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Environmental legal compliance evaluations, an indispensable risk management tool

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The awareness of environmental harms being inflicted by industry is continually growing due, firstly, to the ever increasing visual presence of pollution and, secondly, due to the ease of access to information.

INTRODUCTION

This reality has led to a proliferation in the enactment of environmental legal compliance obligations, and an upsurge in the enforcement activity and capacity of the Environmental Management Inspectors (EMI). These trends translate into ever increasing risks for businesses in the form of compliance notices, which could demand cessation of operations, directives ordering the implementation of reasonable measures and on conviction, penalties of up to R10 million and/or 10 years imprisonment for employers and employees.

To contextualise the range of compliance obligations in this specialised area of law, a medium sized manufacturer will, on average, need to comply with approximately 12 different pieces of environmental related legislation, containing approximately 50-60 alternate compliance obligations. These figures begin to rise as do the risks when the size and complexity of the organisation increases.

HOW CAN AN ORGANISATION MANAGE THIS RISK VOLUNTARILY?

The ISO 14001 Environmental Management System (EMS) accreditation standard is a voluntary compliance management tool, utilised by numerous organisations to systematically manage environmental management risks. Once implemented and enforced correctly this management system can have the added benefit of improving the lifecycle development and outcomes of an organisation's products and services, which can translate into beneficial financial outcomes. One of the cornerstones for this system is "compliance obligations" as this – along with other requirements – determines the scope of the EMS. Compliance obligations are defined in the standard as "legal requirements which the organisation has to comply with and other requirements that an organisation chooses to comply with". When establishing an EMS, an organisation is, in terms of the standard, required to determine its compliance obligations and ensure that it has access thereto when managing this system. In practice this takes the form of a legal register, which is typically connected to the organisation's environmental aspects and objectives, which the standard requires should be consistent with the organisation's environmental policy, should be measurable, monitored, communicated and kept up date.

Legal compliance evaluations are required as part of the standard's performance evaluation tools as these tools play a pivotal role in ensuring that an organisation's legal registers and objectives are kept up to date. These evaluations are conducted by undertaking a site visit of the organisation's premises and evaluating the organisation's real time compliance with applicable environmental legislation. The outcome of such an evaluation is usually a findings report with recommendations. This method of evaluation is effective as it provides the organisation with perspective on the changes in the environmental laws and identifies the visual problem areas which are likely to be the focal point of an EMI investigation. The standard does not specify the frequency of legal compliance evaluations; it is however recommended that they be undertaken pre-certification and approximately six months before re-certification.

Due to a common misconception that legal compliance evaluations are another form of certification audit, it is necessary to take a moment to set these two assessments apart. A legal compliance evaluation is an assessment of the organisation's performance against the applicable legislation, whilst a certification or re-certification audit is an assessment of the organisations performance against the ISO 14001 EMS standard. The two fit together in that a legal compliance evaluation is mandatory for the purposes of achieving and maintaining certification.

In addition, the amendments to the new ISO 14001:2015 accreditation standard have the effect of giving more weight to compliance evaluation in the certification process, a change which will most certainly influence the way in which certification auditors interrogate these evaluations.

Should your organisation however not subscribe to an EMS, the voluntary and regular undertaking of an environmental legal compliance evaluation is still a recommended and feasible form of assessment which will assist the organisation with managing environmental legal compliance risks.

WHAT TO EXPECT FROM AN ENVIRONMENTAL LEGAL COMPLIANCE EVALUATION?

A legal compliance evaluation should be conducted by a legal professional, experienced both in the fields of environmental law and management. It is also plausible for a specialist legal professional to team up with an environmental manager, to undertake such an evaluation.

An organisation can expect the assessment team to request access to all permits, licenses, authorisations and to also undertake a site visit. The purpose of the site visit is to determine what activities are being undertaken by the organisation so that these activities may be measured against the legal obligations in place for the activities and to identify visually high risk areas. The assessment should produce an evaluation report which identifies applicable legislation, reflects the organisations compliance with all applicable environmental laws and provides recommendations on how to resolve the identified compliance issues.

CONCLUSION

The 2015/2016 environmental legal compliance statistics released by the Green Scorpions indicates a 27.6% increase in the businesses investigated by Environmental Management Inspectors (EMI's) compared to 2014/2015, then with this upsurge a 25.6% increase in non-compliances requiring follow on enforcement actions. These actions included issuance of administrative notices which increased in this period by 25.65%. It is certainly evident from the statistics that the Department of Environmental Affairs' enforcement activity is on the rise, and that the authorities are testing and utilising the numerous enforcement tools available to them under the National Environmental Management Act 107 of 1998. A subtle warning to industry and an incentive to be proactive.

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