

Liability issues facing the mining industry today

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Abstract

There are many avenues for potential liability facing the Mining Industry today. Liability for breaches of environmental statutes such as the Resource Management Act 1991 and the Hazardous Substances and New Organisms Act 1997 include not only financial penalties but imprisonment and perhaps even more significantly will affect the reputation of the Industry. The potential for liability is not restricted to the employees that cause the act's to which liability attaches, but also potentially affects all the levels of management and even the company itself. There is also potential for liability through common law actions which can be utilised in cases of environmental harm. These should not be ignored by the Mining Industry. The Mining Industry must take a proactive approach to minimise exposure to potential environmental liability. This can be achieved by undertaking comprehensive environmental management initiatives and policies.

Introduction

The Mining Industry is operating within a climate of heightened awareness of the environment. With this heightened awareness there has been an increase in regulation, and therefore the associated liability for environmental damage. In this paper we will describe areas of environmental liability facing the Mining Industry, pointing out on whom this liability falls and the limits to the liability. Finally, we will suggest ways to minimise the risk of facing environmental liability.

Liability under the Resource Management Act 1991

Background

The Resource Management Act 1991 ("the RMA") regulates the use, development and protection of physical and natural resources. The fundamental principle of the RMA is that the use of resources should promote sustainable management of those resources and the environment (See section 5 of the Act).

The RMA has a strong and pervasive emphasis on avoidance of adverse effects on the environment. This is evident in the stringent regime of penalties and punishment and the wide powers given to the District Court under the Act. The potential for separate criminal liability for company directors and managers of companies reinforces the clear legislative direction to the Courts to ensure penalties are imposed which will have a significant deterrent quality.

The individual or company that ignores responsibilities in terms of the RMA, ignores them at their peril and a pro-active approach to minimising exposure to liability under the RMA should be a priority for the Mining Industry.

Liability under the RMA

It is an offence to contravene or permit a contravention of sections 9 and 11 to 15 of the RMA. These sections impose duties and restriction in relation to:

- (i) the use of land (s9)
- (ii) subdivision (s11)
- (iii) the use of coastal marine area (s12)
- (iv) the use of lake and river bed (s13)
- (v) the use of water (s14)
- (vi) the discharge of contaminants (s15)

It is also an offence to not comply with the terms of an abatement notice (which is issued by a Council officer) or an enforcement order (which is issued by the Environment Court).

Liability is not limited to the party that actually commits the offence. It extends to any party who permits the commission of the offence (See sections 338 and 340 of the RMA). Therefore, if a body corporate, company employee or contractor is convicted of an offence against the RMA, a director or any person concerned in the management of a party convicted of an offence can also be held liable for that offence if it can be proved (See s340(3)(a) and (b):

- (i) That the act that constituted the offence took place with his or her authority, permission, or consent; and
- (ii) That he or she knew or could reasonably be expected to have known that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it.

This means that directors and managers within the Mining Industry cannot adopt a passive role in terms of their environmental responsibilities. Therefore, the failure of a company to put into place appropriate operational management safeguards and procedures may result in personal liability attaching to directors and managers.

Defences under the RMA

The offences of contravening or allowing a contravention of sections 9 and 11 to 15 are known as strict liability offences (See section 341 of the RMA). This means the prosecution does not have to show that the defendant intended to commit the offence, simply that the offence occurred. There are defences to these strict liability offences. These include (s341(2)):

Either

- (i) the act was necessary to save or protect life or health, prevent serious damage to property, or avoid an adverse environmental effect; and
- (ii) the conduct was reasonable in the circumstances; and
- (iii) the effects of the act were adequately mitigated or remedied after the act occurred.

Or

- (iv) the act was due to an event beyond the defendant's control (eg natural disaster, mechanical failure or sabotage); and
- (v) the act could not reasonably have been foreseen or provided against; and
- (vi) the effects of the act were adequately mitigated or remedied after the act occurred.

Possible defences available to Directors, Managers and employers who are found to have permitted the commissioning of an offence under the RMA are (See s340):

- (i) That they did not know or could reasonably be expected to have known that the offence was to be or was being committed;
- (ii) If there was knowledge that the offence may be commissioned they took all reasonable steps to prevent the commission of the offence; and
- (iii) In all circumstances reasonable steps were taken to remedy any effects of the act that gave rise to the offence.

Penalties under the RMA

The RMA imposes severe penalties on people who do not comply with the Act and/or do not comply with the requirements as set out in the relevant Regional or District Plans.

The penalties provided for in the RMA are:

- (i) a maximum fine of \$200,000 plus \$10,000 per day for continuing offences (s339(1));
- (ii) a maximum prison term of 2 years (s339(1));
- (iii) community service (s339(4)); and
- (iv) an enforcement order.

Case law

To put the preceding comments into context, we discuss examples of the application of these provisions.

The leading case on prosecutions under the RMA is *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492. This case concerned an appeal to the High Court against a sentence for a contravention of the RMA involving the unlawful discharge of a contaminant onto land which resulted in the contaminant entering water. The contaminant was a concentrated mixture of toxic chemicals and water and it was discharged onto a timber yard and from there into a stream. The discharge had a severe effect on the stream, on both wildlife and members of the public who entered the stream to rescue ducks.

The offence was actually committed by two employees of the company who overturned and drained several liquid storage tanks. On prosecution of the company the question was whether the executive director with responsibility for administering the day to day operations of the company knew of the offence. His defence failed because it was held that he had personal knowledge of the discharge even though he thought the storage tanks only contained stormwater.

The Company was fined \$25,000 in the District Court. In sentencing, the Court took into consideration the company's financial position and the company's efforts to mitigate or remedy matters following the incident. The Judge indicated that if it were not for this mitigation, the fine would have been substantially more. The High Court upheld the decision and set out the principles applied in sentencing, which in summary are that the Court will have regard to:

- The nature of the environment affected;
- The extent of the damage inflicted;
- The deliberateness of the offence;
- The attitude of the defendants;
- The financial position of the defendants;
- The extent of efforts to comply;

- Remorse;
- Profits realised; and
- Criminal record.

The case of *Northland Regional Council v Gourley* (Reserved Judgment of Judge P Doogue District Court Whangarei 2005) is an example of a more recent prosecution under the RMA. Mr Gourley, a helicopter pilot, worked for Skywork Helicopters Limited (“Skyworks”). During an aerial spraying operation using Tordon Brushkiller it was alleged that the spray entered a waterway that was a tributary to a stream which was the source of water for horticultural operations downstream, which claimed to have been adversely affected by the spray. Charges were brought against Mr Gourley and Skyworks respectively for:

- (i) discharging a herbicide into a tributary of a river (s. 15(1)(a));
- (ii) discharging a contaminant to air in breach of the Regional Air Quality Plan for Northland (s.15(2)); and
- (iii) a discharge of the herbicide onto land (s.15(2)).

The violation of the Regional Air Quality Plan was for not complying with New Zealand Standard 8409: 1995 which constitutes the Agricultural Users Code of Practice for applications of agrichemicals in New Zealand. Both breaches of the code were because Mr Gourley did not make provision for buffer zones near a sensitive area, namely the tributary.

On hearing the evidence in the case the Court held that:

- (i) there was water in the unnamed tributary on the day spraying occurred;
- (ii) the herbicide from the affected sites travelled from a point of origin in the unnamed tributary; and
- (iii) it is beyond reasonable doubt that the spraying conducted by Mr Gourley carried out on 23 October 2002 constituted a discharge of a contaminant directly to water.

Because the RMA imposes strict liability subject to affirmative defences the prosecution did not have to prove that the defendant knowingly acted or omitted to act in a way that contravened the RMA. Therefore, it was held that Mr Gourley did commit the offences against the RMA (at this stage the sentencing details are unavailable).

In terms of the liability of Skyworks the Court pointed to two routes by which the company could avoid liability. These were, as discussed previously, that:

- (i) the directors of Skyworks did not know or could not reasonably have been expected to have known that the offence was to be or was being committed (s340(2)(b)(i) of the RMA); or
- (ii) if the Directors of Skyworks took all reasonable steps to prevent the commission of the offence (s340(2)(b)(ii) of the RMA); and

To establish (i), the Court held the company had to establish that it did not know that the offence was to be committed or was being committed. At paragraph 109 of the decision the Court said:

To know that an event is to occur implies greater certainty than appreciating that there was a risk that that event might occur. That is to say, the corporation does not have to establish that it did not think there was any risk at all.

In this case the Court held that neither the Directors nor any person concerned in the management of the company knew that the offence was to be committed. The background to the company was very important in satisfying the Court that the Directors had no knowledge of the offence being committed. This background entailed the training undertaken with Mr Gourley and the

fastidious approach of the company to their business. The task was delegated entirely to Mr Gourley and the Court accepted that this was not unreasonable. The Court also acknowledged that the company's procedures cannot exclude some risk of human error of the kind that occurred in this case. The Court concluded that in applying an objective standard, it could not be said that the company's officers ought reasonably to have known that the mishap was going to occur. The Court stressed that this section was not concerned with risk but with an expectation on reasonable grounds that the offence was actually going to occur.

This case highlights the importance of companies implementing and maintaining comprehensive training policies and environmental management policies. To assist the Mining Industry in this regard we later suggest ways of ensuring that companies and businesses within Mining Industry set up comprehensive environmental management systems.

A further case of note is *R v Bata Industries Ltd* (Unreported, Provincial Division of Ontario Court of Justice, February 1992). The facts were that pollution control authorities, inspecting a shoe manufacturing plant at Batawa Ontario, discovered drums of chemical waste improperly stored that were allowing chemicals to spill into the environment. The company, the President, the Vice President and the CEO were all charged with breaches of pollution control laws. The company was found not guilty.

The President visited the site once a month and had personal knowledge of the chemical storage problem five months before the authorities became aware of it. The evidence was that he took no steps to rectify the problem after he was informed of it. The Court found that due diligence required him to exercise a degree of supervision and control and that he had not done so. He was found liable. The Vice president was also convicted as he had delegated the task of chemical storage to junior staff without adequate training. The CEO, and Chairman of the Board, Mr Bata, was exonerated from culpability because he had fulfilled his environmental responsibilities by issuing written instructions to all his companies directing that environmental policies be followed. Additionally, Mr Bata had placed an experienced manager on site at the Batawa plant and was entitled to assume that the manager would bring any problems to his attention.

The result of this prosecution was a significant fine for the company and the directors. However, this decision provides a further example of the ways in which liability for environmental harm can be distributed throughout a corporate structure, and again highlights the need for environmentally responsible systems to be in place.

Restorative justice

Under section 8 of the Sentencing Act 2002 the Environment Court is now required to take into account the outcome of restorative processes:

8. Principles of sentencing or otherwise dealing with offenders—

In sentencing or otherwise dealing with an offender the court— ...

- (j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case ...

The Environment Court has made use of these provisions in sentencing under the Resource Management Act 1991, and has noted that “there is potential for a greatly increased use of this approach” (See Judge McElrea's article *The Role of Restorative Justice in RMA Prosecutions* Resource Management Journal 3 November 2004). There is no legislative definition of restorative justice but the concept was described by the Select Committee's commentary to the Sentencing and Parole Reform Bill as follows:

Restorative justice involves community-based processes, which offer an inclusive way of dealing with offenders and victims of crime through facilitated meetings. They provide a forum in which offenders can take personal responsibility for their offending.

Importantly, restorative justice has already played a role in sentencing for offences against the RMA. One such case directly concerned the mining industry. This case was *Waikato Regional Council v Huntly Quarries Ltd* (Auckland District Court, CRN 2024011394,30 October 2003, McElrea DCJ) and involved the sentencing of a company and its Managing Director for contravening an abatement notice.

The offences involved discharges of dirty water from a quarry into the Waikato River. Following a restorative justice conference between the parties it was agreed that a donation to the Lower Waikato River Enhancement Society would be made, which would replace a fine.

On sentencing the restorative justice process contributed to the Managing Director receiving a discharge without conviction. The company was fined \$5,000 on one charge and the Court indicated that \$10,000 would be a suitable penalty for the other charges but put this fine on hold pending the making of a donation to the Lower Waikato River Enhancement Society of \$7,500.

Professional obligations – how do these fit into the mix?

The Courts can take into account a wide range of factors in prosecuting under the RMA. However, one factor that has not yet been considered is the obligations of individuals and organisations that are members of professional bodies. The perfect example of this is the Australasian Institute of Mining and Metallurgy, which has a membership of over 7000 in Australia, New Zealand and around the world. AusIMM serves the same function within the mining industry, as does the New Zealand Law Society and the New Zealand Medical Association. Therefore, the instances where both lawyers and doctors have faced more severe penalties due to the need to maintain public confidence in their professions are equally applicable to mining professionals, whether they be mining engineers, geologists, metallurgists or environmental scientists.

Members of the AusIMM are subject to Codes of Best Professional Practise, which are of course designed to protect the public and enhance the profession. All members of the AusIMM are also subject to the Code of Ethics. Important parts of that code are:

1. In conducting their professional activities, the responsibility of members for the welfare, health and safety of the community shall at all times come before their responsibility to the profession, to sectional or private interests, or to other members.

...

8. Members shall comply with all relevant laws and government regulations relating to the mineral industries, and with the rules, regulations and practices as established and promulgated by the stock exchanges with respect to their official listing requirements for mining and/or other companies.

In any environmental prosecution where the prosecuting body is aware of a defendant's obligations in this respect it is possible that if found guilty, the punishment will take into account such obligations. This is even more pertinent given the adoption by the Court of restorative justice processes.

As a part of any liability for environmental damage faced by a member of the AusIMM through the laws of New Zealand, they are also liable for disciplinary procedures within the AusIMM itself. Disciplinary proceedings within the AusIMM itself, are important to preserve public confidence in the mining industry and the professionals working within it, and it is therefore important for breaches of the code of ethics to be enforced.

Although there is no direct reference to the environment within the code of ethics, it can safely be assumed that any environmental damage caused by a member of the AusIMM could easily fall within clause 1 of the code of ethics. In terms of statistics on the disciplinary procedure within the AusIMM, over the past ten years 41 complaints have been deliberated on and action has been taken in the form of warnings or suspensions in 17 cases. Overall, the professional responsibilities of members of the AusIMM are another aspect of potential liability facing the Mining Industry and need to be given due consideration.

Liability under the Hazardous Substances and New Organisms Act 1997

Background

The Hazardous Substances and New Organisms Act 1997 (“HSNO”) establishes a regime for assessing and controlling hazardous substances and new organisms. The most relevant part to the Mining Industry is that part which deals with hazardous substances. Hazardous substances are defined in HSNO as:

any substance—

- (a) With one or more of the following intrinsic properties:
 - (i) Explosiveness:
 - (ii) Flammability:
 - (iii) A capacity to oxidise:
 - (iv) Corrosiveness:
 - (v) Toxicity (including chronic toxicity):
 - (vi) Ecotoxicity, with or without bioaccumulation; or
- (b) Which on contact with air or water (other than air or water where the temperature or pressure has been artificially increased or decreased) generates a substance with any one or more of the properties specified in paragraph (a) of this definition:

To date litigation of HSNO has focussed on the new organisms aspects of the legislation, so there is little judicial guidance on the implementation of these provisions. Therefore, assessing the risks in dealing with hazardous substances involves developing a thorough understanding of the statute itself.

HSNO has a performance based approach. The controls on hazardous substances prescribe the required outcomes, rather than what is required to be done to manage hazardous property. However, HSNO also provides for the issue of codes of practice, which will set out certain pre-tested ways of meeting a performance requirement specified in a regulation or an approval. Importantly, following an approved code of practice provides a legal defence to any prosecution taken under HSNO.

Offences, liability and defences under HSNO

Section 109 of HSNO outlines when an offence is committed and includes:

- (i) Manufacturing any hazardous substance in contravention of HSNO;
- (ii) Failing to meet controls placed on a hazardous substance or specified in regulations (s109(1)(e)(i) and (ii));
- (iii) Failing to comply with a compliance order

The offences under HSNO, like under the RMA, are strict liability offences, so it is not necessary for the prosecution to show that a defendant intended to commit an offence. Moreover, like the RMA, employers, principals, directors or other managers involved in a body corporate are liable for the actions of their employees.

The defences available to employers, principals, directors and managers under HSNO are almost identical to those contained in the RMA, with one extra defence under HSNO being available by complying with a code of practice (section 117(3)). The similarities in defences between HSNO and the RMA will make much of the case law under the RMA applicable to any prosecutions under HSNO. However, a more important result of the similarities between HSNO and the RMA is the need to exercise due diligence to avoid liability under these environmental statutes.

Penalties

Pursuant to section 114 of the Act, persons found guilty of an offence listed in section 109 are liable to pay fines not exceeding \$5,000 for less serious offences, or not exceeding \$500,000 for more serious offences. For continuing offences, daily fines not exceeding \$5,000 per day for less serious offences and not exceeding \$50,000 per day for more serious offences can be imposed. Moreover, the maximum term of imprisonment under HSNO is 3 months as opposed to the maximum term of 2 years under the RMA.

These penalties, for the serious offences, are a level above the penalties available under the RMA and are a clear signal that the government is instituting a high level of deterrence in regard to the management and use of hazardous substances.

Liability at common law

Despite detailed regulation of the Mining Industry it is still important to be aware of developments in the common law context. Common law is that part of the law that arises from and is administered by the Courts, and is not found in any statutory instrument. Although there is no specific concept of liability for environmental damage at common law, there are a number of possible common law actions relevant to the environment.

The broadest common law action is that of negligence. This action requires that a duty of care exist, and that this duty of care is breached leading to damage. In the Mining Industry there are many examples of duties of care, whether it be a statutory code like the RMA or a broad ethical obligation contained within the AusIMM charter. A further common law action which is often seen as uniquely applicable to the environment is an action called Nuisance. The purpose of an action in nuisance is to prevent interference with a person's use and enjoyment of land. A relevant example of where this action might apply in the Mining Industry is where dust or vibrations from a mining operation interfere with a neighbouring properties use of their land.

There is a further common law rule which derives from an old English case known the as "the rule in *Rylands v Fletcher*". This rule has been recognised as a distinct action in New Zealand and can be summarised as: an occupier of land is strictly liable for damage caused by the isolated escape of something harmful that was brought on to or accumulated on the defendant's land in the course of a non-natural use of the land. This circumstances which give rise to this type of action abound in the mining industry. For example, the processing of ore utilises various hazardous chemicals that need to be stored on site, which could escape from the site.

Summary

There are a number of areas of potential liability facing the Mining Industry. It is important to have a thorough understanding of all parts of the legislation touching various aspects of the

Industry, from land use consents to storage of explosives for blasting. The penalties imposed under the legislation can be severe, however, this is often only a fraction of the real penalty in terms of the affects of a prosecution on the reputation of the industry.

Taking a pro-active role in minimising exposure under the law

We have seen that the Mining Industry is subject to a number of avenues for potential liability, therefore it is vital to minimise the risks. Four important steps in minimising the risk are:

- Identification of the relevant environmental laws which impact upon your operations:
- Evaluation of potential hazards from operations or products in the light of the legislation. These two steps may best be implemented through a legal impact analysis, as well and economic and environmental impact analysis;
- Identification of the options for controlling the risk (through both the adoption of technological measures and management procedures).
- Identification of the options for financing the risk to ensure that there are funds available to meet the clean up and mitigation costs.
- Training of staff.

These four steps form part of an environmental management programme. A check list of features of such a programme should include:

- (a) An environmental strategy

This is the cornerstone of the programme. It should indicate the emphasis on the programme and outline the major responsibilities for environmental management. The strategy must be communicated to management and staff.

- (b) An environmental management structure

This may include:

- (i) Board level support
 - (ii) Environmental committees
 - (iii) Environmental manager (a co-ordinating role)
 - (iv) Environmental operating guidelines (standard operating procedures for the translation of policy into action)
 - (v) Environmental budget
 - (vi) Environmental training (on company environmental policy and requirements)
- (c) Allocation of sufficient resources to environmental management.
- (d) An effective system of delegation, monitoring and reporting of environmental issues to the board of directors. Directors and managers must personally take steps to ensure that they receive regular reports and from time to time they should monitor the system personally.
- (e) Use of independent advisers.
- (f) Regular monitoring of all contracts to ensure compliance with environmental legislation (environmental auditing)
- (g) A system for prompt corrective action to be taken in the event of any non-compliance. This should include reporting back to management so that regulatory authorities can be notified.
- (h) Regular review of all company manuals to ensure continuing compliance with legislation.

- (i) The existence of crisis management plans.
- (j) Monitoring of the regulatory climate including maintaining good relationships with consent authorities.
- (k) Maintenance of good records and review.
- (l) Maintenance of good channels of communication between employee and senior management.
- (m) Employee instruction on the environmental consequences of their actions.

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For four years, Rob was Vice-Chairman of the Environmental Law Committee for the International Bar Association and an inaugural committee member of the Resource Management Law Association in New Zealand.

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