

QUARTERLY NEWSLETTER

Vol. 4, 2008

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FROM THE DIRECTOR

Incident Investigation



Arguably there is no more important aspect of risk related systems implementation (OH&S, Environment, Security, etc) than

incident reporting and investigation. Every incident represents a failure in the management system and with it, an opportunity to learn and address these failures, thus strengthening the system, and without repeat occurrences.

Many businesses are simply not prepared and do not react appropriately.

The low level of priority and hence effort, expertise and attention applied to incident reporting and investigation in many businesses astounds me.

More than half of the investigation reports I have viewed recently had a single recommendation arising, and that is often a low level administrative control.

In my experience there is always a

number of contributing causal factors and a raft of improvement opportunities identified.

When challenged most report that investigations were often conducted by under-trained investigators without workforce visibility/ consultation, as an adjunct to their role, and often did not commence until at least 24 hours, and often 5-7 days, after the event. How can these be diligent or credible?

Loss or near loss events provide line management a great opportunity to openly and visibly demonstrate their commitment and expectations at a time when the workforce and other stakeholders are looking for leadership.

Some organisations require investigation if a threshold severity is breached- e.g. an LTI or EPA reportable consequence occurs. This is seriously flawed logic. It is the potential consequence not the actual consequence that matters. Setting a minimum threshold also telegraphs the consequence that management is prepared to accept without question.

When the incident has, or has the potential for, serious consequences then it goes beyond leadership - management have a governance need. There are situations where management is at risk through its inaction.

Lack of knowledge is not a defence as it is managements duty to require reporting on system failures and make due enquiry and representation. One needs to look no further than recent prosecutions to evidence this. Managers are being increasingly charged and found personally liable of criminal offences.

Fortunately high consequence incidents occur very infrequently. When such an incident occurs however there are a myriad of competing high priority actions that managers need to attend to. If unprepared it is difficult to make reasoned decisions. Very quickly authority is wrested from them. Companies need to have planned for these – have a system and have verified that it is understood and will work reliably. So many haven't.

With the collective experience from leading or supporting over 50 investigations under legal privilege we offer a unique and valuable support to organisations.

For further information or assistance in this area, please contact us on

03 9875 6913 or visit
www.riskstrategies.com.au.



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REGULATORY CHANGES

Safe Work Bill set aside



The Minister for Workplace Relations, Julia Gillard, has set aside the Safe Work Bill in the first week of December at the upper house. Federal Government refused to accept amendments that were introduced by Independent, Coalition and Greens Senators in October.

The Safe Work Bill aimed to create a new national workplace health and safety body to oversee major reform of the nation's health and safety laws. Legislation was returned to the Senate three times since September 2008 after being repeatedly rejected.

Among the proposed changes to the Bill include were increasing the membership from two employers and two employee representatives to three employers and three employee representatives. The amendments also downgrade the powers of the minister

Parliament has ended for 2008 so the reintroduction of the Bill will have to wait until 2009. This will allow the government to amend the Bill by including the recommendations of the National Review. The Review has consulted broadly across the political spectrum and should present further options to all.

The amendments proposed by the Opposition don't have a great deal to do with safe

workplaces but a lot to do with limiting union influence in the decision-making of the new OHS body.

Of course, the government is not obliged to accept all the recommendations of the review panel and over the next few months it will be closely watching the reception of its industrial relations legislative platform to perhaps indicate a more successful pathway for its Safe Work Bill.

COMCARE

New high risk work regulations



The Occupational Health and Safety (Safety Standards) Amendment Regulations 2008 (No. 1), which commences on 9 October 2008, updates Part 2 of the Occupational Health and Safety (Safety Standards) Regulations 1994 to implement the National Standard for Licensing Persons Performing High Risk Work.

Changes include:

- updating terminology to refer to licensing instead of certification;
- updating the occupations referred to as 'high risk work';

- recognising State and Territory licences issued to perform high risk work;
- imposing a specific duty on employers not to permit a person to undertake high risk work in the absence of appropriate licences;
- imposing a duty on employers to provide an employee or contractor with training, instruction and information on the equipment operation, hazards, risks and control measures;
- imposing specific duties on employers with regard to the employees undertaking high risk work while undergoing training; and
- enabling Comcare to make a recommendation to a State or Territory

authority for the cancellation of a licence to perform high risk work.

The regulations also clarify that certain State and Territory occupational health and safety laws relating to licensing high risk work are preserved to ensure that State and Territory licences and certificates to perform high risk work are recognised under the *Occupational Health and Safety Act 1991* and Regulations.

If you require any assistance with implementing the amendments, contact riskstrategies@acohs.com.au.



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WORKERS COMPENSATION

Victorian Workers Compensation Obligations

Providing Suitable or Pre-Injury Employment – your obligations under S155A

Under the Victorian Accident Compensation Act, employers have an obligation to provide suitable or pre-injury employment to workers depending on their capacity for work.

Section 155A provides that the employer must provide the worker:

- if the worker is partially incapacitated for work, with suitable employment; or
- if the worker no longer has an incapacity for work, with employment which is the same as, or equivalent to, the position the worker held before the injury.

The obligation to provide suitable employment commences when a claim for compensation is accepted or a direction/recommendation is made by the by the Accident Compensation Conciliation Service (ACCS) or a court in favour of the worker and continues for a period of 12 months from the date of acceptance.

The period does not include any period during which the worker does not have an

incapacity for work. For example, if an injured worker is incapacitated for 3 weeks and then provides a clearance certificate and resumes pre-injury duties, the count of weeks stops at that point. If the worker later becomes incapacitated again under the same claim, the count would then recommence at 3 weeks.

It is a common misconception that the employer must “hold open” a worker’s pre-injury position for the 12 month period. When a worker recovers from injury, the employer must provide a position that is equivalent in status and remuneration to the position held before the injury within the 12 month period.

Another important consideration is that employers that provided workers with suitable or pre-injury employment before claim acceptance (effective early intervention) receive a “credit” for the period that employment was provided for prior to claim acceptance the relevant period is 12 months less that period of employment.

Employers often believe that section 155B, which provides that an employer need not comply with section 155A if doing so would cause unjustifiable hardship, can be relied

upon in order to justify not meeting requirements under s155A. WorkSafe Victoria does not have the power to issue ‘exemptions’ under section 155B and does not entertain applications for exemption. Section 155B is only a potential defence to a prosecution under section 155A. It is assumed that WorkSafe would take into account the factors set out in section 155B when deciding whether to prosecute an employer, however, employers should always obtain expert advice if considering this direction.

WorkSafe will actively investigate suspected breaches of section 155A and fines of up to \$28,355 can be imposed.

Risk Strategies are experts in understanding employers obligations and can assist in reviewing your current Injury Management and Return to Work Programs to ensure you are not exposed.

For further information and/or assistance, contact Risk Strategies at riskstrategies@acohs.com.au.



ENVIRONMENTAL MANAGEMENT

Prime Minister Confirms Emissions trading Starting in 2010

On the 17th December 2008 the Prime Minister, Kevin Rudd, confirmed that the Carbon Pollution Reduction Scheme (CPRS), the government's proposed emissions trading scheme, would commence in 2010.

The CPRS is as follows "a national reduction in Australia's greenhouse gases (GHG) emissions by between 5 per cent and 15 per cent below 2000 levels by the end 2020".

The CPRS also describes the 5 per cent commitment as 'a minimum (unconditional) commitment' and the 15 per cent commitment as 'a commitment to reduce emissions in the context of global agreement. Sectors that will be covered from the scheme's commencement are the following:

- (i) stationary energy;
- (ii) transport;
- (iii) industrial processes;
- (iv) fugitive emissions of methane, carbon dioxide and nitrous oxide during the production, processing, transport, storage and distribution of coal, oil and gas;
- (v) emissions of all 6 synthetic GHGs;
- (vi) waste, and
- (vii) optional for – post – 1989 reforestation of previously cleared land.

Liability will be imposed combining both 'direct' and 'as agents of another' liability as follows:

- (i) stationary energy (combination of direct emitters above 25,000t CO₂e and fuel supplier for small emitters);
- (ii) transport (upstream point of obligation only, via excise system);
- (iii) industrial process emissions (direct emitters, 25,000t CO₂e threshold);

- (iv) fugitive emissions (direct emitters only 25,000t CO₂e threshold); and
- (v) waste (direct emitters only, 25,000t CO₂e for landfills in rural areas, 10,000t CO₂e if a landfill facility is operating within proximity to another landfill facility, with a distance to be determined in the regulations, and 25,000t CO₂e for waste water and incineration).

Ultimately liability will be passed down to other businesses and consumers, resulting in increases in costs for fuel, electricity and energy intensive products and services. Whilst for most households the increase in costs is expected to be affordable. To offset the initial price impact on fuel associated with the introduction of the CPRS, the Government will:

- (i) cut fuel taxes on a cent for cent basis, periodically assess the adequacy of this adjustment measure for three years (one year for heavy vehicle road users) and adjust this offset accordingly;
- (ii) provide a rebate equivalent to the excise cut for businesses in the agricultural and fishing industries for three years;
- (iii) increase payments, above automatic indexation, to people in receipt of pensioner, carer, senior and allowance benefits and to provide other assistance to meet the overall increase in the cost of living;
- (iv) increase assistance to other low-income households through the tax and payment system to meet the overall increase in the cost of living;
- (v) assistance to middle-income households to help them meet any overall increase in the cost of living flowing from the scheme; and
- (vi) provide additional support through the introduction of energy efficiency measures and consumer information to help households take practical action to

reduce energy use and save on energy bills so that all can make a contribution.

The Government will also establish the Climate Change Action Fund (CCAF) to help business transition to a cleaner economy, by providing in partnership funding for a range of activities, including:

- Capital investment in innovative new low emissions processes;
- Industrial energy efficiency projects with long payback periods; and
- Dissemination of best and innovative practice among small to medium sized enterprises.

In general, emissions permits under the CPRS will be sold by quarterly public auction (via an electronic register). Special transitional assistance will be given to industries identified as emissions-intensive trade-exposed (EITE) industries, where approximately 20 per cent of emissions permits will be allocated free of charge to certain EITE industries.

Legislation for the CPRS will contain 'assurance' provisions including compulsory external auditing. CPRS regulatory arrangements will also have a range of compliance, investigative and enforcement powers (and a range of mechanisms, including civil penalty and criminal provisions, to respond to non-compliance with the CPRS. This legislation is planned to be introduced in the Australian Federal Parliament in the winter session of 2009.

Given the short timeframe for the introduction of the CPRS it is anticipated that organisations will start to reduce emissions 'now' before the commencement of the scheme.

