

SHE Regulatory News



Welcome

Welcome to Clyde & Co's Safety, Health and Environment Regulatory Newsletter.

Our SHE Regulatory Team is one of the largest and most recognised in the UK specialising in regulatory defence work.

We are only too aware of the difficulties that face businesses today with an ever increasing burden of regulation and legal duties. A workplace incident or a breach of those duties often culminates in an investigation and potentially criminal prosecution of a business, its management or staff.

With the stakes so high, it is essential that you and your organisation are kept up to date with changes in the law to protect the reputations of your business, its directors and employees.

Our quarterly newsletter provides a topical update on recent key developments in our areas of specialism:

- **Corporate Manslaughter/Health and Safety**
- **Road Traffic and Transport**
- **Environmental**
- **Fire safety**
- **Trading law**
- **Food safety**
- **Meet one of the team**

By clicking on any of these topics, you will be taken to the articles relevant to that area.

We would be happy to answer any comments or queries you may have regarding the topics covered in this bulletin – please email SHERegulatory@clydeco.com.



Corporate Manslaughter / Health and Safety

84% of health and safety Regulations to be scrapped – radical change or damp squib?

The Government has promised a shake-up of health and safety after announcing that 84% of Regulations will be scrapped or improved.

Whilst the announcements of the 2012 Budget have been heralded by some as the biggest change in direction ever seen in health and safety legislation, closer examination reveals that the changes may not be quite as radical as they first appear.

The Government has so far confirmed that 167 of the 199 health and safety Regulations considered as part of the Red Tape Challenge [which we reported on in the Spring edition of this enewsletter] will either be withdrawn or improved. The HSE Board has already approved the scrapping of seven pieces of legislation that it believes are either obsolete or have been superseded by modern legislation.

To help businesses make sense of this potentially huge streamlining exercise, the Health and Safety Executive (“HSE”) has confirmed it will redesign information on its website this year which will provide guidance on the changes.

Whilst the Government’s intentions are clearly admirable, further information is needed on what proportion of the 84% figure cited will be improvement of Regulations and what proportion will be removal of redundant Regulations. For example, Regulations such as the Pottery (Health and Welfare) Special Regulations 1950 and Regulations for the use of locomotives and wagons will be abolished, whilst legislation which most affects employers on a daily basis, such as the Management of Health and Safety at Work Regulations 1999, will remain intact.

With little information currently available on the detail of the proposals, it remains to be seen quite how the changes will impact on businesses.

Network Rail hit with largest ever fine

The largest ever fine ordered to be paid by a company for rail-safety failings has been imposed on the United Kingdom’s railway provider, Network Rail. Such significant fines are clearly intended to act as a stark warning to organisations, irrespective of who ultimately pays the price.

On 4 April 2012 Network Rail was fined £4 million, and ordered to pay costs of £118,000, by Preston Crown Court following the Grayrigg train derailment which resulted in one fatality and 86 injuries.

The derailment occurred when a high-speed train from London Euston to Glasgow Central derailed after hitting a set of badly-maintained points. Stretcher bars holding the moveable rails a set distance apart when the points are operated had failed, causing the train’s wheels to come off the tracks. The Office of Rail Regulation found during its investigation that Network Rail had failed to provide and implement suitable and sufficient standards, procedures, guidance, training, tools and resources for the inspection and maintenance of fixed stretcher-bar points.

The penalty comes after Network Rail was recently fined £1 million for the deaths of two teenage girls at a level crossing in Essex in 2005. In May last year, Network Rail was also fined £3 million for its safety failings over the Potters Bar Rail crash in May 2002.

In imposing the most recent penalty, the judge commented “the fine is imposed in order to mark the seriousness of the offence and to emphasise the fact that those who bear responsibility for ensuring the safety of the public must exercise proper care.”

All these fines are of interest since Network Rail is a government-backed body, with no shareholders and its debt guaranteed by the government. This means that the money will effectively be paid out of the public purse, ironically leaving less available to be spent on upgrading Britain’s railways. The fine reminds organisations that, whatever their standing, they cannot ignore their health and safety responsibilities.

*STOP PRESS

As part of its crack-down on reforming health and safety Regulations, the Government has also reaffirmed that changes in strict liability will be brought in this year, so that health and safety law will no longer hold employers to be in breach of their duties in civil law where they have done everything that is reasonably practicable and foreseeable to protect their employees.

In response, the HSE will provide more help for businesses by this summer on what is “reasonably practicable” to assist in understanding how they can comply with the law. This is an area where limited guidance and advice is available and any clarity which can be provided will no doubt be welcomed by all.



Corporate Manslaughter / Health and Safety

CDM – Building for the future or falling to pieces?

Criticisms that for a long time have been levelled at the Construction (Design and Management) Regulations 2007 (“CDM”) have come to a head following a recent evaluation of the legislation.

The evaluation shows that whilst CDM has gone a long way in meeting its objectives, there remain areas for improvement. Whilst the review is helpful in drawing attention to the key issues, no recommendations have been made. This begs the questions “What was the purpose of the evaluation?” and “What can we expect for the future?”.

What was the purpose of the evaluation?

The evaluation was commissioned in order to fulfil the recommendations set down in the Löftstedt report, which emphasises the need for clearer expression of duties, a reduction of bureaucracy, and tailored guidance for small projects.

The evaluation was based on surveys by parties in the construction industry conducted in 2006 and 2010 and aimed at answering two key questions:

- To what extent has CDM met its stated objectives?
- What are the cost implications for the construction industry of CDM?

Broadly speaking, the results of the evaluation show that:

- CDM has gone a long way to meeting its objectives, but some concerns remain within the industry
- construction, design, management and site practices have improved between 2006 and 2010
- a cost impact was associated with CDM, but respondents rated the benefits obtained higher than costs, and
- industry practice was found to have a significant influence on how CDM is implemented

What were the key findings?

What is clear is that CDM has gone a long way towards clarifying duty holders’ roles and responsibilities. This was considered to be one of the positive aspects of the legislation.

However, there remain concerns regarding the interpretation and implementation of the Approved Code of Practice. A common theme that featured was that parties were satisfied with the Regulations, but some did not appreciate their applicability or understand what was required of them. For example, some small organisations thought that since their role on a project was relatively minimal, CDM did not apply to them.

The recent economic downturn has also led to much of the work undertaken since the introduction of CDM being done under difficult commercial circumstances. This has resulted in instances of price being more important than competence, early starts on site and compressed timescales. These all limit the time and resources available for coordination and cooperation. In the current economic climate, Contractors, Designers and Coordinators are not always confident enough to say ‘no’ to a Client. The report stresses that parties must take their CDM responsibilities seriously to avoid breaching the Regulations; commercial pressures will not be an excuse.

What can organisations expect for the future?

Whilst the report makes no recommendations for changes to CDM, the evidence produced will support policy development, and the Health and Safety Executive has announced that it will be re-drafting the Regulations for reissue in 2014. At present, no further detail is available on the changes to be made, however it is envisaged that CDM will be given the necessary attention to ensure that its key objectives do not fall by the wayside.



Corporate Manslaughter / Health and Safety

A toothless bite or a hidden danger? – Coroner's reports

At every Inquest, there lurks the prospect that a Coroner will order a report – this is known as a Rule 43 report.

For an organisation to receive such a report after the daunting experience of a fatality and an Inquest can be a frightening prospect. But what is a Rule 43 report and can it be detrimental to a business?

This article looks at whether Rule 43 is a toothless bite or a hidden danger that could have potentially far-reaching ramifications for a business.

What is Rule 43?

At the conclusion of an Inquest, a Coroner who believes that action should be taken to prevent the recurrence of fatalities similar to those in respect of which the Inquest is being held may announce that he is reporting the matter in writing to the person who may have power to take such action.

Whilst that business or individual is then required to respond there are currently no sanctions for failing to do so, nor does the business or individual have to take any action following their response.

The key powers Coroners have in relation to these reports are:

- Coroners have a wide remit to make reports to prevent future deaths. It does not have to be a similar death
- A person who receives a report has a statutory duty under the Coroners Rules 1984 to send the Coroner a written response within 56 days. However, there is no sanction for failing to do so
- Coroners must provide interested persons to the Inquest and the Lord Chancellor with a copy of the report and the response
- Coroners may send a copy of the report and the response to any other person or organisation with an interest
- The Lord Chancellor may publish the report and response, or a summary, in various publications he produces or in the Ministry of Justice Summary of Reports and Responses

- The Lord Chancellor may send a copy of the report and the response to any other person or organisation with an interest (other than a person who has already been sent the report and response by the Coroner)

So should this concern a business or individual?

To receive a Rule 43 report is both a toothless bite and a hidden danger.

It can be highly embarrassing, damage the brand and reputation that organisations strive for. The impact alone can often spur organisations to remedy situations. However, if a business chooses not to respond, the Coroner has no powers to enforce it.

On the other hand, the Coroner is entitled to provide the Rule 43 report, and any reply, to anyone who “may find it useful or of interest”, which clearly includes the HSE, local authorities, DVLA, the media and pressure groups, as well as the deceased's family. Therefore, if a business does respond to the report, it could be used as part of any subsequent HSE investigation or civil claim.

Businesses should also be alert to the fact that the final impact might not be felt now but instead in the future. If there was a failure to act on issues that were brought to an organisation's (and its senior management's) attention by a Coroner and no action was taken, what if a fatality in similar circumstances should occur again? There is then the prospect of allegations of manslaughter and senior management failings against both the organisation and individuals.

What can a business do to avoid a Rule 43 report?

To ensure your organisation's interests are fully protected, it should seek specialist advice in the immediate aftermath of a fatality. The legal team can then guide you through the subsequent Police/HSE investigation and any inquest with a view to protecting your position and avoiding a Rule 43 report.



Corporate Manslaughter / Health and Safety

Control of Asbestos Regulations 2012 (CAR2012) – Money for old rope?

Whilst CAR2012 replaced the previous legislation on 6 April 2012 with little fanfare, do you know what the changes mean for your business?

The duty to manage asbestos and the requirements when carrying out licensed work remain, but CAR2012 has created a new category of Notifiable Non-Licensed Work (NNLW) which employers must be aware of. Businesses failing in these new duties risk a criminal investigation and prosecution.

What was required previously?

Work with asbestos required a licence unless it was short duration (less than two hours in total and no more than one hour of exposure per person) and met certain criteria.

All non-licensed work required employers to:

- identify where asbestos is, its type and condition
- assess the risks
- put in place effective control measures to manage the risk
- provide training

So what is required now?

All the above duties still apply but, in addition, NNLW places duties upon employers (which we will look at in more detail below) to:

- notify the work to the HSE
- arrange medical examinations
- keep medical records

What is NNLW?

NNLW still has to be short duration work, but requires an assessment to be made of the friability (how easy it is for the asbestos fibres to be released) of the material containing the asbestos, the condition of the material and how firmly the asbestos is bonded.

Removal work with highly friable materials and/or involving materials in poor condition will likely be NNLW, whereas short duration maintenance work on non-friable materials in good condition is likely to remain simply non-licensed.

Employers concerned that that they may get the assessment wrong could end up treating all work as licensed or NNLW, leading to additional and unnecessary costs.

How do we notify the work?

Licensed asbestos contractors will be familiar with this, but NNLW must be notified to the HSE using an online form before work starts.

The form covers the:

- location of the work site
- activities being undertaken
- number of workers
- start date and duration
- type and quantity of asbestos present (and its condition)

The HSE guidance is that “reasonable” notice should be given. Notification being sent just as work is about to start will only be reasonable in circumstances where urgent work is required.

A project with multiple NNLW jobs (e.g. minor works of a similar nature across a housing estate) can use one form to notify all the jobs.

Medical examinations

All employees who undertake NNLW must have an asbestos medical examination by 30 April 2015, and then at least every three years whilst an employee. Any new starters after 30 April 2015 will need a medical exam before they undertake NNLW.

The HSE estimates the cost of each examination at £85-120, although the British Medical Association suggests the cost will be higher. This figure does not include other costs to the business – attendance must be on Company (paid) time.

Record keeping

The records must contain the details of the individual worker, the nature and duration of work with asbestos, levels of exposure and the date of the worker's medical examinations. The records must be kept for 40 years and offered to the HSE and employees if the business ceases to trade.

Penalties

An employer guilty of breaching CAR2012 is liable to a fine of up to £20,000 for each breach in the Magistrates' Court, with an unlimited fine available in the Crown Court. Individuals guilty of such offences could also face a custodial sentence.

The Bribery Act 2010 – One year on.....

The Bribery Act 2010 (“the Act”) came into force on 1 July 2011 with a fanfare of publicity. One year on, there has been one successful prosecution. Does this mean the mayhem was all hype and businesses can rest on their laurels safe in the knowledge that this legislation is not aggressively enforced? The short answer to this is “no”.

There are a number of industries which are particularly vulnerable to bribery – in particular, there have been several reports highlighting the construction industry’s susceptibility. Moreover, in a survey of 1,400 construction professionals by The Chartered Institute of Building, 41 per cent had been personally offered a bribe, and 60 per cent felt fraud within the industry was commonplace.

This article provides an overview of the new legislation, the associated guidance designed to assist businesses’ compliance, and the steps organisations should be taking to ensure they have robust systems in place.

When did the Act become effective?

As criminal legislation is not retrospective, the Act applies only to offences committed since 1 July 2011. Investigations into such offences are extremely complex and time consuming, which may explain the dearth of prosecutions to date under the Act.

However, the Serious Fraud Office has illustrated that pursuing prosecutions of bribery and corruption offences are very much on its radar, asserting that “in almost every month of the past year the SFO has brought new prosecutions to court, albeit under the old laws”.

So what are the new offences?

The Act creates four criminal offences;

- bribing another person
- receiving a bribe
- bribing a foreign official
- failure by a commercial organisation to prevent bribery

Senior company officers can be prosecuted in a personal capacity if it can be proved that the act of bribery was committed with their consent or neglect.

Significantly, commercial organisations can be prosecuted if they fail to prevent persons associated with them from bribing another person on their behalf.

“Adequate procedures” – a defence to the corporate offence

The Act creates a defence for commercial organisations accused of the corporate offence, if it can be shown that there were “adequate procedures” in place to prevent the commission of the offence.

The Ministry of Justice identifies six principles to assist businesses in determining the type of procedures which might be considered “adequate”.

The six key principles identified by the Ministry of Justice are:

(i) Proportionate procedures

An organisation’s anti bribery procedures must be proportionate to the risks that organisation faces; these should be identified during the risk assessment procedure (iii).

(ii) Top-level commitment

The management of an organisation should cultivate a culture of integrity in which bribery is considered unacceptable.



Corporate Manslaughter / Health and Safety

The Bribery Act 2010 – One year on.....[cont.]

(iii) Risk assessment

This process should identify and prioritise the risks that organisation faces. Upon completion of the assessment, appropriate preventative and proportionate procedures (i) can be implemented.

(iv) Due Diligence

The guidance stresses that due diligence checks should be proportionate to the identified risk. The level of required and expected due diligence will vary depending upon the risks identified.

(v) Communication and training

Internal communications should confirm the management's stance on bribery, address the implementation of the company policy and its effect on employees. External communications of a company's bribery policy should both reassure business associates and act as a deterrent.

(vi) Monitoring and review

This may involve evaluation by an external business, reviews of existing procedures or the implementation of internal systems to detect and investigate possible bribery.

What are the potential sanctions?

The Act imposes severe penalties on conviction.

For individuals, the maximum custodial sentence for bribery has been increased from seven to ten years.

The penalty for a corporate defendant convicted of the offence is an unlimited fine.

In addition to any sentence or fine, there are powerful ancillary orders which should not be overlooked, namely:

- Compensation / reparation
- Directors' disqualification orders
- Prosecution costs
- Confiscation under the Proceeds of Crime Act 2002

“Does this mean the mayhem was all hype and businesses can rest on their laurels safe in the knowledge that this legislation is not aggressively enforced?... No!”

Road Traffic and Transport

Is your paperwork in order?

It's easy to overlook paperwork, but one document which should always be dealt with as soon as it arrives is a Notice of Intended Prosecution issued under section 172 of the Road Traffic Act 1988 ("RTA").

Businesses should ensure they have appropriate internal procedures in place to promptly process paperwork from the Police. Failure to do so could mean an appearance in a criminal Court.

Let's look at the offence, and the steps an organisation should take to avoid a criminal investigation and prosecution.

What is the offence?

Where the driver of a vehicle is suspected of a driving offence, the keeper of the vehicle and any other person must provide information requested by the Police as to the identity of the driver. The information is likely to be requested by a written Notice sent through the post to the registered keeper of the vehicle; be it an individual or a company. Such Notices are treated as a request for the information to be provided within 28 days of the date on the Notice. If the Notice is to be served on a limited company then it should be served on its company secretary.

Typically the request for information is generated upon the detection of a minor road traffic offence such as speeding or travelling through a red traffic light. If the registered keeper is an individual with just one private vehicle then the process is simple. The keeper returns the Notice complete with the driver's details and no offence under section 172 RTA is committed.

However, the matter may not be so straight forward for those who operate within the transport sector. Notices get lost within company administration, the company may not know who was driving the vehicle at the time or the driver may have left the company without leaving forwarding contact details.

If the information is not provided then the Court may issue a summons ordering the person or company named on the notice to appear at the local Magistrates' Court.

What are the defences?

If you respond to the Notice out of time, it will be a defence to show that the information was provided as soon as reasonably practicable after the end of that period or that it was not reasonably practicable to provide it within the time limit.

The offence can be committed by the keeper of the vehicle or by any other person who is named in the Notice, but it will be a defence to show that you did not know and could not reasonably have ascertained who the driver was.

The director, manager, secretary or other officer of the company can also be guilty if the offence was committed with their consent or was attributable to their neglect.

What are the penalties?

As well as the hassle of administration and the time taken out of your working day to deal with this matter, an individual who is convicted of the offence is liable to a fine of up to £1000 and potentially the Prosecution's costs. In addition, a driver can be disqualified or have his licence endorsed with 6 penalty points. There is also an enhanced fixed penalty of £120 available for this offence.

A company convicted of this offence is liable only to a fine of £1000 and will not be subject to any endorsement of a driving licence. Again, if the matter proceeds to court then the company may become liable for the Prosecution's costs.

What most people do not realise is that the penalty for failing to provide information is often greater than the penalty imposed for the original offence by the driver.

So how do I avoid committing the offence?

It is important for companies to ensure that they keep proper records of who is driving company vehicles at any one time so that the identity of the driver can be provided within the time limit.

Importantly, if you cannot provide the requisite information, do not just ignore the Notice. Seek legal advice immediately.

It is worth noting that the Crown Prosecution Service takes seriously any attempt to mislead the authorities as to the identity of the driver. Misleading the authorities in this way may lead to a prosecution for perverting the course of justice; the penalties for this offence are much more serious than for failing to provide the identity of the driver and often lead to imprisonment.

In summary, make sure that your company has the procedures to swiftly bring these Notices to the attention of senior management, and administration staff know how to deal with these Notices today.

*STOP PRESS

A consultation has been launched by the government into raising the fines for motoring offences. The proposals would make fixed penalty notices available for careless driving, with a suggested penalty of £90 and three points on the driver's licence. However, there are already concerns that fines may not necessarily be the right approach for careless driving offences, even though drivers would still be able to appeal any decision in court. Other proposals to be considered include plans to increase the payment levels from £60 to £90 for many motoring fixed penalty offences, such as speeding, not wearing a seat belt and using a mobile phone whilst driving. The consultation seeks views on these changes and closes on 5 September 2012. We shall continue to keep you updated.

Largest ever environmental fine

Global energy giant ExxonMobil Chemical Limited has been forced to pay the largest ever environmental fine in British history for failing to report greenhouse gas emissions from its Scottish chemical plant. The scale of the fine should act as a deterrent to other companies who are in danger of complacency when it comes to their environmental obligations, even if there is no direct impact on the environment.

ExxonMobil is the world's largest publicly traded oil and gas company. The £2.8 million penalty was levied by the Scottish Environmental Protection Agency ("SEPA") when the company failed to report over 30,000 tonnes of carbon dioxide emissions from its ethylene facility at Mossmorran, Fife. Whilst the fine was imposed back in 2010, the information only came to light when SEPA published their enforcement statistics recently.

The penalty was a mandatory consequence of breaching the Greenhouse Gas Emissions Trading Scheme Regulations 2005, the UK Regulations that implement the EU emissions trading scheme, under which operators must submit a report to SEPA on the greenhouse emissions from their installation. The whole point of the scheme is to limit the total climate pollution coming from industry. The Regulations provide for a penalty of 100 Euros or £83 per tonne of carbon dioxide not reported. As there was no direct environmental impact, the fine was a civil penalty and no prosecution was instigated. The fine will be used to fund a series of environmental projects.

Whilst SEPA currently has only a restricted power to issue fines for breaches of certain Regulations, there are proposals that the regulator should have the power to hand out fines of between £500 and £40,000 to environmental offenders or to accept enforcement undertakings giving an offender the opportunity to make an offer to take steps to correct its behaviour.

Given the potentially astronomical fines which are already available for breaches of the scheme, as well as the proposals to extend SEPA's powers, businesses should take care to ensure that they carefully monitor their environmental compliance or else face the ramifications of their errors.

“The £2.8 million penalty was levied by the Scottish Environmental Protection Agency (“SEPA”) when the company failed to report over 30,000 tonnes of carbon dioxide emissions.”



Fire safety

'Responsible Person' for fire safety? – if you have a contract of employment it could be you!

In a potentially groundbreaking approach to the Regulatory Reform (Fire Safety) Order 2005 (the "Order"), a UK Fire and Rescue Authority has recently commenced a criminal prosecution of an individual manager, alleging personal culpability for safety related offences by virtue of the individual's contract of employment - a 'contract' being a component of the Article 5(4) offence with which the manager is charged.

Whilst it will be left to a jury to decide whether this is an innovative development of UK fire safety legislation by the Fire Authority or a misguided interpretation of the existing law, if the prosecution is successful, the ramifications for employers and employees alike are significant, with the re-writing of contracts of employment and corporate fire safety policies an inevitability. Further, the potential for intelligent and conscientious employees to distance themselves from any form of fire safety responsibility in the future must be a real risk, something which even the most ardent of fire safety campaigners would concede is not what the legislation intended.

The introduction of the Regulatory Reform (Fire Safety) Order 2005 satisfied the UK's obligations under the EU Framework Directive (89/391/EEC) imposing unconditional obligations on employers by requiring they have ultimate responsibility for the safety of their employees in case of fire, even where others may have obligations in respect of the same premises.

The 'Responsible Person' ("RP") is the primary dutyholder under the Order. In the case of a workplace, the RP is defined under Article 3 as 'the employer', that is to say, the body corporate which employs people to work in the premises. However, in addition to the RP, the requirements imposed on the RP in respect of fire safety are also imposed on every other person who has, to any extent, control of the premises.

Article 5(4) of the Order gives a further clue as to who such persons might be. It includes any person who has, by virtue of a contract or tenancy, an obligation of any extent in relation to maintenance or repair of the premises or an obligation in relation to the safety of the premises (to the extent that such obligations extend). From a contractual perspective, examples of this 'other person' may include a managing agent for residential or commercial premises or a facilities contractor with specific responsibility for a fire suppressant system or equivalent. However, it would seem, if the Fire Authority is correct, 'contractual obligations' are not limited to commercial scenarios, but also individual contracts of employment, rendering individual employees as the responsible person.

Interestingly, in the same case, but in a separate charge under article 32(8), the leading fire safety authority of *R v Boal* and the concept of whether a mid-level manager can in fact be classified as 'a person with both the power and responsibility to decide corporate policy and strategy' is also to be tested, which again has far reaching implications for businesses across the whole regulatory criminal spectrum including health & safety, environmental crime, consumer law and food safety.

Article 32(8) of the order borrows the wording of s.37 of the Health and Safety at Work Act 1974 and provides:

"Where an offence under this Order committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

The case of *R v Boal* (1992) was a decision of the Court of Appeal concerning the provision in the Fire Precautions Act 1971 identical to Article 32(8) and the facts concerned the prosecution for fire safety breaches of the assistant store manager of the retail bookstore Foyles, who was in charge of the store during the general manager's absence. Dismissing the case, it was held that the intention of the section was to fix criminal liability only on those who were in a position of 'real authority': the decision-makers within the company who had both the power and responsibility to decide corporate policy and strategy. Its purpose was to catch those responsible for putting proper procedures in place; 'it was not meant to strike at underlings'.

With the matter likely to be tried in early 2013, clarification on both matters is still a little way off, although it is to be hoped from a corporate perspective that the attempt to significantly widen the ambit of the Fire Safety Order is extinguished by the criminal courts.

Groupon promises honest and transparent practices

Businesses offering online services could be required to give undertakings that control their practices, or face prosecution if they fail to comply with consumer protection Regulations. The Office of Fair Trading's ("OFT") remit to regulate commercial practices includes online sales and a recent investigation of discount website Groupon has shown that the OFT will not shy away from exercising its powers.

The OFT has accepted undertakings from Groupon to change some of its trading practices following an investigation which uncovered wide-spread breaches of consumer protection rules. Groupon has enjoyed rapid growth over the past few years but has failed to ensure that its policies and procedures continued to comply with consumer protection law; such as the Consumer Protection from Unfair Trading Regulations 2008, Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Protection (Distance Selling) Regulations 2000.

Groupon uses "collective buying power" to offer discounted deals for customers by promising firms a minimum number of customers taking up the offer. However, the OFT had specific concerns over practices involving reference pricing, advertising, refunds, unfair terms, and the diligence of its interactions with sellers.

The undertakings require Groupon to change its practices to ensure that in the future:

- Reference prices (adverts that compare an original reference price against a sale price, including actual savings contained within that price) are accurate, honest and transparent
- Groupon carries out an accurate, honest and realistic assessment of a seller's ability to provide goods or services in the quantity or time frame suggested

- Products display clearly, prominently and on the same screen or before purchase all the limitations which apply to any deal
- Groupon takes reasonable steps to ensure that health or beauty product claims are properly supported
- Terms and conditions are fair
- Groupon applies refunds policies and cancellation rights in accordance with the Distance Selling Regulations

MyCityDeal Ltd, which trades as Groupon, has a three-month deadline to implement the changes.

Whilst collective buying and discount schemes can offer real benefits for both consumers and merchants, it is vital that those parties also benefit from consumer protection law.

The OFT has stated that it "will continue to monitor Groupon closely.....and should evidence emerge of a breach of any of these undertakings, it will consider appropriate [enforcement] measures". Businesses should therefore take note that prosecution remains a real option open to the OFT against those that fall short of their obligations.

"Businesses offering online services could be required to give undertakings that control their practices, or face prosecution if they fail to comply with consumer protection Regulations."

A commercial practice – to be or not to be; what is the answer?

A recent ruling at Snaresbrook Crown Court has provided some much needed guidance on what constitutes a ‘commercial practice’ under the Consumer Protection from Unfair Trading Regulations 2008 (‘CPR’) – is a single act sufficient or is a more sustained course of action required?

What happened in this case?

The case involved South East Maintenance and Cleaning Services Ltd (“SEM” or “the Company”). The Company had agreed to carry out building work on a property owned by Ms Martinez. This included gas, plumbing and electrical work and the creation of an extension.

Before the works began, the company director, Mr Steele, assured Ms Martinez that all his tradesmen were fully qualified to undertake the various types of building work, including gas fitting.

Following a number of delays and problems, the work stopped, unfinished in December 2009. Mr Steele sent an email to Ms Martinez shortly after, asserting that all works had been passed by building control and in a subsequent letter he also claimed that the completed works had met all of the requirements of the various statutory bodies.

Ms Martinez was not convinced! Chartered building surveyors who inspected the property upon Ms Martinez’s request concluded that some of the work had been defective and substandard. The extension was subsequently demolished and rebuilt by different contractors.

The Prosecution alleged that the statements made by Mr Steele (both before the contract was entered into and also in the correspondence after the work was completed) contained false information which amounted to a misleading action under the CPR’s.

In addition, a gas fitter used to undertake work was not approved, endorsed or authorised by the Gas Safe Register, which is one of the so called ‘Black List’ offences identified in the CPR’s.

What did the Court say?

The issue was whether a ‘commercial practice’ requires a regular or repeated business approach or whether a single act would be sufficient.

The Judge concluded that there is a distinction to be made between an unintentional error addressed to a single consumer, compared to a wider commercial strategy (even if that wider strategy only actually affects one consumer). An unintentional activity or error addressed to only one consumer did not constitute a “commercial practice” for the purposes of the CPR’s.

Based on this latest case, it appears that Courts may be willing to offer some degree of protection to businesses that provide misleading or incorrect information when dealing with one customer, as long as it was an unintentional and a one off error. However, there is no guarantee of this so businesses should take the appropriate steps to ensure their dealings with all their customers are fair and not misleading.

The reality of this case may be that, in future investigations, Trading Standards Departments conduct more thorough and lengthy investigations to gather evidence which reveals a repeated course of conduct and which affects more than one consumer.

Food giant fined £180,000

Food giant Nestlé UK Ltd has been fined £180,000, and ordered to pay nearly £42,000 in costs, by Bradford Crown Court after one of its employees was crushed to death inside a depalletiser. The incident took place at Nestlé's Albion Mill plant in Halifax. Nestlé pleaded guilty to breaching section 2(1) of the Health and Safety at Work etc Act 1974.

It appears that the employee may have gone into the depalletiser to remove a blockage as earlier in the day some large sweet tins had jammed the machine, causing the alarm to sound. The Health and Safety Executive's investigation found that a safety key device to halt the machine was available but the company had failed to ensure its employees were aware of its purpose and how to use it correctly. The breaches were compounded by the fact that as early as 2002 Nestlé had received warning advice about improving guarding on another palletiser but had not applied that advice to the machine operated by the deceased.

The case acts as a warning that even the largest of businesses can ill afford to ignore advice in relation to their health and safety practices. Businesses should prioritise taking steps to ensure such advice is properly actioned or else face the consequences.

Don't let it go to waste

A Bill targeted at forcing supermarkets and manufacturers to donate their surplus food to charities in a bid to reduce the amount of food wasted in the United Kingdom was recently before Parliament.

The Regulation sets down labelling requirements in a bid to simplify and streamline rules, covering areas including allergens, nano-ingredients and imitation foods. It aims to improve and simplify the presentation of nutritional information on packs and The Food Waste Bill 2012 was brought forward by Kerry McCarthy, Labour MP for Bristol East, under Parliament's 10-minute rule, which allows MPs to introduce private members' bills. With up to 50% of edible and healthy food being routinely wasted across the UK, McCarthy believes that urgent action is needed to tackle the problem.

However, some organisations argue that legislative change is not required to address this issue. The British Retail Consortium has pointed out that retailers already offer excess produce to food charities, and food waste generated is being substantially reduced thanks to improvements in packaging. They also emphasise that the majority of food waste comes from households.

Given the potentially major obstacle of the risk of liability for food donors, McCarthy is also calling for a UK equivalent of the US Good Samaritan Food Donation Act, which exempts from prosecution any food banks and donors who donate surplus food in good faith, if, for example, the food turns out to have caused food poisoning.

Whilst the Bill has failed to make it any further through Parliament, at the very least it will help draw attention to an issue of growing public environmental concern.

Meet one of the team



1. Who are you?

Kath Turner, Associate in the Safety, Health & Environment Regulatory Department.

2. Why did you choose the law?

I've always aimed high and wanted a career which challenged me. Accountancy was not my forte so it was a choice between medicine and the law; with law I got to wear business suits rather than scrubs!

3. What appealed to you about this career?

Having grown up watching TV dramas such as Law & Order, the prospect of representing clients in court and having to think on my feet appealed to me. However, being a Solicitor (as opposed to a Barrister), I also get the opportunity to build lasting relationships with my clients and be fully involved in the strategic direction of a case from the outset.

4. Have you had any particularly interesting cases recently?

We are currently advising a manager of a major retailer in connection with a fire safety matter. There have been a number of high profile cases in this area of late and Fire Authorities are becoming increasingly keen to prosecute. The legislation is still being tested and it is probable we will have to argue a point of law before the Divisional Court as the case progresses. It doesn't get much more interesting than being involved in 'making' the law.

5. What has been your career highlight so far?

Being recognised in Chambers and Partners at only 2 years PQE.

6. What do you do in your spare time?

Sadly I am unable to say I regularly conquer mountains or run marathons! I enjoy spending time with my husband John, dog Ralph, family and friends. Admittedly this often involves a glass of wine or two and preferably a location abroad!

7. What is your favourite holiday destination?

I really enjoy travelling and like to go somewhere different every holiday ... my favourites so far have to be India, Hong Kong and New York. And for a beach holiday, definitely the Maldives.

8. If you could only take three things to a desert island, what would they be?

An iPad with all my music and books on it, a supply of gin and tonic, and a fully crewed yacht to sail me somewhere different when I was ready to leave!

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR
T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

Further advice should be taken before
relying on the contents of this summary.

Clyde & Co LLP accepts no responsibility for
loss occasioned to any person acting or refraining
from acting as a result of material contained in
this summary.

No part of this summary may be used,
reproduced, stored in a retrieval system or
transmitted in any form or by any means,
electronic, mechanical, photocopying, reading
or otherwise without the prior permission of
Clyde & Co LLP.

Clyde & Co LLP is a limited liability partnership
registered in England and Wales. Authorised and
regulated by the Solicitors Regulation Authority.
© Clyde & Co LLP 2012

Clyde & Co LLP

www.clydeco.com