

# FFI - 7 months on

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## Cost Recovery (FFI) Background

- Power under S43(2) HSWA to make regulations for “such fees ...to be payable for or in connection with the performance...of any function ..conferred by or under any of the relevant statutory provisions”
- Existing fee regulations – nuclear/offshore/COMAH (Control of Major Accident Hazard Regulations 1999)

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# Response to Consultation

## Concern

- HSE Priorities
- Material Breach
- Trigger for FFI
- Financial Impact
- Dispute Process
- LA regulation
- Relationship between HSE and business

## Action

- Transparency of Plans
- Guidance and examples
- Significant H&S failings
- Reasonably incurred costs
- Independence at 2<sup>nd</sup> Stage
- Excluded from scope
- Experience of such schemes e.g. COMAH

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# Fees for Intervention (FFI)

- HSE will recoup all its costs if a 'material breach' leads to an enforcement letter (includes e mail or instant visit report) or a notice. No fee for verbal advice.
- Arises from proactive and reactive visits
- HSE enforced sectors only
- Costs are recovered at £124 per hour (or part hours) up to point where breach has been concluded. No VAT. Will also reclaim cost of specialist advice, e.g. HSL
- Estimates £750 for a letter £1500 for a notice -18,290 notices issued in 10/11. Improvement notices up 23% Prohibition Notices up 13%. No numbers for letters

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## HSE enforcement statistics

	Improvement	Prohibition (deferred)	Prohibition (immediate)	Total
2007/08	4,525	45	3,188	7,758
2008/09	4,825	44	3,208	8,077
2009/10	5,794	47	3,886	9,727
2010/11	7,137	48	3,835	11,020

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# Fees for Intervention (FFI)

- HSE estimates that in a full year it will eventually recover £43.6 million in costs
- Came into force on 1<sup>st</sup> October 2012, delayed from April blamed on 'technical details', thought to be computer systems for generating invoices.

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# Fees for Intervention (FFI)

- Brought in under Health & Safety (Fees) Regulations 2012
- Not retrospective
- Cannot apply to employees
- No double charging where other fees apply e.g. COMAH or Asbestos Licence holder
- Law must have been made under HSWA so check exemptions e.g. Consultation Regs, RRO (Fire Safety), Working Time, Pressure Equipment Regulations etc.

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# Fees for Intervention (FFI)

- Fees cover —
  - Time identifying material breach
  - Helping to put it right
  - Investigation time
  - Taking enforcement action
- Time runs from start of visit when material breach identified
- Invoices every two months (set as Oct, Dec etc) to be sent to site visited unless temporary workplace.
- Payment terms 30 days, non payment is a civil debt.

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# Fees for Intervention (FFI)

‘Material Breach’ defined in guidance as –

*‘When in the opinion of an inspector there is or has been a contravention of health & safety law that requires them to issue a notice in writing to that effect’*

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# Material Breach

- Written notification setting out which contraventions are a material breach.
- Specify provisions contravened
- Give reasons for opinion
- Inform person that fee is payable (or might be in future if identity of dutyholder in doubt)
- Have regard to guidance issued and
- Enforcement Policy Statement and Enforcement Management Model – underlying principle of which is enforcement action should be proportionate to scale of risk identified and seriousness of the breach. Inspector's discretion not fettered.
- Fee only payable to the extent that performance of functions reasonably attributable to that person.

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# Inspections

- Inspectors are being told that at beginning of visit they must inform you of what they intend to look at and seek agreement as to the reason and extent of their visit (based on key risk areas)
- Inspections will be for high risk or in response to “intelligence” which can include adverse insurance reports, whistleblowing, and ‘below the line’ accidents
- There are plans for further ‘rationalisation’ of HSE staff, offices and locations

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## Scope - Exclusions

- Existing permissioning regimes
- Local Authorities
- Self-employed dutyholders (putting only themselves at risk)
- Non-Health and Safety at Work Act legislation
- Employees (prohibited by S43(4) HSWA)
- Directors where liability arises under S37 HSWA
- Biological Agents
- Work with asbestos by licensees

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## Costs recoverable under FFI

- Letters and reports
- Preparing and serving notices
- Follow up to ensure compliance
- Specialist assistance (e.g. experts/HSL)
- Investigations work (e.g. interviewing witnesses/statements)
- Assessing findings and enforcement conclusions.
- Costs must be reasonably incurred.

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## Costs not recoverable under FFI

- Costs in connection with appeals against notices
- Costs in relation to prosecutions after information is laid
- Costs in relation to Crown Censure after Crown body notified that it would have been prosecuted but for crown immunity.
- Costs in providing assistance

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## Repayment of fees

- If paid in error
- If dispute is upheld
- If HSE brings a prosecution but no conviction
- If notice cancelled by Employment Tribunal after appeal
- Repayment in relation to prosecutions and notice appeals may involve apportionment.

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## Disputing the Fee

- Disputes are three stages -
  - Query with inspector who issued invoice will lead to review by principal inspector
  - then if unresolved by ‘a senior HSE manager’
  - finally by a disputes panel consisting of a senior HSE manager with operational experience; an HSE senior manager from HSE’s planning, finance and procurement division and an external member drawn from industry or trade unions

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## What if you really don't want to pay

- Obtain breakdown of time (should be recorded daily)
- Is another in breach as well?
- Apply guidance to decisions
- Judicial review?
- Fight the debt action?

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# Fees for Intervention (FFI)

Interim Evaluation Report of Dry /Shadow Run –

- Inspector must have regard to Enforcement Management Model (EMM) and Enforcement Policy Statement (EPS)- both are published on the HSE website

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# Fees for Intervention (FFI)

Report identified some problems –

- Evidence of ‘inconsistent understanding’ of COIN- (HSE’s work recording system)
- Procedure for engaging and managing specialist inspectors
- Duty holders not familiar with terminology especially ‘material breach’
- Construction sector because of different duty holders on same project

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# Fees for Intervention (FFI)

- Are there implications for health & safety consultants?
- Who is 'competent person' advising management?
- What if your audit misses a contravention ?
- Will those on the receiving end attempt to recover cost from their consultant ?
- What are your terms and conditions of business ?

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# Fees for Intervention (FFI)

Following information available on HSE website –

- Guidance for Businesses
- ‘What you need to know’ Leaflet
- Supplementary Inspector Guidance
- Multiple Dutyholder Guidance
- Enforcement Management Model
- Enforcement policy statement

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## The Good News .....

- Less proactive inspections, save for high risk areas.
- Inspectors' reaction to FFI generally negative -  
*“I didn't sign up to be a traffic warden”*

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## The Bad News .....

- Even small breaches could end up costing you money.
- A material breach easily made out in any work place.
- Whole appeal process geared towards making it very difficult to challenge inspector's decision.

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## So what now ....

The reality is that HSE probably right that “around 1% or less of all UK enterprises” will be affected by FFI

But

to protect budgets crucial that priority given to HSE compliance.

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## So what now .....

Crucial that strategy developed for dealing with HSE when visiting:

- (i) Single point of contact.
- (ii) No other employees to have authority to speak with HSE on organisations behalf and to refer inspector to that individual.

But -

all about the relationship with the inspector .....

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## FFI – The view from HSE

- ⑩ David Ashton – HSE head of field operations gave a presentation to the I.O.S.H. conference on 26<sup>th</sup> February 2013 he revealed that the “money is really coming in”
- ⑩ The first run of 1400 invoices were sent out in January and at that time the number of appeals were in single figures
- ⑩ He repeated there were no financial targets for inspectors and that they will not go looking for breaches, easy targets or deep pockets
- ⑩ He admitted that some of his staff have complained that they “didn’t join to be a revenue collector”
- ⑩ He commended their peer-review process and the “100% quality checks on all invoices we issue”
- ⑩ He did not think extending the scheme to LA’s would happen because with 400+ to cover it “ would not be practical

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## Latest News

- ⑩ Second invoice run generated £857k
- ⑩ 60% of inspections during period – 1<sup>st</sup> Dec to 31<sup>st</sup> Jan 13 resulted in FFI charge
- ⑩ Over 1,800 invoices issued 500 more than first invoice run.
- ⑩ Average value at £474 ( or just under 4 hours) remains low but misleading as invoices issued every two months for ongoing matters
- ⑩ Only 89 queries were raised by recipients. HSE amended or conceded 26 of them
- ⑩ Acceptance of notice and/or payment can be used by HSE as evidence in subsequent criminal proceedings

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# Questions?

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