companies fined a total of £120,000.
- In the Metals sector there were 21 serious breaches with no companies fined.
- In the Minerals sector there were 33 serious breaches and 3 companies were fined a total of £70,000.
- In the Waste sector there were 955 serious breaches with 57 companies fined a total of £761,846.



- In the Water sector there were 115 serious breaches with 15 companies fined a total of £300,080.

## LEGISLATION

The Health and Safety (Offences) Act 2008 ("the Act") received royal consent on 16 October and will come in to force on 16 January 2009. Although reported elsewhere in this Insight, in summary, the Act allows for larger fines and sentencing powers for the courts in relation to health and safety offences. The Act raises the maximum penalties for breaching health and safety regulations in the lower courts from £5,000 to £20,000 and the range of offences for which an individual can be imprisoned has also been broadened. Under the Act more cases will be sent to the Crown Court for prosecution and/or sentencing.

The Regulatory Enforcement and Sanctions Act 2008 ("RES") received royal assent on 21st July 2008 and will come in to force in 2 phases. Parts 1,3 and 4 came into force on 1 October 2008 and Part 2 will come in to force on 6 April 2009. RES is designed to help relax the regulatory burden on companies that comply with the regulators, allowing the regulators to concentrate on non-compliant businesses. RES aims to implement the principles of good regulation as established in the Hampton Review, these being:

- Proportionality
- Accountability
- Consistency
- Transparency
- Targeting cases where action is needed.

The new legislation is also intended to give regulators more options and greater flexibility in imposing sanctions such as fixed and variable monetary penalties, stop notices and enforcement undertakings. The Department for Business Enterprise and Regulatory Reform ("BERR") have published guidance on RES on their website.

Although canvassed in more detail The Environmental Damage (Prevention and Remediation) Regulations ("the Regulations") 2008 were expected to come into force on 31 December 2008. However, Defra have advised that this is now more likely to be 1 March 2009 with final Regulations and guidance being made available on the Defra website during January 2009. The purpose of the Regulations is to implement the European Liability Directive into UK law and provide a pan-European framework for environmental liability. The Regulations are set to become the legislation of first resort for environmental damage and are to complement rather than replace the current environmental liability regime in the UK. Perhaps the most significant feature of the Regulations is the introduction of a statutory duty to notify the relevant authority of a mere 'imminent threat' of environmental damage. For a more comprehensive look at the Regulations and what they may mean for your business, please read our article 'Polluter\_Pays'.

## FURTHER INFORMATION

If you require further information, please contact:

**Russell Fitzpatrick**  
Professional Support Lawyer  
Safety, Health & Environment  
T: +44 (0)20 7655 1643  
E: [russell.fitzpatrick@hammonds.com](mailto:russell.fitzpatrick@hammonds.com)

- 
- To view BERR's "Regulatory Enforcement and Sanction Act 2008: Guidance to the Act" (July 2008) [click here](#) or visit BERR at [www.berr.gov.uk](http://www.berr.gov.uk).



## And Finally...

To return to the Index [click here](#)

Hammonds LLP has strengthened its Safety, Health and Environment (SHE) Group by recruiting Claire Harvey as a consultant with over 15 years experience in nuclear Law, regulatory defence and transport and storage of dangerous goods. Claire was head of legal for United Kingdom Nirex Limited (Radioactive Waste Management) where her work included

- Advising on the generic legal aspects of design and planning for Public Inquiry and Regulatory Consents for a Deep Geological Radioactive Waste Facility.
- Delivering papers both to Nirex and external audiences on Nuclear Law, Environmental Law and Planning issues.
- Advising at Cabinet Office level in respect of public consultation, freedom of information and environmental information disclosure.
- Leading and coordinating the legal aspects of Nirex restructuring including contract/relationship negotiation with Non-Departmental Government Bodies and high value taxation and transactional advice including dealing with the negotiation and 'write off' of loans in the region of £840 million in a tax efficient manner.
- Advising on Nirex's restoration and environmental projects with respect to the land previously used for investigations at Sellafield and ensuring proper liaison with local stakeholders.

Claire is a member of the International Nuclear Lawyers Association and presented a paper at the International Nuclear Lawyers Congress 2007 in Brussels.

Claire has also had experience in both contentious and non-contentious regulatory matters, including:

- The transport of radioactive substances. Claire is the adviser to main industry body setting standards for transport containers and carriage of radioactive material.

- Advising on the control of pesticides, toxins and medicines, food imports and health and safety.
- Advocacy and case management in cases prosecuted by Police, Local Authority and environment Agency.

Hammonds won an exclusive mandate to advise UK Nuclear Waste Management Ltd on the management and operation of a Low Level Waste Repository site in Cumbria. Given Claire's experience, she will be a welcome member to the Hammonds armoury.

Rob Elvin, head of SHE, said "The commitment of the Government to nuclear power means that Claire's experience and expertise will provide Hammonds' SHE Group with a unique ability in nuclear work, and one of the Country's top experts in the transportation of radioactive and other hazardous waste".

### **Claire Harvey**

Consultant

Safety, Health & Environment

T: +44 (0) 161 830 5071

E: [claire.harvey@hammonds.com](mailto:claire.harvey@hammonds.com)

# Hammonds

## Berlin

Hammonds LLP  
Georgenstraße 22  
10117 Berlin Germany  
Telephone +49 30 7261 68 000  
Fax +49 30 7261 68 001

## Leeds

Hammonds LLP  
2 Park Lane  
Leeds LS3 1ES  
Telephone +44 (0)113 284 7000  
Fax +44 (0)113 284 7001

## Manchester

Hammonds LLP  
Trinity Court  
16 John Dalton Street  
Manchester M60 8HS  
Telephone +44 (0)161 830 5000  
Fax +44 (0)161 830 5001

## Birmingham

Hammonds LLP  
Rutland House  
148 Edmund Street  
Birmingham B3 2JR  
Telephone +44 (0)121 222 3000  
Fax +44 (0)121 222 3001

## London

Hammonds LLP  
7 Devonshire Square  
London EC2M 4YH  
Telephone +44 (0)20 7655 1000  
Fax +44 (0)20 7655 1001

## Munich

Hammonds LLP  
Karl-Scharnagl-Ring 7  
80539 Munich Germany  
Telephone +49 89 207 02 8300  
Fax +49 89 207 02 8301

## Brussels

Hammonds LLP  
Avenue Louise 250  
Box 65  
1050 Brussels Belgium  
Telephone +32 2 627 7676  
Fax +32 2 627 7686

## Madrid

Hammonds LLP  
Plaza Marques de Salamanca 3-4  
28006 Madrid Spain  
Telephone +34 91 426 4840  
Fax +34 91 435 9815

## Paris<sup>•</sup>

Hammonds Hausmann  
4 Avenue Velasquez  
75008 Paris France  
Telephone +33 1 53 83 74 00  
Fax +33 1 53 83 74 01

## Hong Kong<sup>•</sup>

Hammonds  
Suites 3201-05, 3217-20  
32nd Floor Jardine House  
1 Connaught Place  
Central Hong Kong  
Telephone +852 2523 1819  
Fax +852 2868 0069

## Beijing<sup>+</sup>

Hammonds Beijing  
Representative Office Hong Kong  
Suite 1419 - 20  
South Tower Beijing Kerry Centre  
1 Guang Hua Road  
Chao Yang District  
Beijing 100020 China  
Telephone +86 108529 6330  
Fax +86 10 85296116

<sup>•</sup> Affiliated undertakings of Hammonds LLP <sup>+</sup> Representative Office

## WWW.HAMMONDS.COM

If you do not wish to receive further legal updates or information about our products and services, please write to: Richard Green, Hammonds LLP, Freeport, 2 Park Lane, Leeds, LS3 2YY or email [richard.green@hammonds.com](mailto:richard.green@hammonds.com).

These brief articles and summaries should not be applied to any particular set of facts without seeking legal advice. © Hammonds LLP 2009.

Hammonds LLP is a limited liability partnership registered in England and Wales with registered number OC 335584 and is regulated by the Solicitors Regulation Authority of England and Wales. A list of the members of Hammonds LLP and their professional qualifications is open to inspection at the registered office of Hammonds LLP, 7 Devonshire Square, London EC2M 4YH. Use of the word "Partner" by Hammonds LLP refers to a member of Hammonds LLP or an employee or consultant with equivalent standing and qualification.