



4.

### SELLING MACHINERY OR PLANT?

If the plant is new or has a warranty then you are obligated to provide full working instructions and training methodology in detail. The information must be comprehensive and comprehensible to comply with the Act. Refer to Regulations.

If the plant is second hand and you wish to avoid obligations relating to due diligence and due care then you must specify that the plant or machinery is SECOND HAND and is being sold on the basis that it is "AS IS, WHERE IS". Refer to section 18.



## News and views from Summit Special Edition - August 2012

### Due Diligence – Occupational Health & Safety Act

In recent articles we have discussed both the Degree of Control and the Duty of Care. In this edition we propose to talk about Due Diligence. This term usually relates to carrying out investigations in the process of preparing to bid on a company or a property and will or should include ALL relevant factors that need to be taken into account. Unfortunately most people do not understand that the Health and Safety laws also require Due Diligence. ALL relevant factors must be taken into account both in the matter of putting in place systematic management (yes SYSTEMS) and then in the maintenance of them. What is often glossed over is that the Act in section 5 stipulates that the objective is to promote and achieve a standard of excellence. This is in stark contrast to most other Acts that allow for what might be termed reasonable effort or what normal people would consider to be acceptable or appropriate.

The object of this Act is to promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work by—

- (a) promoting excellence in health and safety management, in particular through promoting the systematic management of health and safety; and
- (b) defining hazards and harm in a comprehensive way so that all hazards and harm are covered, including harm caused by work related stress and hazardous behaviour caused by certain temporary conditions; and
- (c) imposing various duties on persons who are responsible for work and those who do the work; and
- (d) setting requirements that—
  - (i) relate to taking all practicable steps to ensure health and safety;
  - (ii) are flexible to cover different circumstances; and
- (e) recognising that volunteers doing work activities for other persons should have their health and safety protected because their well-being and work are as important as the well-being and work of employees; and
- (f) recognising that successful management of health and safety issues is best achieved through good faith co-operation in the place of work and, in particular, through the input of the persons doing the work; and
- (g) providing a range of enforcement methods, including various notices and prosecution, so as to enable an appropriate response to a failure to comply with the Act depending on its nature and gravity; and prohibiting persons from being indemnified or from indemnifying others against the cost of fines and infringement fees for failing to comply with the Act.]

In plain language good or even very good is not good enough and we need to be able to prove that we destined to put in place high quality systems and methods to prevent harm to ourselves and other people. You should note the clause (g) above which provides for a range of enforcement methods and multiple prosecutions plus you cannot pass the buck to other parties unless you assign them specific control.

### MAKE SURE YOU DO NOT DISTURB THE ACCIDENT SCENE

#### 26 No interference at accident scene--

(1) Where a person is seriously harmed while at work, no person shall, unless authorised to do so by an inspector, remove or in any way interfere with or disturb any wreckage, article, or thing related to the incident except to the extent necessary--

- (a) To save the life of, prevent harm to, or relieve the suffering of, any person; or
- (b) To maintain the access of the general public to an essential service or utility; or
- (c) To prevent serious damage to or serious loss of property.

### OTHER THAN OSH INSPECTOR CAN FINE YOU? SERIOUSLY?

#### 54A Laying information

(2) A person other than an inspector may lay an information in respect of an offence under this Act only if—

- (a) an inspector or another person has not taken enforcement action against any possible defendant in respect of the same matter; and
- (b) an enforcement authority has not taken prosecution action under any other Act against any possible defendant in respect of the same incident, situation, or set of circumstances;

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### WEALTH CREATION IS USING HELICOPTERS TO THROW MONEY?

*"There is no means of avoiding the final collapse of a boom brought about by credit expansion. The alternative is only whether the crisis should come sooner as a result of a voluntary abandonment of further credit expansion, or later as a final and total catastrophe of the currency system involved."* -- Ludwig Von Mises - Austrian School of Economics

### INSURANCE BROKERS CAN RUN THE RISK OF LITIGATIONS

It is common for insurance brokers to tell their clients that they can take out insurance to cover the cost of fines relating to Health and Safety - as well as other Acts, of course. This is simply NOT TRUE. It is possible to insure against the legal costs and reparations but NOT against the cost of fines. Remember that there was a day when legal costs were \$5000 and the fines were also \$5000. Those days are long gone and the minimum fine is now \$45,000.

### WHEN DOES WORK ACTUALLY FINISH?

Most people will say at 5 o'clock, did you not know that? Yes of course. And the ACC legislation agrees with you and when the bell goes at 5pm and work stops, then the worker is no longer at work, he or she is finished work.

Not so with the HSE Act. If you happen to provide a worker with a company vehicle and s/he is allowed to take it home then he does not finish work until he arrives at home and safety parks your vehicle. If s/he makes a mess of parking the vehicle then you could become liable for the ensuing accident. Are you serious? Yes.

### VOLUNTEERS ARE NOW TREATED AS EMPLOYEES. BUT WHAT ABOUT THOSE ON WORK EXPERIENCE?

If you will take a moment to go back to page 1 and read section (e) you will find that employees and volunteers are both afforded protection under the legislation along with other parties of course. But in the first rendition of the Act it was clear that volunteers were to be exempted. That is NO LONGER the case and volunteers are to be treated as if they are employees.

Persons engaged under a work experience regime are still exempted from the obligations of the Act. But having said that, remember that they still have rights to litigate the negligent employer for failures under the UN charter relating to Human Rights.



3.

### MACHINERY ACT BRING ENFORCED

We are informed that the Dept of Labour staff will be having a blitz on all work where machinery could be used by workers and that the machinery could cause potential harm. It is imperative that machinery have proper guarding and that there be a maintenance regime with both preventative maintenance and remedial maintenance contracts where possible.

It is fatal to argue that you knew that the guard was faulty but that you were "getting a round tuit" In our view the only way to cover yourself is to have proper JOB TASK ANALYSIS forms for every machine type and signed off by every worker.



### WHAT ABOUT DOMESTIC DWELLINGS – THE HOMEOWNER?

An interesting aspect of the legislation is that work on domestic dwellings by a homeowner is considered to not come under the control of the Act and that the homeowner has no obligations or in simple language is exempt from prosecutions. It is also (in our opinion) probable - that if a contractor works for a homeowner and is under the direct supervision and control of the homeowner then the contractor would probably have much less than his or her normal obligations.

### BUT IT WAS ONLY A HAIR LINE FRACTURE OR A SIMPLE STITCH

Most people do not understand that the NZ rendition of the definition of serious harm is complication, convoluted and cannot easily be understood. You need to look at the exact definition of serious harm as defined in Form 1. A recent decision of the Dept of Labour was to review the definition but we are not aware of any outcome. In our view the NZ definition is confusing to say the least and for example, serious puncture wounds do not fall under the NZ definition. In our view, the Australian states have a much clearer definition. Let me say that in my view the NZ Act should specify that any medical or surgical intervention apart from bruises, sprains and strains, grazes OR similar must be consider as serious harm or potentially serious harm. It is NOT CORRECT to assume that a minor fracture or a simple stitch is nothing to worry about.

### BUT I DID NOT KNOW THAT I HAD TO INVOLVE MY EMPLOYEES

Section 14 requires that an employer must involve employees in the development of procedures to identify and control all significant hazards (under sections 7-10). If the employer fails to do this exactly in accordance with the Act then a further penalty can apply.

#### 52 Failure to comply with section 14--

Where-- (a) Any employer is convicted of failing to comply with any provision of sections 7 to 10 of this Act; and

(b) The Court is satisfied that the employer has also failed to ensure that employees had the opportunity to be fully involved in the development of procedures developed for the purpose of complying with the provision,--

the Court may take the failure referred to in paragraph (b) of this section into account in determining the penalty to be imposed.