



BURGESS
SALMON

Environment and energy briefing from Burgess Salmon published
in the June 2011 issue of The In-House Lawyer:

Developments in health and safety law for the energy sector

THE 
IN-HOUSE
LAWYER

Developments in health and safety law for the energy sector

THE EFFECT OF HEALTH AND SAFETY legislation is increasingly being felt by the energy sector, and particularly the alternative energy sector as it has expanded into larger projects over the past few years. The health and safety arena is entering a period of change following Lord Young's Report (the Report) and the Comprehensive Spending Review (CSR). Events like the Buncefield oil storage depot disaster in 2005 and Deepwater Horizon are also having an impact. This article discusses some of the developments and implications that will be of interest to general counsel advising boards on liability and corporate governance.

As the nuclear industry is subject to its own specific safety regime the changes in that industry are not included in this article.

HEALTH AND SAFETY LEGISLATIVE FRAMEWORK

The framework is based on self-regulation principles, with targets or goal setting rather than a prescriptive approach that aims to give strict rules for all possible work situations. Failure to comply with the requirements is a criminal offence and can, in the worst cases, result in significant fines and even imprisonment.

The Health and Safety at Work etc Act (HSWA) 1974 contains a reverse burden of proof that means that, if prosecuted, the defendant duty holder must prove that it reduced risk to a level as low as reasonably practicable (ALARP). What that means in practical application is something that troubles many organisations, leading sometimes to a failure to act or to over-react. Approved Codes of Practice, Guidance and industry good practice are all relevant when working out how to satisfy the ALARP requirements, but there are often gaps and uncertainty for innovative or emerging technologies.

The effect of the Corporate Manslaughter and Corporate Homicide Act 2007 (the

2007 Act) has increased the profile of safety obligations. However, if an organisation complies with HSWA 1974 it is unlikely to be caught by the 2007 Act. However, the 2007 Act does emphasise the importance of senior management and executive involvement in safety. A corporate manslaughter prosecution will only succeed if the gross breach of duty is due substantially to the way in which senior management has organised its activities.

LORD YOUNG'S REPORT AND CSR

The commentary following publication of the Report into regulations that burden businesses was about how there should be a change in approach for risk assessment for activities where there is minimal risk of injury or death. Lord Young suggested:

- providing compliance checklists;
- introducing minimum standards for health and safety consultants; and
- providing a system of appeal to challenge decisions made at local authority level to ban public events on safety grounds.

With what appeared to be a focus on small events and low-risk businesses it is easy to conclude that it was not relevant to higher risk and larger, energy businesses.

However, when the Report is combined with the Health and Safety Executive (HSE)'s response to the CSR, this conclusion would be a mistake. On 21 March 2011 the Minister for Employment, Chris Grayling, made this apparent when he announced the government's next steps as:

- a) making more effective use of regulation by shifting the focus of health and safety activity away from businesses that are compliant, and instead concentrating on higher risk areas



'Failure to comply with the requirements is a criminal offence and can, in the worst cases, result in significant fines and even imprisonment.'

Ann Metherall, partner, Burges Salmon LLP
E-mail: ann.metherall@burges-salmon.com

'A report into the Deep Water Horizon incident concluded that the offshore oil and gas industry is responding to disasters, rather than anticipating worst-case scenarios and planning for high-consequence, low-probability risk.'

and dealing with serious breaches of regulation;

- b) a review of health and safety regulation;
- c) reducing the number of proactive inspections of relatively low-risk and well-performing workplaces by one-third, reducing the amount of poor advice to businesses from badly qualified consultants, and simplifying the current complex structure for regulation;
- d) recovering HSE's costs from businesses that are found to be materially at fault;
- e) new charges for users of HSE's services; and
- f) better support for low-risk businesses and making their workplaces safe and healthy.

The CSR is going to force HSE to make 'so-called' efficiencies. However, government funding will have to be replaced and this could have an effect on all business as HSE:

- a) Charges those who create risks: a 'fee for fault'. HSE has suggested that if it finds a business that is not compliant during an inspection, it should be charged for the advice or costs of issuing and following up an enforcement notice. HSE see this approach as fair and also expect it to be welcomed by businesses that are compliant. Others have raised whether it creates a conflict of interest.
- b) Charges business who use HSE staff and resources for advice and consultation on their health and safety systems.
- c) Charges for advice and input given on land use planning matters. HSE see the principal beneficiaries of advice are

the developers who want to build near major hazards installations.

- d) Extends charging to businesses with comparable regulatory oversight to those governed by permissioning regimes where charges are already levied.

A direct output of the Report is a review of health and safety regulation legislation chaired by Professor Ragnar Löfstedt, director of the King's Centre for Risk Management (the Löfstedt Review). Terms of reference were published at the end of April and the review's main aim is to consider the opportunities for reducing the burden of health and safety legislation while maintaining progress made in improving health and safety outcomes. The review intends to gather evidence from a range of key stakeholders, but it has a relatively short timescale of six months in which to report. In particular, the review is aiming to determine:

- a) the scope for consolidating, simplifying or abolishing regulations owned by HSE and local authorities (which means fire safety, product safety, transport safety and working time will not be covered);
- b) whether the requirements of EU directives are being unnecessarily enhanced (gold plated) on translation into UK law;
- c) if lessons can be learned for comparison with health and safety regimes from other countries;
- d) whether there is a clear link between regulation and positive health and safety outcomes;
- e) if there is evidence of inappropriate litigation and compensation arising from health and safety legislation; and

- f) whether the changes to legislation are needed to clarify the legal position of employers in cases where employees act in an irresponsible manner.

This all appears to be sensible. In particular, the last point will be welcome as employers can find themselves prosecuted for actions of employees, despite them being trained and properly briefed. However, there are some concerns that the scope is not wide enough. That the review will only look at the range of statutory instruments and not HSWA 1974 is disappointing, as this review would be an ideal opportunity to clarify the meaning of 'reasonably practicable' within HSWA 1974 to avoid confusion. The current accepted standard for this test is that a step should be taken unless it would be grossly disproportionate to the risk (measured in cost, time and effort) to do so. In contrast, and rather confusingly, HSE speaks about duty holders taking proportionate steps and most of its recent guidance uses the same phrasing.

It is difficult to quantify the effect of the risk-averse advice given that flows from the current definition. Anyone who has sat in court while a judge directs the jury on the test they have to apply in coming to their conclusion will sense what a high hurdle it is and therefore why some health and safety professionals demand gold-plated requirements (at cost and expense to business). It would be a shame if the review misses an opportunity to consider this opportunity to reduce the regulatory burden.

HSE intends to reduce its inspections by being more targeted. Traditionally, HSE inspectors have had a great deal of discretion in deciding what and who to target. No doubt to achieve efficiencies, HSE want to scale back the resources directed towards major businesses. Although this is not confirmed, observers expect HSE to design intervention plans with major organisations where its senior inspectors meet senior executives and hold them to account based on the organisations' own metrics, bringing an end to unplanned visits. Suddenly an organisation's approach and internal metrics and targets will assume an even greater importance. This is going to need plenty of thought, particularly from new and emerging businesses not so experienced in this area.

WHAT DOES THIS MEAN FOR THE ENERGY SECTOR?

For new energy businesses, HSE says it is investing considerable effort in responding to what it sees as a fast-moving position as:

- emerging technologies arrive in the marketplace;
- new players join the energy industry; and
- smaller businesses have a greater role within it.

Of course, large-scale businesses have been around for years and for those HSE consider asset integrity as highly important given the issues that arose at Buncefield and the Texas City disaster.

Emerging energy technologies

Key issues for HSE are:

- a) the relative lack of safety data for some emerging technologies (eg wind turbine failure rates);
- b) that many of the technologies are yet to be deployed on a commercial scale (carbon capture storage is a good example); and
- c) businesses set to be involved in the new energy framework are those where fatality and injury rates are relatively high and already cause HSE concern, in particular agriculture, manufacturing, transport and waste management.

Specifically, HSE is looking closely at onshore wind farms. It recognises that standards are still developing, but it is concerned whether the risks around access to site and the sequence of construction are being addressed sufficiently. HSE says (and this is a common theme with all emerging energy technologies) it wants to work on early intervention with designers. The underlying objective of the Construction (Design and Management) Regulations (CDM) 2007 is that designers and CDM co-ordinators work together to solve problems before construction starts. This is often an area that developers are reluctant to engage with before planning permission or funding is approved. HSE's current stance probably highlights that if there was an accident leading from

construction sequencing or access then it will be looking closely at early design decisions.

Established energy technology

HSE are looking at the importance of asset integrity and process safety. HSE emphasise that incidents at Flixborough, Bhopal, Piper Alpha, Buncefield and Texas City show that a lack of injuries and near misses is no guide that all is well in process safety terms. HSE says it is not impressed by boards and stakeholders who measure the safety performance by means of lagging indicators (in other words, how many incidents have occurred) or focus purely on worker safety, as was the case at BP Texas City.

Similarly, a House of Commons select committee report into the implications of the Deep Water Horizon incident concluded that the offshore oil and gas industry is responding to disasters, rather than anticipating worst-case scenarios and planning for high-consequence, low-probability risk. The committee was concerned that the equipment that should have prevented the blow out when other controls had failed had no redundancy if any part of it failed. The committee went as far as to suggest that government should consider adopting minimum prescriptive safety standards for 'fail-safe' devices. However, prescription of this nature would conflict with

HSWA 1974 and would also be odd given that the US government's own report into the accident identified outdated and inflexible prescriptive standards as part of the problem.

General issues

There has already been a shift in approach to legislation. The better regulation agenda means there is a strong likelihood that new legislation emerging from Europe will not necessarily be enacted under a UK statutory instrument. Additionally, HSE announced in late 2010 that, although the approach to regulating offshore developments would be by extending the application of HSWA 1974, it would not be taking similar steps with relevant regulations such as CDM 2007 or Control of Major Accident Hazards (COMAH) 1999 Regulations.

HSE intends to make clear that for offshore wind farm construction, and carbon capture and storage, it will highlight that the principles of specific regulations, such as CDM 2007 and COMAH 1999, represent relevant good practice and ALARP. Given that there is already much dispute over the application and usefulness of CDM 2007, stakeholders will have to engage with HSE to understand exactly how the guidance is to be applied.

Separate from the Report is an evaluation of CDM 2007. It was promised at the time CDM 2007 came in because there was so much concern about their impact. It is not clear

SUMMARY

Recent developments give food for thought to businesses and particularly those emerging companies in the energy sector that will not necessarily have had to deal with these issues in the past or focus on them. In summary:

- cost of non-compliance may increase as the Health and Safety Executive (HSE) seek to charge for intervention;
- costs may go up as HSE charge for advice on development next to major hazard sites;
- expect HSE to be more targeted on inspections and look at whether internal safety metrics are being met as HSE start to engage with senior executives on compliance;
- emerging technologies should expect HSE to ask questions about whether design at an early stage has addressed safety before construction or the project starts or gets into commercial production;
- existing technologies should expect to see HSE focus on process safety and the use of leading safety indicators; and
- the energy industry should aim to get involved in the legislation review and industry standards development so that it has legislation and standards that are fit for purpose and not restrictive or set unrealistic standards.

'The better regulation agenda means there is a likelihood that new legislation emerging from Europe will not necessarily be enacted under a UK statutory instrument.'

how the evaluation will interface with the Löfstedt Review, but it will look at whether the new regulations have achieved the objectives, including:

- reducing bureaucracy;
- improved the competence of duty holders, in particular CDM co-ordinators, as many clients struggle to see they add any value to a project; and
- deal well with complex contracting arrangements, such as public private partnerships.

The energy industry should consider getting involved in the review.

CORPORATE MANSLAUGHTER AND DIRECTOR'S RESPONSIBILITIES

This article would not be complete without an update on the first corporate manslaughter prosecution brought under the 2007 Act. Much comment has been

made about the fact that the company prosecuted was very small and the managing (and only) director had a direct involvement with the excavation of the trench that collapsed. It was the sort of situation covered by the common law of corporate manslaughter and therefore it is questionable whether larger businesses will learn very much about the court's likely approach to as a result of this prosecution.

The company sought permission to appeal the conviction and fine of £385,000 (more than the annual turnover of the company). The court refused. While the lessons to be learnt may be relatively limited, what can be observed is that the Crown Prosecution Service (CPS) will point to industry good practice as being the standard by which the jury will measure the breach of duty, not just HSE-approved guidance. This emphasises the importance for industry to be involved in the development of industry good practice to check that it is appropriate and not gold plated.

The mention of corporate manslaughter often makes directors ask about their personal liability. Although there is no secondary liability under the 2007 Act for individuals, because one of the elements of the test is senior management failing, it is likely that an investigation will include:

- detailed scrutiny of the board;
- their safety performance; and
- decision making.

It is theoretically possible for a director to be guilty of gross negligence manslaughter (although with a large organisation this is extremely unlikely), but it is possible that a health and safety offence may come about because of neglect of that director and in which case a HSWA 1974 prosecution may come about. CPS will cite the Institute of Directors' Guidance (<http://www.hse.gov.uk/pubns/indg417.pdf>) as the standard to be achieved, and it is recommended that this, or similar, forms part of an organisation's safety management systems and that directors are aware of the requirements. The test of neglect is not based on what the director knew but what they should have known.

*By Ann Metherall, partner,
health and safety team,
Burges Salmon LLP.
E-mail: ann.metherall@burges-salmon.com.*