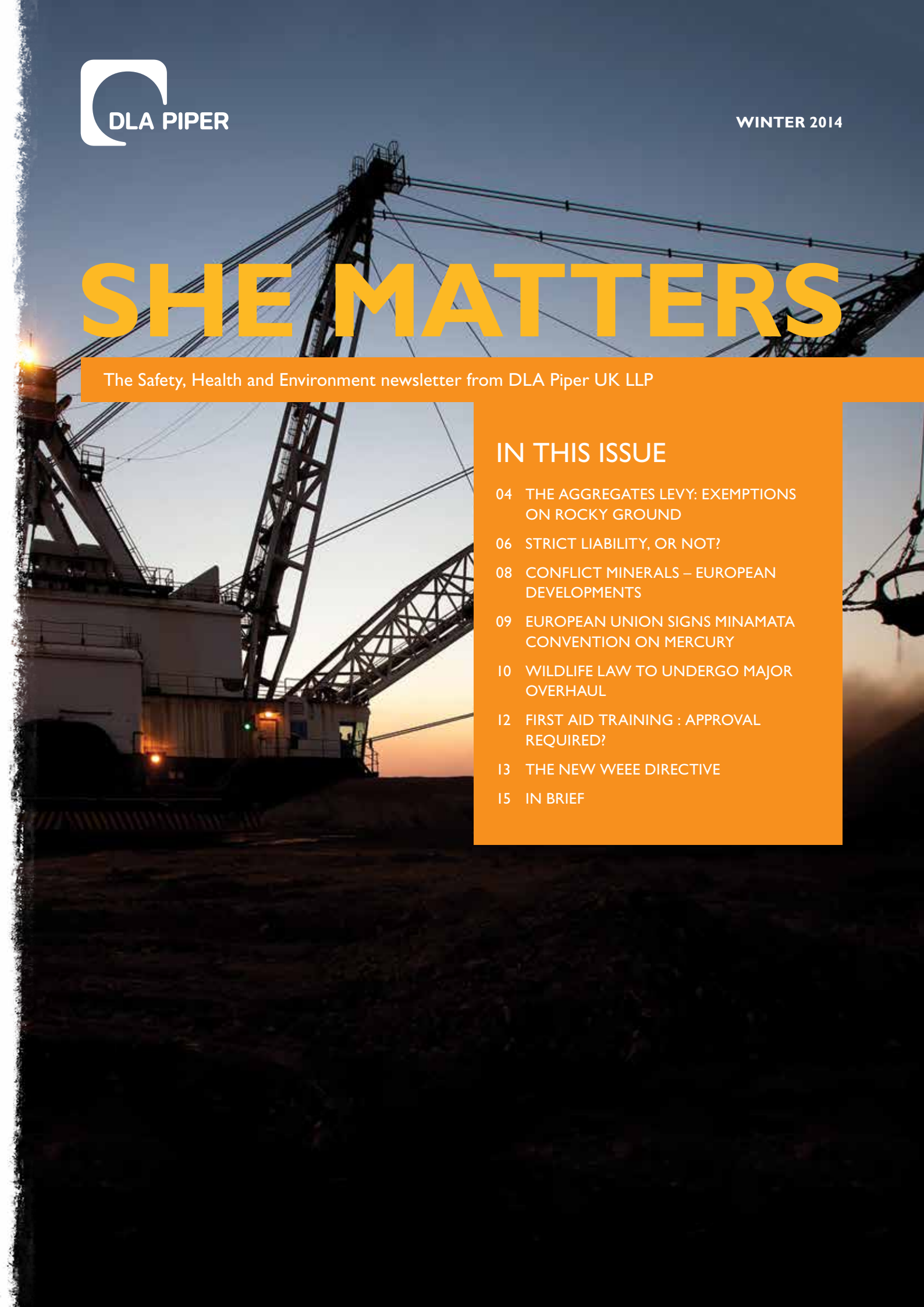
DLA PIPER

WINTER 2014

SHE MATTERS

The Safety, Health and Environment newsletter from DLA Piper UK LLP



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SHE MATTERS

Teresa Hitchcock
Partner

As this edition of SHE Matters went to press, the media announced a pledge by Mr Cameron, made to a conference of the Federation of Small Businesses, that more than 3,000 rules affecting business will be dropped or changed, saving more than £850m a year.

A Government Statement published at the same time indicated that the Department for Environment, Food and Rural Affairs will have slashed 80,000 pages of environmental. Guidance by March 2015, saving businesses around £100m a year.

There is a clear political message behind this that the Government intends to be seen as a friend of enterprise and small business, and no doubt many representatives of such businesses will welcome the announcement. Predictably some environmental groups have reacted with less enthusiasm, pointing to the dangers of sacrificing environmental protection, and the argument that good environmental regulation can actually save businesses costs.

No doubt the proof will be in the proverbial pudding, and the devil in the detail, and we will need to consider carefully what actually transpires in the next year or so as regards the bonfire of Red Tape.

Undoubtedly it makes good sense to reduce unnecessary burdens on business, and it has sometimes proved to be the case that some "guidance" provided by regulatory authorities can impose restrictions and burdens additional to those actually required by the law. However not all guidance is burdensome. Some of it can help businesses find a way through a minefield of regulatory requirements, particularly where, as is now so often the case, national implementing legislation simply "copies out" EU requirements, to protect the Government against infraction proceedings by the EU Commission. Businesses are often left to pick their own way through the maze, or pay lawyers and other advisors to provide an explanation. Good guidance can therefore provide real assistance. Another benefit from guidance is that where requirements are complex, it can indicate solutions which will be acceptable to the regulator.

There is also another side to the coin in terms of the need for, and benefits of, good self-regulation. Under s 2(3) Health and Safety at Work etc Act 1974 (**"HSWA"**) employers are required to prepare and revise a written statement of their general policy with respect to the health and safety of employees and the organisation and arrangements for the time being in force for carrying out that policy.

This is not supposed to be (as it unfortunately often is) simply a statement of general platitudes on health and safety. It was envisaged by the Robens Committee, whose report led to the enactment of HSWA, as the basis of a system of self-regulation which it was hoped might reduce the need for over-prescriptive health and safety legislation.

Good companies do provide documents which actually set out the specific management structures procedures and arrangements adopted to address the activities hazards and needs of their particular organisation. When conducting due diligence on the acquisition of a business, as we often do when acting for buyers, the presence or absence of a good health and safety policy can often be a key indicator of the attention, or lack of it, paid to good safety management. Similarly, although there is no comparable statutory requirement as regards environmental management, many good companies have voluntarily adopted sound environmental management policies to address environmental issues.

As the note in this issue on the recent Court of Appeal case on fines for large companies convicted of environmental and health and safety offences shows (see In Brief below), systemic failings can be costly. In order to avoid the risks, it is sensible to have good health and safety and environmental management systems in place, and also documentation to prove that this is the case.

THE AGGREGATES LEVY
EXEMPTIONS ON ROCKY GROUND

INTRODUCTION

The Aggregates Levy ("**Levy**") was introduced in the UK as part of the Finance Act 2001 ("**The Act**") and came into force in April 2002. It is a tax imposed upon the commercial exploitation of various aggregates such as rock, sand and gravel, within the UK.

The purpose of the Levy was to reduce the environmental impact of mining and quarrying activities through incorporating the environmental cost into the market price, thereby reducing the demand for primary aggregates, and it has been seen as a successful "stimulus towards environmental improvements".

THE BIG FREEZE

The current rate of the Levy is £2.00/tonne and has been since 2009, which currently equates to around 20% of the average sale price of aggregates (net of VAT). Recently, the 2013 Budget has frozen a planned rise in the Levy to £2.10, which had been scheduled for April of last year.

Aggregates purchases typically make up only a very small proportion (2-3%) of construction costs, and therefore the freeze is unlikely to make any major impact on the economy, particularly with regards to the construction industry. Nevertheless, it does represent a reduction in expected costs to the industry.

STATE AID

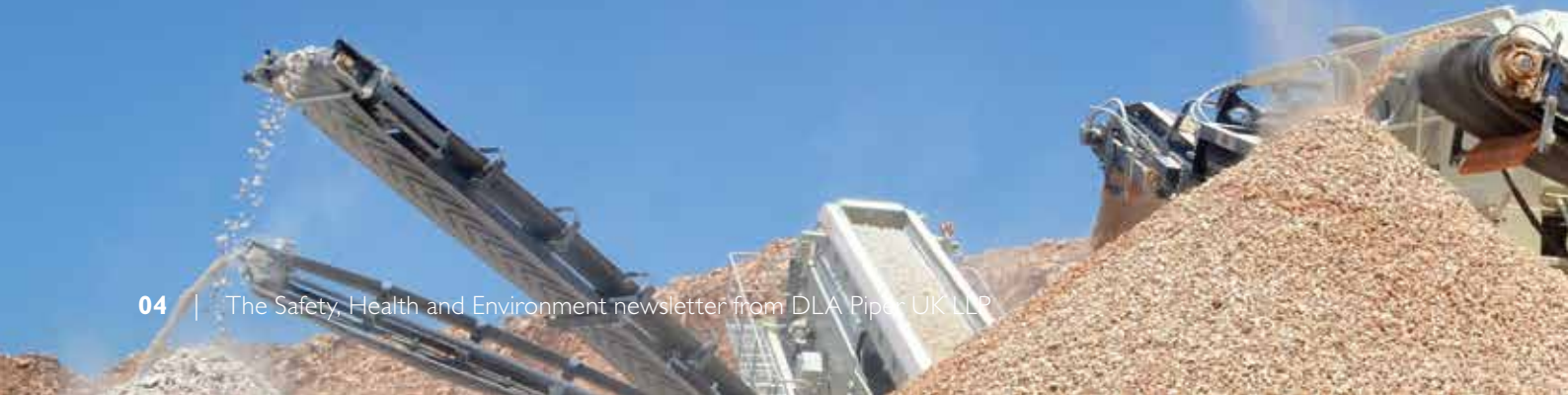
On the 31 July the European Commission ("**EC**") notified the UK of its decision to open a formal investigation intended to scrutinise certain exemptions, exclusions and reliefs ("**Exemptions**") applicable under the Levy.

The EC objected to the Exemptions on the grounds that they had the potential to distort competition and affect trade between EU Member States, constituting "**State Aid**", arguing that in the interests of parity, HMRC should either tax all aggregates or none.

The Government has rejected such claims. However, whilst the process continues, the Government has been forced suspend the Exemptions under Article 108(3) of the TFEU. In line with its legal duty the Government proposes to introduce new legislation as part of the Finance Bill 2014 ("**The Bill**"). This will amend the Act, suspending numerous exemptions, pending the results of the investigation.

IMPACT

The Government predicts there to be a small impact on approximately 200 businesses as a result of the suspension, primarily as a result of increased administrative duties, such as registering for the Levy. However, others turn the view out the potential impact is likely to be far greater. In order to deal with the increased costs associated with the Levy, businesses will



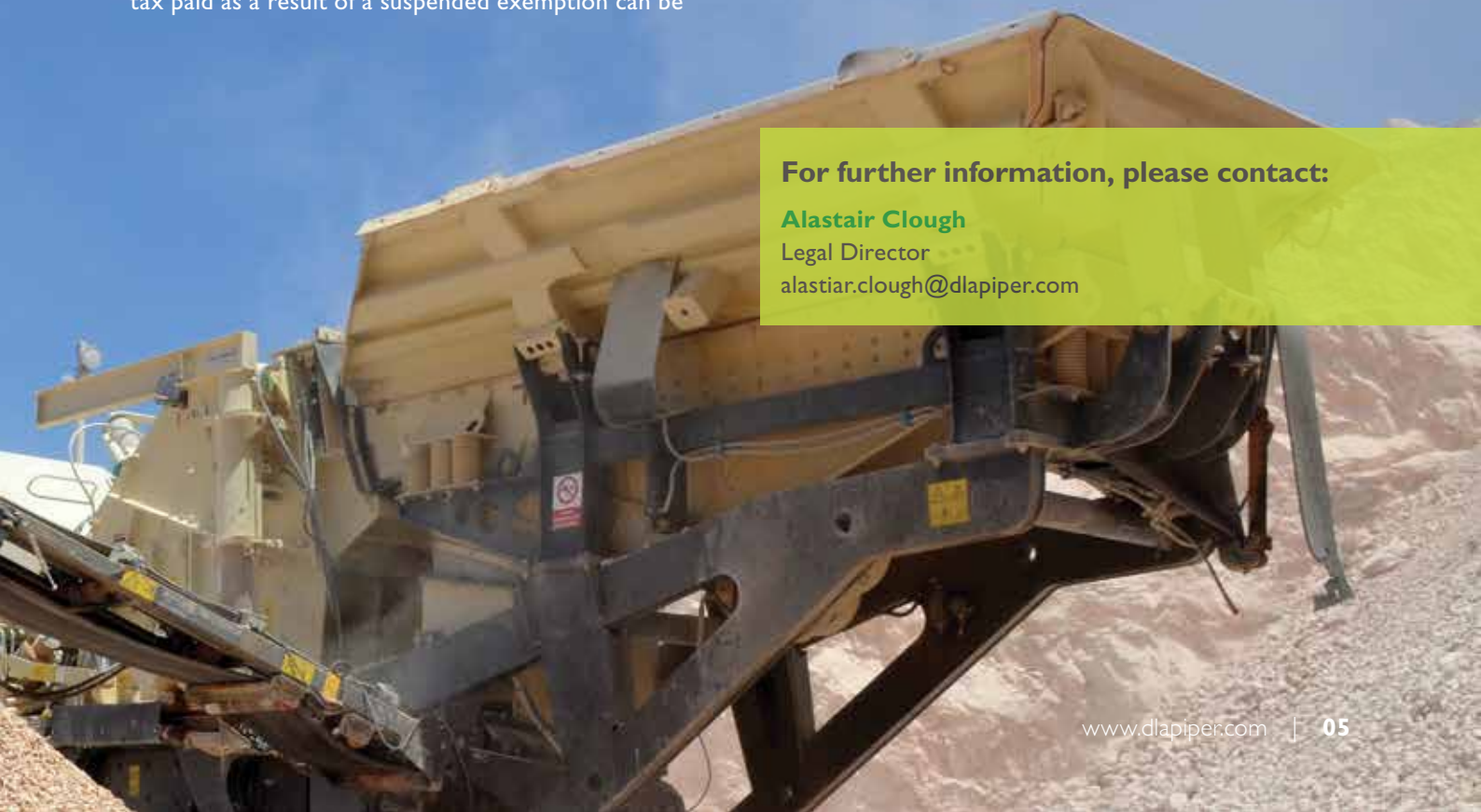
need to pass the cost on to the consumer, which could lead to a down turn in aggregates sales. Conversely, businesses who shoulder the costs themselves will do so at significant expense, with the Levy accounting for around 20% of the sale cost for aggregates. In any event, the effect of the suspension is unlikely to be small for those affected, despite what the Government may believe.

Additionally, the uncertainty as to whether the exemptions will be permanently suspended or reinstated is equally likely to cause problems for businesses involved in the aggregates industry. Businesses are faced with the proposition of paying taxes which they may never be able to fully recover or incurring costs to meet a tax shortfall, having unlawfully benefited from the Exemptions. Indeed, some businesses are withholding payment of the levy pending the outcome of the decision, which could result in possible enforcement action from HM Revenue and Customs.

The Government seeks to alleviate this problem by ensuring that the Bill provides secondary legislation to restore any suspended exemption. This will mean that tax paid as a result of a suspended exemption can be repaid to the person who accounted for it, provided the Commission decides that the measures are lawful and the taxpayer would not be unjustly enriched as a result of receiving the repayment. Businesses would, therefore, be well advised to keep records in order demonstrate that they would not gain financially from repayment; for example, by including a commitment in contracts to repay any amounts charged to their customers to cover all or part of the cost of the Levy in the event that the taxpayer is repaid the tax

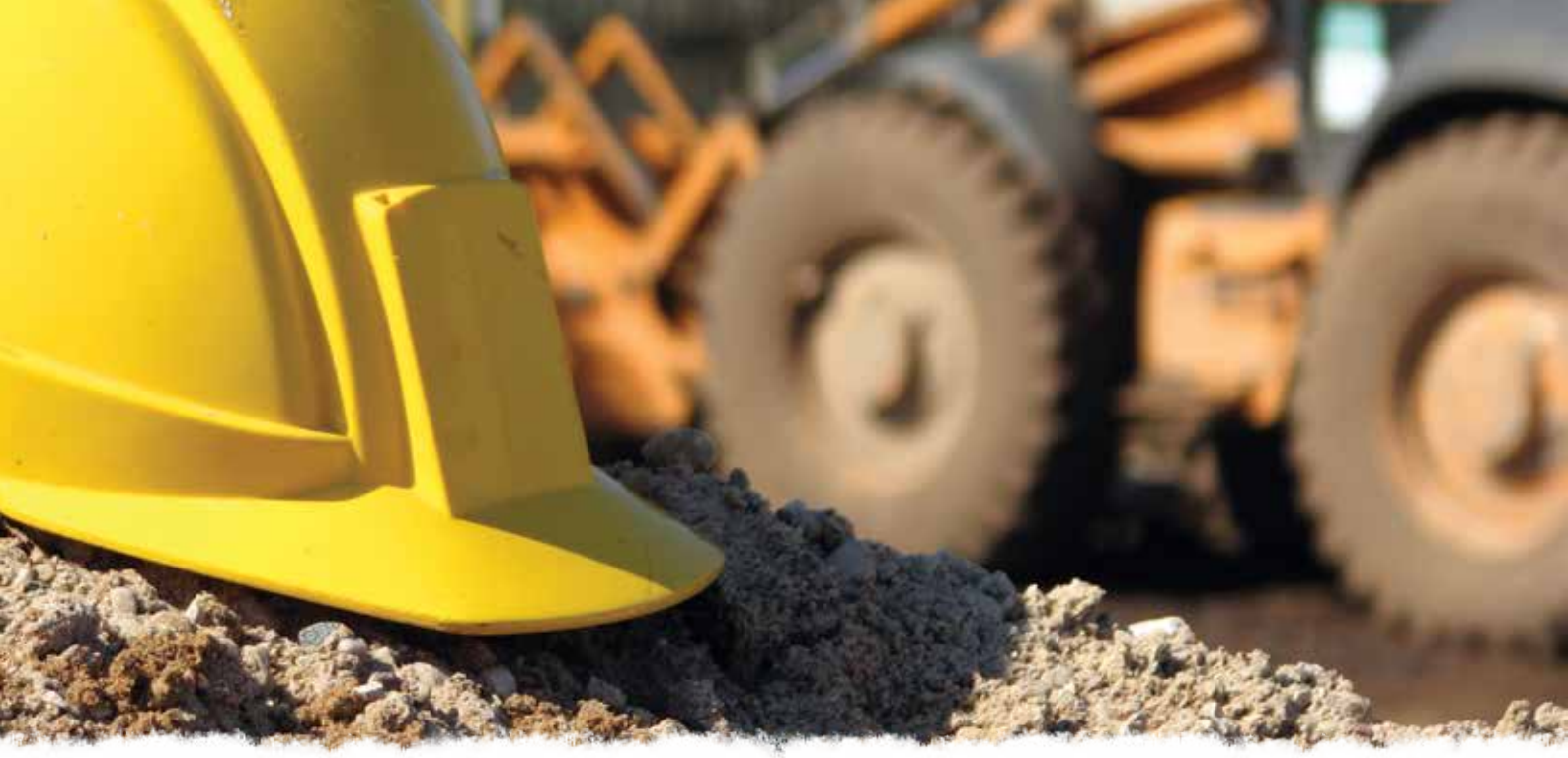
CONCLUSION

Over the coming months the industry will be subject to large scale changes with the introduction of the Bill and the associated legislative amendments. With the future of the Exemptions undecided, those involved in the aggregates industry nervously await the outcome of the Commission's investigations and the potential financial impact of their decision.



For further information, please contact:

Alastair Clough
Legal Director
alastiar.clough@dlapiper.com



STRICT LIABILITY, OR NOT?

One of the changes to health and safety has enacted in the wake of the Löfstedt Report, which came into force on 1 October 2013, concerns civil liability for breach of health and safety regulations.

Under the common law of negligence, employers owe a duty to take reasonable care to carry on operating in such a way as not to subject their employees to an unnecessary risk of injury, or detriment to their health.

This duty is a personal duty on the employer, not simply automatic vicarious responsibility for any negligence on the part of his other employees. Accordingly, an employee may, for example, be able successfully to sue an employer for negligence if he has been unnecessarily exposed to the risk of an injury which was in fact caused by the negligence of an employee of an independent contractor, a person for whose acts or omissions the employer would not ordinarily be responsible.

However, this duty of care owed to the employee is limited by reference to what is reasonable. Under the common law, the employer is not (for the purposes of civil liability) required to guarantee the safety of his employees. Accordingly, if an injury results from an employee being exposed to a risk, but the court considers that the risk was acceptable in all the circumstances of the case, then the employer will not be liable. Furthermore, the burden of proof that the employer was at fault rests with the injured employee. That burden can often be difficult to discharge.

For this reason Parliament has for a very long time supplemented the common law with statutory provisions which provide for strict civil liability for breaches of safety requirements which cause injury. In such a case the injured claimant does not have to prove negligence on the part of the employer, but merely that breach of the relevant statutory requirement has caused an injury.

The classic example of this was under the Factory Acts, which contained a provision requiring dangerous machinery to be fenced, and gave employees a right to sue if they were injured as a result of a failure to provide suitable fencing to protect them.

This strict statutory liability has sometimes been described as being "no fault" liability. In many respects this was misleading. The employer was placed under a duty by the statutory provisions to do something (e.g. fence dangerous machinery) and made liable in damages if he failed to do so and an employee was injured in consequence. Therein lay his fault. However, in some cases this type of statutory provision could (and as we shall see) still can, impose liability on an employer who has not actually been at fault. One case would be where an employer is required to provide safe work equipment, but injury is caused by a hidden defect in that equipment as supplied by the manufacturer.

Under the Health and Safety at Work Act 1974 this arrangement continued. While breach of the general duties, under sections 1, 2, 3, 4 and 6 HSWA, only gives rise to criminal liability, Section 47 of the Act provided that a breach of health and safety regulations which caused injury would also give rise to a right for the injured party to sue, unless the health and safety regulations provided otherwise. This regime has however now been drastically altered as part of the Government's "Red Tape Challenge".

The Löfstedt Report, which forms a substantial pillar of the Government's reform of health and safety law under the Red Tape Challenge, suggested that the question of civil liability for breach of health and safety regulations should be examined. However, the Government went much further, and persuaded Parliament to recast this aspect of section 47. Under section 69 Enterprise & Regulatory Reform Act 2013, subject to certain exceptions specified in regulations, breaches of health and safety regulations will not now give rise to civil liability, unless the regulations expressly provide for this. In respect of accidents occurring after 1 October 2013, the former position is thus effectively reversed.

The Government promoted this change as a means of attacking a "health and safety culture" which it considered burdensome to employers. Whether employers will significantly benefit from the change is, however, open to doubt.

It should be borne in mind that civil claims against employers for workplace injuries are in practice defended by employers' insurers, given that employers are obliged by law to take out insurance against their liability to employees. In current practice following an industrial accident, the principle of liability is only rarely disputed, and the negotiations between the solicitors of the injured employees and their employers' insurers have generally focused on the quantum, or amount, of damages payable. Employers have therefore only rarely been concerned with such matters. However, the position could change if in future issues arose as to whether or not a particular employer had been negligent. Significant amounts of management time might have to be devoted to such disputes, particularly if they had to go court.

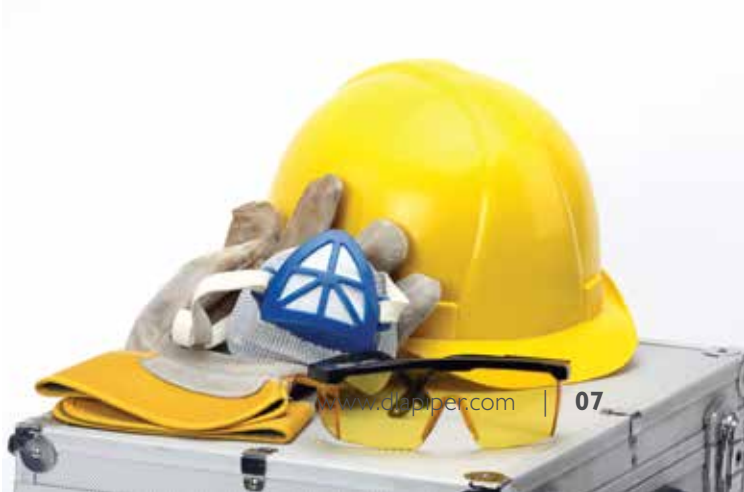
Lawyers who represent claimants have understandably been unhappy at the change, and have recently put on their websites arguments which they hope to use to undermine it. One potential approach is simply to argue that the failure to meet a statutory requirement under the relevant health and safety regulations (which the employer must have known about) is proof of common law negligence. It is possible that this approach will succeed in some (but not all) cases. However, it will certainly not lead to a reduction in litigation. Another approach is to argue that because most health and safety regulations now derive from EU Directives, any employer which is an "emanation of the State" under EU law, (ie, all public sector bodies, but probably also privatised utility companies and perhaps also certain contractors working for them) is civilly responsible for meeting these requirements. However, that argument assumes that Member States are required to implement the relevant Directives by imposing civil liability as well as criminal sanctions. An ECJ case on an unsuccessful challenge by the Commission to the UK's implementation of the Health and Safety Framework Directive suggests that this is not the case, but that may well not deter litigation.

It should be noted that the amended legislation makes an exception for new or expectant mothers in respect of rights derived from the Pregnant Workers Directive 92/85/EC. This is one case where it is clear that the relevant EU Directive does require redress to be available under civil law.

Furthermore, the change in the law does not affect strict liability under legislation not contained in health and safety regulations. An example is provided by the Employer's Liability (Defective Equipment) Act 1969. This provides that if an employee is injured in the course of his employment in consequence of a defect in equipment provided by his employer and the defect is due to the fault of a third party (whether identified or not) then the injury is deemed to be also attributable to the negligence of the employer. Furthermore, "fault" is defined as "negligence breach of Statutory duty or other act or omission which gives ... to liability in tort". Since manufacturers are subject to strict liability for defects in their products under the Consumer Protection Act 1987, it appears that any defect in work equipment provided to employees which gives rise to injury, will enable the injured employee to sue his employer. It therefore seems that in some cases at least, strict liability on employers for workplace injury remains with us.

For further information, please contact:

Noy Trounson
Barrister in Employed Practice
noy.trounson@dlapiper.com



CONFLICT MINERALS
EUROPEAN DEVELOPMENTS

A "conflict mineral" is a mineral that has been sourced from an area of conflict or a high risk area. Such areas are identified by the presence of armed conflict, widespread violence or other risks of harm to people and are often interpreted to include central African countries including, the Democratic Republic of the Congo, Congo, South Sudan, Uganda and Rwanda.

It was understood that the European Commission was planning to release draft legislation late 2013 but there has been a delay to this. The Commission is now expected to release guidance and suggested legislation on conflicts minerals in the first quarter of 2014.

EUROPEAN PROPOSALS

Between March and June 2013, the Commission launched a consultation on the proposed EU initiative on the sourcing of minerals from conflict and high risk areas.

The Commission has said that any European legislation in this area will be similar to equivalent US legislation. In the US, sections 1502 and 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act require that US listed companies disclose whether or not their suppliers use "conflict minerals". For the purposes of US law, conflict minerals means tin, gold, tungsten and tantalum that are sourced from the Democratic Republic of the Congo or its bordering countries.

It would seem from the consultation documents that the European proposals will apply a wider definition of "conflict mineral", covering more minerals and countries than the definition in the equivalent legislation in the US. References in the public consultation are to "*minerals originating from conflict-affected and high risk areas*". However the Commission has since confirmed that while the geographical scope of the definition will be broader than that under the US legislation, it will only apply to the same four conflict minerals.

IMPLICATIONS

The implementation of European legislation will require companies to undertake additional due diligence to ensure that their current sourcing systems and supply chains are compliant with EU law. The anticipated wider definition of conflicts minerals will mean that companies would have to consider supplies sourced from a broader range of countries than the central African countries commonly understood to be risk areas for conflicts minerals.

The timescales involved mean that businesses have time to follow the developments in this area and gain an understanding of the proposed course of the European Commission. Given this, businesses therefore may want to undertake a pre-emptive review of their systems and suppliers to ensure that they are in the best position possible to have compliant systems in place. Such a review could include:

- Ensuring that appropriate management systems are in place;
- Reviewing supply chains to identify risks;
- Updating the conflict minerals strategy; and
- Seeking an external, independent review of the strategy.

Such action would also help avoid the risk of reputational damage which could arise as a result of publicity about the use of conflict minerals by the company.

For further information, please contact:

Richard Buxton
Associate
richard.buxton@dlapiper.com

EUROPEAN UNION SIGNS MINAMATA CONVENTION ON MERCURY

On 10 October 2013, the Minamata Convention on Mercury (**"Convention"**) was signed on behalf of the European Union. The Convention aims to protect humans and the environment from the release of mercury and its compounds. The 'cradle to grave approach' of the Convention covers all aspects of the mercury life cycle.

BACKGROUND

Mercury is a toxic chemical element which causes harm to humans, animals and the environment. As well as being released by natural sources, mercury and its compounds were used in a range of industrial processes as well as products such as thermometers, dental amalgam and energy efficient lamps. As a global pollutant, it is important that any action taken to restrict and reduce the use of the metal is effective at an international level and the Convention aims at this.

In 2003 the United Nations Environment Programme (**"UNEP"**) launched a mercury programme encouraging all countries to take action to reduce the adverse effects of mercury on human health and the environment. In 2009 UNEP launched negotiations for a legally binding instrument limiting the use of mercury. The successful negotiations concluded in January 2013 and resulted in the Convention.

CONVENTION

Key provisions of the Convention include:

- a ban on new mercury mines and the phase-out of existing mines;
- the regulation of mercury releases from industrial equipment such as boilers, incinerators and power stations;
- a ban on the manufacture, import or export of the products listed in Annex A to Convention after the specified phase out date (2020). The products include lamps, batteries and pesticides; and
- parties to the Convention are required to take steps to reduce and where feasible eliminate the use of mercury and its compounds in artisanal or small scale gold mining and processing.

The Convention has been signed by 94 countries but at the time this article was written, the United States was the only country to have ratified the Convention.

EUROPEAN RESTRICTIONS ON THE USE OF MERCURY

There have been a number of restrictions in relation to the use of mercury throughout the EU. In 2005, the European Union launched its mercury strategy which includes 20 steps to reduce mercury emissions and the use of mercury and its compounds.

There are number of pieces of European legislation that restrict the use of mercury:

- Directive 2011/65/EU RoHS bans the use of mercury in electrical and electronic products;
- Directive 2008/12/EC and Directive 2006/66/EC restricts the use of mercury in batteries and accumulators;
- Regulation 1907/2006 REACH bans the use of measuring devices containing mercury for use by the general public;
- Directive 1994/62/EC (as amended) restricts the amount of mercury that same we used in packaging;
- Regulation 847/2012 restricts the use of mercury in measuring devices for industrial and professional uses from 10 April 2014.

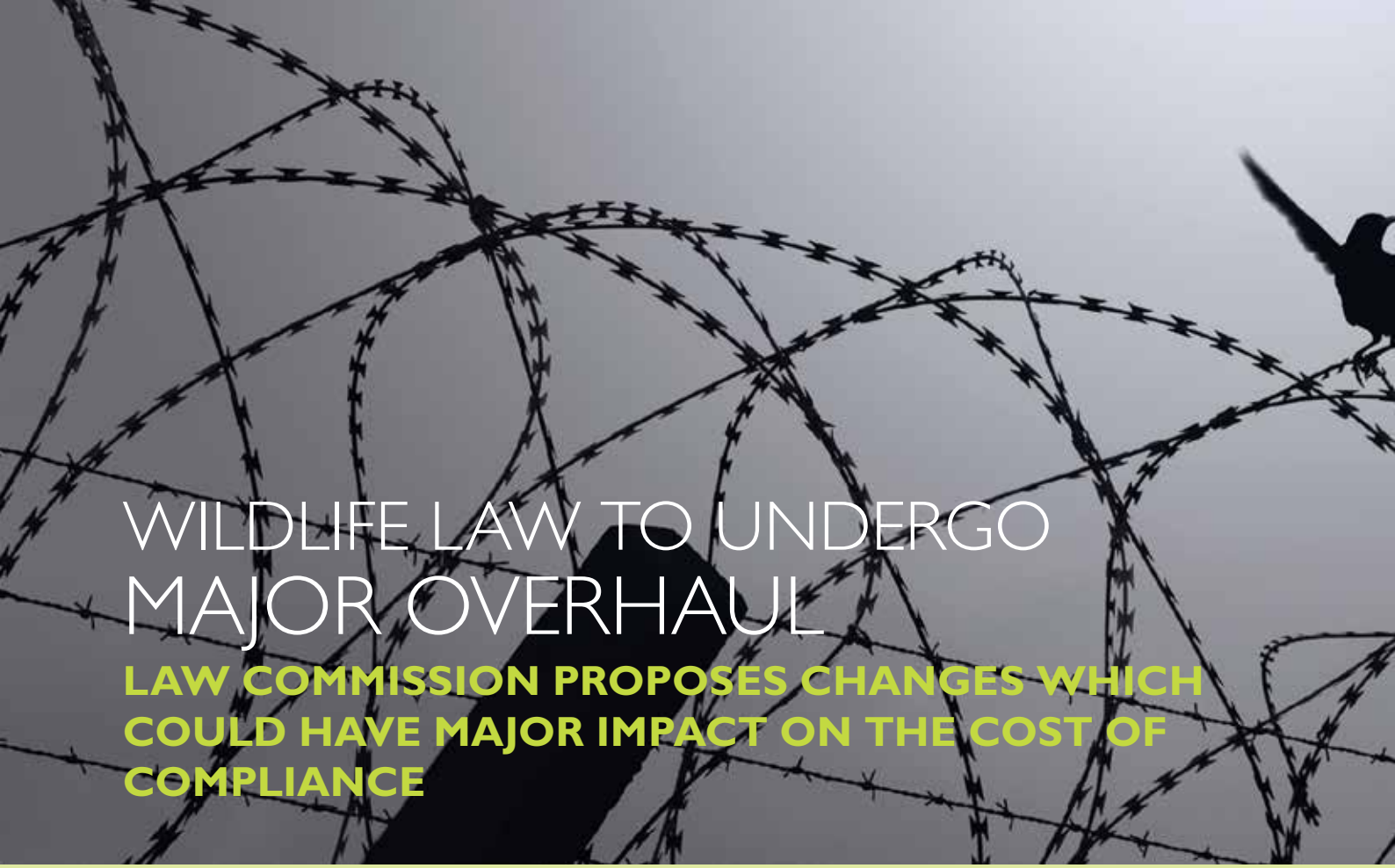
From 2011 following the coming into force of Regulation 1102/2008, there has been a ban on the export of mercury (including the common ore of mercury, cinnabar ore) from the EU.

FUTURE STEPS

The Commission is currently assessing the changes needed to both policy and legislation in light of the Convention and it is understood that a consultant will be appointed to assist with this task. Now signed, the Convention needs to be ratified and the Commission is developing the relevant legal instrument to do this as well as drafting the relevant implementing legislation. There will be stakeholder consultations on these instruments over the course of 2014.

For further information, please contact:

Richard Buxton
Associate
richard.buxton@dlapiper.com



WILDLIFE LAW TO UNDERGO MAJOR OVERHAUL

LAW COMMISSION PROPOSES CHANGES WHICH COULD HAVE MAJOR IMPACT ON THE COST OF COMPLIANCE

The Law Commission (LC) has recently published an interim statement detailing its proposals to transform wildlife law. Its aim is to make wildlife law into a workable and coherent system allowing businesses and individuals that are subject to it, to better understand their obligations. These proposals are perhaps overdue, given the current patchwork of competing requirements and lack of clarity in the existing law. The proposed single statute aims to increase consistency and simplify provisions which will make the law easier to use and understand. If the proposals in the interim statement are enacted, then there will be a considerable impact on business, particularly developers, construction businesses and large land owners.

In its proposals the LC has recommended the introduction of the concept of vicarious liability for employers and principals. The purpose of this is to pin criminal liability on the ultimate beneficiaries of wildlife crime. For example, under the proposed new regime, if a developer did not give an instruction, but *knew* that the action of a sub-contractor was going to destroy a structure that the developer knew contained protected bat roosts, and did nothing to prevent it, then the developer as well as the sub-contractor would be liable. This is a considerable change from the current position under wildlife law and if introduced will impose a more significant burden on business. It could result in increased liability for employers/principals who will have to take a more active interest in the activities of their employees/ those with whom they contract, to ensure that they do not inadvertently find themselves in breach of wildlife law. This may, for example, manifest itself in terms of costs for additional compliance training or more on the job supervision. In summary, if implemented this change will mean businesses will be liable not only for their own actions, but also potentially those actions of their employees or those with whom they contract.

As part of the LC's review a consultation was undertaken and a large majority of stakeholders responded to the consultation indicating that the current sanctions in respect of wildlife crime are insufficient. Accordingly, the LC has recommended that penalties in the Magistrates' Court be standardised for wildlife offences so that most are increased to the current maximum fine of £5,000 available for summary offences. The LC also recommends that, where appropriate, wildlife crime should be triable on an either-way basis; summarily in the Magistrates' Court or on indictment in the Crown Court (where more severe penalties are available). The ability to try more wildlife offences in the Crown Court is significant because the penalties available are anything up to and including life imprisonment and/or an unlimited fine. This represents a marked change in potential liability for businesses.

In line with increasing the efficacy of wildlife sanctions, the LC has also sought to inverse civil sanctions partners for regulators such as Natural England and Natural

Resources Wales. This would allow these regulators to issue fixed monetary penalties, remediation notices and stop notices, and to accept enforcement undertakings in respect of a wider range of wildlife offences, as an alternative to criminal prosecution. The wider introduction of civil sanctions in respect of wildlife offences would arguably be a positive development for many businesses because it would allow for a flexible and proportionate system, without requiring adversarial or stigmatising criminal prosecutions.

Finally, the LC has proposed the removal of the "incidental result" defence under the Wildlife and Countryside Act 1981, which is one of the key pieces of wildlife legislation. The "incidental result" defence offers protection to those who commit a wildlife offence by mistake (provided certain other requirements are met). If this defence is removed then there is likely to be an increase in the perceived risk of prosecution. This in turn could lead to an increase in licensing applications from businesses in an attempt to ensure compliance and avoid enforcement action. Whilst regulators do not charge applicants to apply for a wildlife licence there can nevertheless be substantial costs incurred in completing licence applications. This is because applications can be complicated and often require a substantial amount of supporting information. Costs for putting together an application package can, therefore, run into several thousand pounds. The removal of this defence is therefore another facet of the increased potential liability and costs that businesses are likely to be subject to, if these proposals are enacted.

The proposed changes to wildlife law clearly represent a key shift in the way in which wildlife law will be regulated. The proposed changes, which include the introduction of vicarious liability, more severe penalties, the introduction of civil sanctions for a wider range of offences and the removal of the "incidental result" defence are significant and on balance add to the burden placed on business. It is therefore important that businesses ensure that they are fully aware of their obligations before the reforms are introduced to avoid falling foul of the changes. The LC expects to publish its final recommendations for the reform of wildlife law, and a draft Bill, in summer 2014.

For further information, please contact:

Nicholas Rutherford
Associate
nicholas.rutherford@dlapiper.com

FIRST AID TRAINING APPROVAL REQUIRED?

On the 1 October 2013 the amended Health and Safety (First Aid) Regulations 1981 came into force, removing the requirement for the Health and Safety Executive ("HSE") to approve first aid training and qualifications.

LEGAL DUTIES

Under the Health and Safety (First-Aid) Regulations 1981 ("**Regulations**") employers are required to provide 'adequate and appropriate' equipment, facilities and personnel to ensure their employees receive immediate attention if they are injured or taken ill at work. This obligation applies in all workplaces.

What is 'adequate and appropriate' will depend on the circumstances in the workplace. Employers are required to carry out an assessment of first-aid needs to determine the level of provision required. This involves consideration of workplace hazards and risks, the size of the organisation and other relevant factors, to determine what first-aid equipment, facilities and personnel should be provided. The level of risk in the workplace will then determine whether trained first-aiders are needed, what should be included in a first-aid box and if a first-aid room is required.

In the event that this assessment indicates that first-aid training is required. Training should meet the standards set by the Regulations. Previously the HSE were required to approve training. However as a result of the change this requirement has been removed.

INCREASED FLEXIBILITY

The change is part of the HSE's work to reduce the burden on businesses and "put common sense back into health and safety", while maintaining standards. It stems from Professor Löfstedt's report "Reclaiming Health and Safety For All", which highlighted the need to assist businesses in accessing clear guidance about their health and safety duties.

The new approach applies to businesses of all sizes and from all sectors, and is intended to ensure that businesses have increased flexibility in how they manage their first aid provisions. Under the new system businesses will be able to choose their own training providers and first aid training. This could prove particularly advantageous where additional or specialist training may be required due to the work activity, for example in the construction/manufacturing industry, where there are generally greater risks involved. Employers will be able to choose the most appropriate specialist to meet their identified training needs and hopefully avoid any unnecessary overlap in staff training.

SPOILT FOR CHOICE

However, this improved flexibility could equally prove problematic when it comes to choosing a first-aid training provider. Previously, choosing a provider able to demonstrate HSE-approval would have assured the business that they had chosen an appropriate first aid training provider. Now, employers are faced with the difficult task of choosing a provider, none of which have the official backing of the regulator.

The HSE has provided revised guidance aimed at helping employers to identify and select competent training providers, however, given the variety of providers available and the importance of ensuring compliance, such choice could prove troublesome.

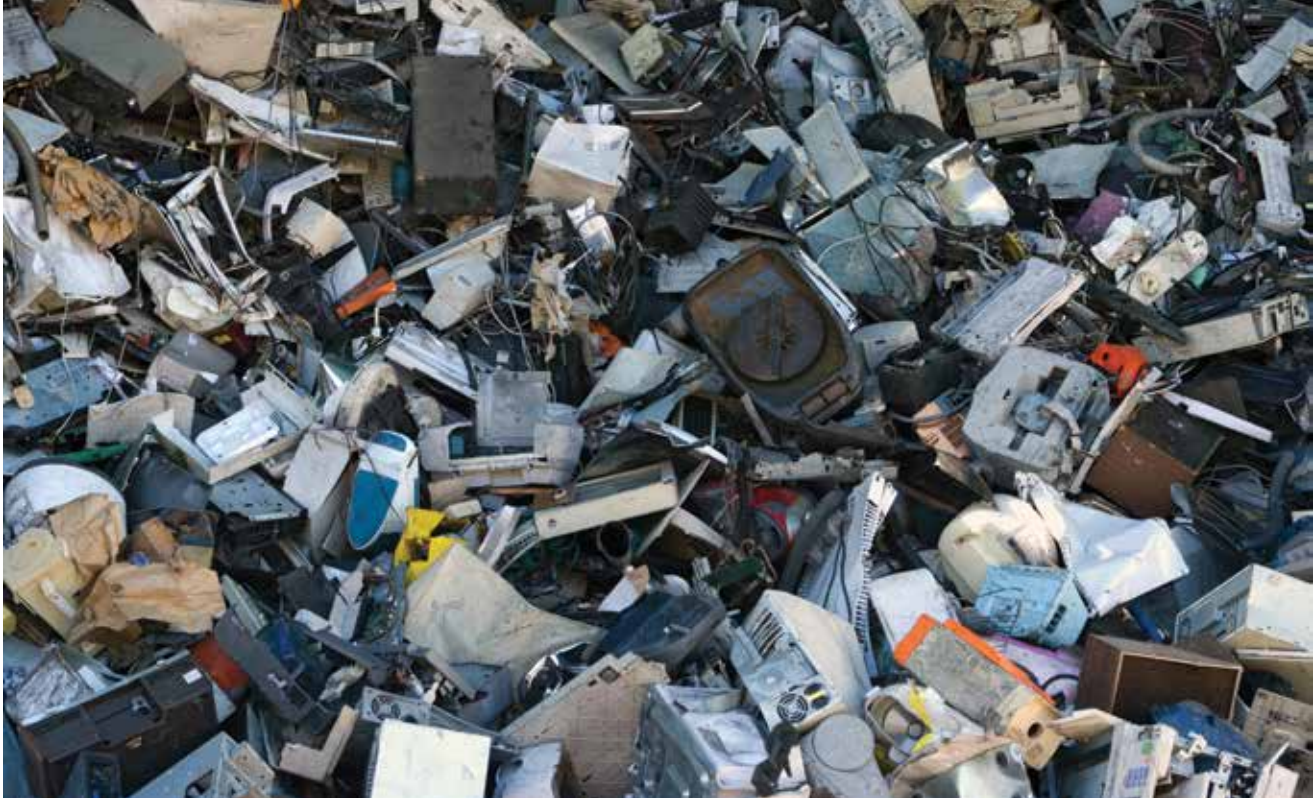
CONCLUSION

Under these changes, it will be important for businesses to ensure that they have the appropriate first aid training provider. Businesses will need to ensure that they choose trainers appropriate to their specific requirements in line with their obligations under the Regulations, without the comfort of HSE-backed approval. Whilst this offers flexibility on the one hand, the increased onus on employers to ensure appropriate first-aid provision, and in particular first-aid training, must be borne in mind.

At DLA Piper we have a dedicated team of health and safety experts who can advise on health and safety issues of this nature.

For further information, please contact:

Ben Nelson
Trainee Solicitor
ben.nelson@dlapiper.com



THE NEW WEEE DIRECTIVE

Many people will be familiar with the concept of *Waste Electrical and Electronic Equipment* or *WEEE,* as the regime has been in force in the UK since 2006 when legislation was introduced to give effect to the WEEE Directive. The legislation imposes obligations on producers and retailers of electrical and electronic equipment (EEE) to finance the collection, treatment, recovery, and environmentally sound disposal of EEE when it becomes WEEE – it is as a result of this legislation that your local electrical retailer may offer to remove your old electrical appliance when delivering a new one or allow you to return it in store free of charge.

RECAST DIRECTIVE

The WEEE Directive has now been recast and a new Directive (2012/19/EU) was published in July 2012 and had to be transposed into national law by 1 January 2014. The UK met this deadline and a new set of WEEE Regulations were laid before Parliament in December 2013 and came into force on the specified date in January 2014.

The aim of the new legislation is to streamline and improve the operation of the regime and to further reduce the amount of WEEE which is disposed of to landfill and to increase the amount which is appropriately treated and then recovered and reused. The new Directive also aims to reduce some of the administrative burden of complying with the regime and ensure that new waste policies and legislation are consistent across the EU.

The general principles behind the legislation will, however, remain the same and producers of EEE will still be required to finance the recovery and disposal of EEE when it reaches the end of its life.

Like many producer responsibility regimes the operation of the WEEE regime has been reviewed following its first few years in force and the amendments which have been introduced have been designed to address areas for improvement identified as part of that review and also as a response to the marked increase in the production and ownership of ever more increasingly complex electrical gadgets which will ultimately lead to an increase of waste electrical equipment.

SCOPE OF THE NEW DIRECTIVE

The new Directive distinguishes between two main periods:

- a transitional period which runs from 13 August 2012 until 14 August 2018; and
- an "open scope" period which runs from 15 August 2018

This is because there has in the past been some debate about what specific items fall within or outside the scope of the WEEE Directive. This has been partly caused by the general drafting style of the legislation which has always required WEEE to fall into prescribed categories, which are set out in very general terms and are therefore open to interpretation. As you might expect, regulators generally provide a wide interpretation whilst industry and retailers seek to adopt a narrow one.

However, up until now it has been a key principle of the WEEE Directive that it only applies to EEE falling within the prescribed categories set out in the relevant Annex and not all EEE. From August 2018 this will all change when the legislation will apply to all EEE (subject to some limited exceptions) which will, at that time, be split into 6 categories for reporting purposes. Until then and during the transitional period the existing 10 categories of electrical equipment will continue to be used.

NEW COLLECTION TARGETS AND OTHER IMPROVEMENTS

New collection targets have also been agreed which will mean that 85% of WEEE generated (around 10 million tons or roughly 20kg per person) will be separately collected from 2019 onwards. Compared with the existing binding EU collection target of 2 million tons per year (4 kg of WEEE per person) out of around 10 million tonnes of WEEE generated per year in the EU. By 2020, it is estimated that the volume of WEEE will increase to 12 million tons.

The new WEEE Directive will also give EU Member States the necessary regulatory powers to fight illegal export of waste. This is because illegal shipments of WEEE disguised as legal shipments of used equipment and designed to circumvent EU waste treatment rules are increasingly a significant problem and the new Directive will force exporters to test equipment and provide documents on the nature of their shipments if those shipments could be waste.

A further improvement is the harmonisation of national registration and reporting requirements under the Directive. One big criticism of the original WEEE Directive was that it imposed an onerous administrative burden on those with obligations and that manufacturers and distributors with pan European operations had to undertake a separate compliance exercise in each Member State in which they operated.

This is something which has been addressed by the revision and a concerted attempt has been made both to reduce the administrative burden and to streamline and integrate member States' registers for producers of electrical and electronic equipment with a harmonised format being used for the supply of information, which is expected to reduce the administrative burden on producers and manufacturers.

SUMMARY

The new Directive is therefore a refinement of an existing set of rules rather than the introduction of a completely new regime and will not bring any new surprises for many operators. However, the more stringent recycling targets and the widening of the scope of the equipment which will be caught by the definition of WEEE will mean that going forward, more and more manufacturers will no doubt find themselves with more onerous obligations or even obligations for the first time.

For further information, please contact:

Matthew Shaw
Senior Associate
matthew.shaw@dlapiper.com

IN BRIEF

1. The Department of Work and Pensions has published a memorandum to the Work and Pensions Select Committee on the Health and Safety (Offences) Act 2008 which was presented to Parliament. This follows guidelines set out in the Cabinet Office Guide to making Legislation, published in April 2013.

   The purpose of the 2008 Act was to increase the levels of maximum penalty available for most health and safety offences, and also make imprisonment more widely available as a penalty in the case of health and safety offences committed by individuals. It was also intended to encourage more cases to be heard in the lower courts.

   The general conclusion, supported by data from the Health and Safety Executive, suggests that the Act has succeeded in these aims, with higher fines being imposed by the lower courts and custodial sentences being imposed more frequently and in relation to a wider range of health and safety offences. It also appears that a greater proportion of health and safety offences are being sentenced in the lower courts.

2. The Court of Appeal has issued guidance on the sentencing of very large companies, with high turnovers, for environmental and health and safety offences.

   In *R v Sellafield Limited* and *R v Network Rail Infrastructure Limited*, the Court of Appeal dismissed two appeals by the companies concerned, in respect of sentences following respectively a conviction for a number of related environmental offences involving the management of nuclear waste, and an offence under s 3(1) HSWA following a serious accident at a level crossing. Fines of £700,000 and £500,000 had been imposed in the Crown Court.

Key points which emerge from the judgment are:

- where a company with a high turnover enters an early guilty plea, it will not be able to avoid a high fine for serious systemic failings, simply on the basis that there was no actual disaster or fatality;
- the courts are likely to require, in the case of high turnover companies, that accounts or financial information are provided in advance to the sentencing court. It is unlikely to be sufficient simply to indicate to the court that the company is able to pay any fine the court is likely to impose;
- the fact that some companies may have no shareholders who enjoy the company's profits, so that income is all used for the company's purposes, will not prevent a high fine being imposed to demonstrate the importance of compliance;
- the courts will scrutinise the impact of a company's response to incidents on the remuneration and bonuses of directors and senior management. If it can be shown that bonuses or remuneration have been reduced by the company, in the wake of an incident demonstrating management failings, this may be relevant to mitigation, but only if the reduction is substantial.

For further information, please contact:

Teresa Hitchcock
Partner
teresa.hitchcock@dlapiper.com

or

Noy Trounson
Barrister in Employed Practice
noy.trounson@dlapiper.com

ABOUT THE AUTHORS

TERESA HITCHCOCK
Partner

Teresa Hitchcock is a Partner based at DLA Piper's Sheffield office and national head of the firm's UK Safety Health & Environment team. A senior environmental regulator before qualifying as a solicitor, Teresa is an acknowledged expert in a number of fields, including contaminated land liabilities, waste and producer responsibility, climate change law, and strategic health and safety compliance, and has presented on these topics at conferences held nationally and internationally.

ALASTAIR CLOUGH
Legal Director

Alastair specialises in environmental and health and safety law as well as other regulatory issues including product and food safety and regulatory licensing and enforcement. He advises on all aspects of environmental law (with particular expertise in relation to waste management and contaminated land issues) as well as health and safety law, product stewardship and regulatory licensing and enforcement matters.

MATTHEW SHAW
Senior Associate

Matthew has 7 years' experience of advising on a broad range of environmental and health and safety issues. A former in-house solicitor with the Environment Agency, Matthew has a good understanding of the many environmental regulatory regimes and how they interact an operator's business. Matthew has also developed a specialism in product safety legislation and the REACH, WEEE, and RoHS regimes.

NICHOLAS RUTHERFORD
Associate

A former environmental consultant, with a Master's Degree in Environmental Consultancy, Nicholas is a solicitor within the SHE team and has experience of advising on a range of environmental and health and safety matters.

RICHARD BUXTON
Associate

A recent recruit to the safety health and environment team, Richard advises on a range of environmental and regulatory matters with a particular focus on product stewardship and food law matters.

NOY TROUNSON
Barrister

Noy in employed practice, is an environmental and health and safety lawyer with the SHE team. For many years an in-house lawyer with the British Coal Corporation, he now specialises in contaminated land and climate change law in addition to matters relating to mining.

BEN NELSON
Trainee Solicitor

Ben is a trainee solicitor within the SHE team assists on a range of environmental and health and safety matters. He has been involved in helping to advise clients on both product stewardship and licensing matters.

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