



EVERYTHING MATTERS

MINERALS MATTERS

Edition 2

WELCOME TO MINERALS MATTERS

Welcome to another edition of Minerals Matters and thank you to those of you who provided such positive feedback in response to our previous edition.

The current economic climate continues to provide challenging conditions for all those involved in the minerals sector. As a result, it is even more crucial that the legal and regulatory framework is understood and set in context in order for our sector to stay “ahead of the game”. We aim to highlight some of the key issues which we believe are areas that currently warrant focus and attention.

This issue of Minerals Matters includes articles in the following areas:

- Agency Worker Regulations
- Import Issues
- Minerals Planning under the National Planning Policy Framework
- Town and Village Greens: a Threat to the Mining Industry
- The interpretations of “Reasonable Endeavours”
- The Construction Act
- Crisis Management
- Nuisance Update

We are also pleased to include a guest article from Robert Edel, the partner who heads up DLA Piper’s Asia Pacific Mining Team. This focuses on the “Australian Experience”.

Should you have any specific requests regarding articles for future editions or contributions from jurisdictions in which you would be interested, then please do not hesitate to contact Michael Pocock or Alastair Clough, the editors of this publication.



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AGENCY WORKER REGULATIONS

The Agency Worker Regulations came into force on 1 October 2011 in Great Britain and present a number of challenges for minerals operators. The regulations give agency workers the entitlement to the same basic employment and working conditions, including pay, as if they were direct recruits once they have attained a qualifying period of 12 weeks in the same job. Agency workers have often provided flexibility in mining and quarrying businesses when work fluctuates and contracts are of variable duration and so the new rules will have a practical impact on managing workforces and the cost of labour supply.

The legislation is not retrospective and so for those workers already on assignment the 12 week qualifying period will start from 1 October and kick in on 23 December 2011.

From 1 October agency workers will also be entitled to access to facilities and information on job vacancies from day one of their assignment. In the current economic climate we are noting that workers take on temporary agency roles in the mining, quarrying and drilling industries with a view to permanent employment and this provision may facilitate that progression.

Hirers need to be aware that recruitment agencies are alert to the risk of agency workers being “converted” into permanent employees and will amend their terms and conditions to provide financial penalties where hirers end up permanently recruiting agency workers who originated from the agency.

MEANING OF PAY

The Department of Business, Innovation and Skills (BIS) guidance lists the following items as pay:

- basic pay, overtime allowances, allowances for shift working or unsocial hours, risk payments for hazardous duties, payment for annual leave and bonuses or commission payments directly attributable to the amount or quality of work done by the individuals.

The Regulations exclude the following from the definition of pay:

- occupational sick pay, occupational pensions, occupational maternity pay, paternity and adoption pay, redundancy pay, guarantee pay, expenses, statutory and contractual notice pay, private health insurance and company car allowances.

The interpretation of pay and particularly bonus terms is predicted to be the real focus for agency workers and we can expect to see litigation in this area. With regards to

such mineral industry norms as standby time payments, hazardous risk premiums and overtime, the best practice for employers is to identify a comparable full time employee and to “roll up” all of these individual pay components into an equivalent hourly rate that they can then demonstrate is paid to the agency worker to discharge the Regulation obligations.

IN SCOPE

An individual is not prevented from being an agency worker under the regulations simply because they work through an intermediary body. Our experience is that intermediary bodies tend to be more of a feature in IT contracting than minerals contracting but it is advisable to be prepared to deal with these case when they arise.

OUT OF SCOPE

The genuinely self-employed who are in business on their own account and those workers who have a permanent contract with the recruitment agency that meet fairly onerous requirements including pay between assignments (the Swedish derogation model) will be exempted from the Regulations. Some of the larger recruitment agencies will no doubt adopt the permanent contract exception as a market differentiator and to demonstrate to hirers that the Regulations can be circumvented.

ASSIGNMENTS FOR LESS THAN 12 WEEKS

Assignments of less than 12 weeks will not be covered by the Regulations although there are complex rules on breaks to avoid manipulating contract lengths. The 12 week period should provide a focus for mineral companies where there is always the possibility that particular contracts such as road maintenance may be for a shorter period, in which case the Regulations do not apply.

It will be open to an employment tribunal to decide that a hirer had malign motives for moving a worker to a different job breaking the 12 week qualification period and will be able to make a punitive award of up to £5,000 on top of the compensation payable for breach of the equal treatment principle.



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FROM PIT TO PORT

Third party access issues

The Australian experience

Where participation in the market is dependent on access to supply chain infrastructure such as rail, road or ports – or more critically – where the infrastructure owners are vertically integrated businesses that participate in the related markets, it is inevitable that governments will step in to ensure third party access to these facilities. But fixing on an efficient and equitable mechanism that both protects the rights of the infrastructure owners and also safeguards the national interest by avoiding inefficient duplication of resources and encouraging competition in the market is no easy task.

Australia has been grappling with issues relating to third party access to infrastructure and the efficient operation of logistics chains for some time. Governments in the emerging resources-based economies are increasingly looking to the way projects are developed in Australia and the policy framework underlying those projects for guidance in relation to development of projects across their territories.

Most of the exciting resources projects being developed today require the development of key infrastructure such as ports, roads, rail, power and water. Yet the cost and complexity of major infrastructure developments can quickly turn a bankable resources project into a non-starter. And with the unit cost of heavy haulage railway in Australia's Pilbara region ranging between AUD\$ 2 and 4 million per kilometre it is easy to see why.

It is understandable therefore, that project sponsors would seek to maximise their return on such a massive investment – and ensure a free flow of their product to market. Yet this seemingly basic principle of the market is at odds with the objectives of other stakeholders – most notably the governments of the territories in which the resources are located.

Infrastructure owners have a strong incentive to maximise the return that can be achieved from the use of the infrastructure. This will put upward pressure on tariffs and may provide strong incentives on infrastructure owners to refuse access to third party access seekers.

Governments on the other hand, usually have strong policy objectives that pull in the opposite direction. Most governments wish to encourage maximum use of

infrastructure, even privately owned infrastructure. This assists in driving economic development and in increasing government revenue through taxes, levies and duties. Governments also have a natural interest in insuring that infrastructure is used by as many different access seekers for as many different purposes as possible. These competing interests are often resolved by use of third party access regimes or laws governing access to infrastructure. In Australia, there are three major sources of law relating to third party access infrastructure:

1. Part IIIA of the *Competition and Consumer Act 2010* (CCA);
2. The *Rail Access Code*, which governs above rail access to railway networks in Australia that have been declared as subject to the *Rail Access Code*. This covers most heavy haul iron ore and coal haulage networks; and
3. An emerging system of regulation of access to ports. This regulation is still in its infancy however DLA Piper is at the forefront in developing, negotiating and drafting a new port access regime for the Oakajee Port in Western Australia.

The access regime contained in Part IIIA of the *Trade Practices Act 1974* (TPA) (now contained in the CCA), enabled third party access to privately owned infrastructure of certain essential facilities. The process involved an application to the National Competition Council (NCC) for a recommendation to the designated Minister that the services provided by that infrastructure be declared. On the Minister's declaration, the third party was granted an enforceable right to negotiate with the service provider for access, failing that, the third party could seek to have terms of access arbitrated by the Australian Competition and Consumer Commission (ACCC).

In order for the NCC to recommend that a service be declared they would have to be satisfied that it was in the interests of competition and efficiency to do so (according to criteria set out in sections 44G(2) and 44H(4) of the TPA) and that the service was a 'service' as defined by section 44B.

Section 44B defines ‘service’ as ‘services provided by means of a facility and includes the use of an infrastructure facility such as a ... railway line’ but excludes (amongst other things) ‘the use of a production process, except to the extent that it is an integral but subsidiary part of the service’.

There are two landmark cases, *Hamersley Iron Pty Ltd v National Competition Council* (1999) 164 ALR 203 (*Hamersley*) and *BHP Billiton Iron Ore Pty Ltd v The National Competition Council* [2008] HCA 45 (*BHP Billiton*) which consider the meaning of ‘service’ and ‘a production process’ as defined in section 44B.

The court in *Hamersley* denied that a section of railway line used by the service provider to transport iron ore for the purpose of producing the end product fell within the section 44B definition of service. The court held that based on the ordinary meaning of ‘production process’ (defined as ‘the creation or manufacture by a series of operations of some marketable commodity’) the section of rail applied for constituted a step in a highly integrated process designed to make the product and was therefore not a ‘service’ under s 44B.

In contrast to the *Hamersley* decision, the High Court in *BHP Billiton* determined that the relevant ‘production process’ was that of the third party not of the service provider. They held that the relevant test was whether the use of the ‘service’ by the third party was the same as the use of the ‘production process’ by the third party. Where the answer is negative, i.e. where the third party wished to use the facility (in isolation) for the third party’s own purposes, the facility should be determined a ‘service’.

The Rail Access Code applies to most rail networks used to haul coal and iron ore in Australia, even if those rail networks are privately owned. Essentially, it provides a safety net for third party access seekers who wish to run their own trains on privately owned rail networks. The parties are required to first negotiate to see if they can reach an arm’s length commercial agreement for access to the track. The access seeker must provide its own locomotives and rolling stock. If the parties are unable to reach agreement on certain terms, then the disagreement may be resolved by reference to arbitration under the Code.

To date, there has been very little direct regulation of third party access to port facilities in Australia. Many of the large iron ore and coal export facilities in Australia are privately owned. Access to these facilities is becoming

more important. DLA Piper is currently advising a joint venture comprising Mitsubishi Development Pty Ltd (a subsidiary of Mitsubishi Industries) and Murchison Metals (a publically listed Australian company) on the development of the Oakajee Port and Rail project. This is a \$6b project for the development of a new iron ore export port at Oakajee in Western Australia, connected by a heavy haul rail network to several iron ore mines in the mid west region of Western Australia. DLA Piper has been negotiating and drafting a regime for access to the port being constructed at Oakajee. This is a first in Australia and is unique in the world. It will set up a “negotiate/arbitrate” model. That is, the parties are required to negotiate an arm’s length commercial agreement whereby the infrastructure owner will handle iron ore through the port facilities on behalf of a third party access seeker in return for payment of a fee. If the parties are unable to reach agreement, then the access seeker may have recourse to arbitration to settle the points of difference. Although it sounds simple, the regime is complex and needs to take into account significant commercial issues for both the infrastructure owner and for government (on behalf of various access seekers). The regime is nearly complete and is likely to be used as a model for port regulation around Western Australia and possibly the rest of Australia as third party access regimes are developed and rolled out across the country in years to come.

Ultimately, the regime seeks to balance the legitimate interests of infrastructure owners with legitimate public policy concerns of government. We believe that the Oakajee Terminal Access Regime achieves this. It will be interesting to see how it operates in practice in the coming years.

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IMPORT ISSUES

The minerals industry, whether you are a mining company, a processor of minerals or a consumer of minerals as an input product, is increasingly becoming a global issue. Suppliers, rivals and customers operate in a global market and the ability to operate seamlessly across borders is essential to maintaining a competitive position. This article looks briefly at some of the steps companies involved in the minerals industry within the UK can take to reduce the costs and minimise the risks associated with importing goods into the EU.

The starting point for the customs treatment of any product is tariff classification. Natural, unprocessed products tend to be classified under lower headings, and tend to attract lower duty rates. Section V of the tariff deals with mineral products. So, as a simple example, salt products are classified under the four figure heading 2501. The exact ten digit tariff classification is determined by breaking the category of salt products down into more specialised headings.

Getting your tariff classifications correct is absolutely crucial. Ten digit tariff classifications give headline duty rates; if you get the tariff classification wrong, you may well be either under or over paying customs duties (and in any event will be committing a technical violation).

Another important factor to consider is where your products originate from. Certain countries (such as Mexico and South Korea) have preferential trade agreements with the EU and many developing countries benefit from general arrangements such as the Generalised System of Preferences (“GSP”), under which the import of certain products will benefit from reduced or zero duty rates. However, to take advantage of these benefits, importers will need to show (through an origin certificate or a supplier’s declaration) that the goods in question qualify for preferential treatment. Minerals importers should assess their supply chain to see whether it is possible to take advantage of preferential trade agreements and, if so, whether suppliers are contractually obliged to provide the relevant documentation on import.

The origin of goods also matters because the EU often imposes additional import duties, known as anti-dumping duties, on certain products from certain jurisdictions

(in particular non-market economies such as China). Depending upon the “dumping” margin identified, these duties can be very significant and may drastically increase the import price of input products. In a very well known case¹, an importer of Chinese silicon was found to be liable for anti-dumping duties of 49% of the value of the product – a backdated bill of €99,974.74 (plus possible penalties).

Clearly, therefore, assessing your supply chain to ensure that you are not and will not be liable for anti-dumping duties (and amending the sourcing of products if you are) can very significantly reduce the cost of importing into the EU and could free up additional working capital for your business.

Conversely, in certain circumstances, the EU will suspend or withdraw customs duties from certain products in certain circumstances. Typically, tariff suspensions or quotas will be put in place where the product in question is not available (either at all or in sufficient quantities) in the EU. This has significant implications for the minerals industry, where certain minerals or mining products are only available in particular jurisdictions. If your input products are not available in the EU, or are not available in the quantities you require, it is worth assessing whether an application for a tariff suspension is worthwhile to reduce your customs duty burdens.

The EU’s Budget for 2011 allows for collected customs duties of €16.65 billion. To maintain their competitiveness on the global stage, those involved in the EU minerals industry should ensure that their share of this figure is as low as possible.



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¹ Hoesch Metals, Case C-373/08

MINERALS PLANNING UNDER THE NATIONAL PLANNING POLICY FRAMEWORK

The National Planning Policy Framework (“NPPF”) intends to integrate the current suite of national planning policy documentation into a single concise document. The result is 52 pages of the NPPF with just over three pages dedicated to minerals policy.

A number of initiatives are included in the NPPF including, the presumption in favour of sustainable development, the aim of shorter more strategic local plans and recognition that indigenous minerals are essential to support economic growth. The pressure of economic growth on finite resources is most apparent in the section on minerals which states:

“Minerals are essential to support sustainable economic growth. It is therefore important that there is a sufficient supply of material to provide the infrastructure, buildings, energy and goods that the country needs. The Government’s objective for the planning system is to:

- *secure an adequate and steady supply of indigenous minerals needs to support sustainable growth, whilst encouraging the recycling of suitable materials to minimise the requirement for new primary extraction; and*
- *facilitate sustainable use of energy minerals.”*

The NPPF also places a requirement on local authorities that they “give significant weight to the benefits of the mineral extraction, including to the economy.”

Concern has been expressed over the use of the word ‘sustainable’ and minerals in the same sentence due to the logical problem that minerals are by their nature a non-renewable resource. There is also concern that mineral working seems to be treated as one of many “planning for places” issues when it comes to defining sustainable development. The Mineral Products Association (“MPA”) believe that as minerals can only be worked where they occur mineral planning is not simply an infrastructure issue. Rather, minerals are a prerequisite and are essential for the construction and manufacturing industries and the economy as a whole. Therefore the MPA believes that mineral planning must be prominent under the heading of “planning for prosperity”.

Whilst it is clear that the NPPF has certainly met its aim of simplifying and reducing the volume of print in such a complex area there is concern regarding the loss of 15 MPSs and MPGs. The National Trust has stated that

they find such a reduction very concerning considering the significant damage that can be caused by inappropriate minerals extraction and related development.

Nigel Jackson, Chief Executive of the MPA, commented:

“We have serious concerns on the detail and legacy of the more effective elements of the current minerals planning system ... We are also concerned at the potential wholesale loss of key mineral planning guidance notes which could have serious long term investment for the silica sand and cement industries already struggling under the weight of carbon, energy and other regulations, as well as having implications for technical matters relating to noise, dust and restoration on most quarry sites. The draft also does not appear to have attempted to address the issue of waste planning, which normally goes hand in hand with minerals planning, at least in terms of policy.”

In this context, there is a strong argument that the NPPF should make reference to the future role of guidance and how the Government believe it should be produced if it is to carry its weight in the planning system.

However, despite such concerns it should be noted that in principle there is no change to the law proposed, there will continue to be a plan led system and statutory protection for designated places and landscapes. Also, there has always been a presumption in favour of sustainable development in particular circumstances.

Therefore with the recognition in the NPPF that minerals are essential to support economic growth and the streamlining of planning policy guidance it may be that the NPPF is a step in the right direction. However, it does appear from the ongoing debate that there is some fine tuning for the Government to do before the final document is produced to achieve the best possible result for the minerals industry, the economy and the environment.

The final document is expected to be in place by April 2012 so watch this space!



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TOWN AND VILLAGE GREENS:

A THREAT TO MINING OPERATIONS

Applications to register town and village greens are increasingly becoming a tool of local residents and environmental groups in order to thwart new development, including mining operations. Minerals operations are at risk and minerals operators need to take steps now in order to avoid the sterilisation of mining areas as a result of successful village green applications being made.

What is a town or village green?

Anyone can apply to register land as a town or village green (“TVG”) where a significant number of local residents have used the land for sports and pastimes for a period of at least 20 years. Such use must be without force, without secrecy and without permission.

The law in relation to TVGs is extremely complex and in a constant state of flux. Applications for the registration of TVGs are becoming the weapon of choice for local action groups seeking to protect land from development.

Why is this relevant to mine and mineral land owners?

The traditional image of a green is not accurate in the legal sense and increasingly successful registrations have occurred on grazing land, golf courses, ponds, rocks, car parks and football fields, amongst others.

Minerals operators and landlords should therefore take care to review their land to ensure that rights are not accruing which could potentially lead to a village green application being made.

The variety of land registered demonstrates that **any open space** is capable of being registered as a TVG. Quite often land which forms part of consented minerals workings is made accessible to the public pending the workings taking place. Such land could be susceptible to a village green application.

How can mine and mineral land owners protect their land?

A variety of measures can be put in place in order to minimise the potential for a successful village green application to be made. These include the following:

■ Public Notices

Public notices stating that the land is private property and access is prohibited without express consent from the land owner will help to prevent registration of a TVG.

■ **Fencing**

Whilst fencing is not necessary to demonstrate that land is not a TVG the erection and maintenance of fencing around land can indicate that the land is private and not for public use.

■ **Response to People using the Land**

The manner in which a landowner or operator deals with people trespassing on land can be relevant to whether or not the use is “as of right”. A failure to communicate to people that the land is private and not informal recreation land could be detrimental to any objections to the village green application.

■ **Regular Visits**

Regular visits to the land will assist in identifying any informal use of the land and to ensure that any signs and fences are still in place.



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REASONABLE ENDEAVOURS DOES IT MEAN WHAT YOU THINK?

For many years reasonable endeavours has been used as a convenient shorthand to quantify the lengths to which a party must go to satisfy its obligations under a lease or contract but, in light of recent case law, is this exposing contracting parties to more onerous obligations than they expect?

Whilst there has been no true legal definition both convention and previous cases have given credence to the view that a reasonable endeavours obligation does not require a performing party to sacrifice its commercial interest.

In July 2011 however the decision in the case of *Jet2.com Ltd v Blackpool Airport Ltd* potentially disrupted our conventional approach by holding that a reasonable endeavours obligation could indeed require a party to act against its own commercial interests.

In the case Jet2 claimed that Blackpool Airport was in breach of contract by seeking to restrict the times during which Jet2 could operate flights from the airport. The contractual term upon which Jet2 were relying was

that “*the Airport would use all reasonable endeavours to provide a cost base that would facilitate Jet2’s low cost pricing*”.

After a change of ownership, and due to an operating loss, the airport sought to implement some cost cutting measures by reducing its operating hours in an effort to increase profitability.

Jet2’s operating model was reliant on being able to run its commercial flights early in the morning and late into the evening and was therefore negatively affected by the changes to operating hours.

Despite the submission by the airport that its contractual duty to Jet2 did not require it to act against its own commercial interests (in keeping the airport open for longer hours) the court ruled that it was in breach of contract and could not justify its decision by the need to protect its own commercial interests.

In reaching its conclusion the court distinguished between two types of reasonable endeavours obligations. Firstly to procure that a third party does something (for example to

procure that a local authority enters into a section 106 agreement as was relevant in the previous case of *Yewbelle Limited v London Green Developments Limited*) where, as the actions of the third party are outside the control of the contracting party, it need not act against its own commercial interests in an attempt to force the third party to perform.

The second type of obligation and where the Jet2 case diverges from past convention are those where the reasonable endeavours are to do something within the contracting party's control (as was the case with the airport's obligations as to operating hours). The court determined in such instances that a party could be asked to act contrary to its other commercial interests to meet the commitment it had undertaken.

Just how far beyond its commercial interests a party could be required to act will always depend on the particular facts and what a reasonable person with full knowledge of the background and the intentions of the parties would expect. It is however clear that parties take a risk when using an endeavours clause that there may be a later disagreement over its meaning.

Why therefore is this term so important not just in terms of commercial contracts but to the mining industry?

Throughout the mining industry there are many instances in both agreements and leases where reasonable endeavours obligations are assumed by one or both parties. Many of these fall within the traditional category of obligations to procure a third party does something, often to obtain a planning consent. Where this case could have a considerable effect, however, is on working obligations as

an operator may give a reasonable endeavours obligation in relation to working safe (the operator believed) in the knowledge that its obligation would be caveated by its commercial interests. Notwithstanding that the Jet2 case is only a first instance decision, it supports an argument that regardless of whether an operator has no market in which to sell the mineral once worked it would nonetheless be obliged to carry on working to avoid breaching its contract.

It seems that the area of endeavours clauses is far from settled and we can expect further cases to come to court. Unless or until a court of higher authority can establish an enforceable precedent there are some practical steps which can be taken in order to protect against unwittingly giving obligations beyond your expectations:

- specify the steps or extent of the steps that will be required to comply with the reasonable endeavours obligation;
- do not use reasonable endeavours to circumvent the need to make express provisions for the occurrence of particular events;
- remember that previous cases or the meaning of various expressions will be a guide only and the court will look at the meaning of the words used in each contract.



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THE CONSTRUCTION ACT CAN AFFECT YOU

Part II of the Housing Grants, Construction and Regeneration Act 1996 (commonly referred to as the Construction Act or HGCRA) is the single most important piece of legislation affecting the UK construction industry. Its origins lie in the wake of the last recession in the early 1990s. Its aims were (1) to tighten up payment practices – and thereby improve cash flow and (2) to introduce, as a new dispute resolution option, a procedure known as adjudication – and thereby help the parties to a contract to obtain a speedier decision.

The Construction Act covers the vast majority of building and engineering contracts and consultants' appointments. It is not possible to "contract out" of its provisions – which means that any changes made to them will have far reaching implications. To the extent that a construction contract does not comply with the Construction Act, the provisions of a statutory instrument made under the Construction Act (and referred to as the Scheme for Construction Contracts) kick in and apply to the contract.

Changes were introduced to the Construction Act on 1 October 2011 in England and Wales and 1 November 2011 in Scotland. Not all of your contracts for procuring works will be caught by the Construction Act e.g. construction operations for the extraction of minerals, but for those that will e.g. extension and maintenance of buildings on your site, the key changes are as follows:

In brief, the amended act:

- removes the current requirement that construction contracts have to be in writing for the act to apply. It extends the provision of the act to oral and partly oral agreements, but means that more disputes may be referred to adjudication;
- contains provisions for dealing with the costs of an adjudication;

- restructures payment notifications to be given under construction contracts – a regime of notices and counter-notices intended to improve transparency around the amount of money the payer intends to pay at the outset of the payment cycle;
- gives contractors and consultants the right to suspend part of works or services. Currently, if a party has not been paid in full by the final date for payment, they are only entitled to suspend the entire works they have performed. Under the new provisions, a party that validly suspends work because of non-payment will also be entitled to the reasonable costs and expenses – and an extension of time – arising from the suspension;
- extends prohibited payment clauses to certain "pay when certified" provisions. Currently, the act prohibits only pay when paid clauses (except where the third party is insolvent);
- gives the government the power to exclude particular types of construction contract from the operation of the act.

We would advise that you:

- update contractual arrangements – and get on top of amendments to industry standard form documents;
- ensure that contract managers understand the changes;
- manage the risks of disputes arising and improve internal dispute management systems.



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WHEN THE GOING GETS TOUGH

CRISIS MANAGEMENT

WHAT IS A CRISIS?

A crisis can happen to anyone at any time, the key is to be prepared. A crisis is often defined as a situation beyond the scope of everyday business which threatens the reputation, continued operation or safety of any individual, company or organisation. These can be catastrophic incidents which suddenly erupt or they can be “slow burners”. In the mining and minerals sector these could range from catastrophes affecting the environment or human life to interventions by a number of different regulatory authorities. Even key supplier failure or industrial action can represent a major crisis. During such incidents, natural reactions can lead to confusion and fear. If mishandled the consequences can be devastating including sustained negative media coverage and brand damage, the loss of customer and investor confidence as well as the potential for criminal charges against senior management and massive fines.

The preparation of a crisis management plan and its implementation by trained and rehearsed individuals will help to prevent such damage.

HOW EXPOSED ARE COMPANIES?

Many surveys including one undertaken for DLA Piper of 250 leading European firms confirm that businesses are failing to manage risk effectively. In that survey over half of the companies had no crisis management plan at all whilst those that did were not comprehensive enough to deal with the wide range of risks that businesses now face.

IS YOUR BUSINESS PREPARED?

Questions you should consider to confirm whether your business is prepared to deal with a crisis situation include the following:

- What types of crisis might we face?
- Do we have a comprehensive crisis management plan in place to manage these risks?

- When was the plan last updated?
- Do we have a crisis management team with the right people on it?
- Are all team members trained as necessary including media training?
- When was the plan last stress tested?

THE CRISIS MANAGEMENT TEAM

A crisis management team must be appointed to respond to the crisis. The organisation within the team will need to be clearly defined and each member should be fully aware of their individual and collective roles and responsibilities. It is crucial to ensure that the right people are involved in preparing any crisis management plan with representation from every part of the business including corporate affairs, environmental, human resources, operations, finance and legal but you should make sure that the team is small enough to allow effective and expedient decisions to be made.

The crisis management team will be expected to deal with the immediate crisis which may include dealing with the regulators. They will also need to deal with the media, shareholders, key suppliers, customers and the general public whilst at the same time seeking to ensure the operational integrity of the business. If your business does not have the relevant expertise in-house, make sure you know which external advisors you can turn to when you need them.

WHAT SHOULD THE CRISIS MANAGEMENT PLAN COVER?

The crisis management plan should as a minimum address the following key areas:

- the crisis management team and their roles/responsibilities;
- communication lines both internally and externally to the media, regulators and public at large, emergency services and external advisors;
- reporting structures and mechanisms;
- corporate communications/public affairs policies;
- levels of control and authorisation limits;
- infrastructure and logistics in relation to the crisis management control centre;
- the role of external advisors including legal, technical, insurance and media professionals.

Think about what resources the crisis management team will need. Where will they be based, how will they communicate, what about if you are forced off-site? Try and accommodate a plan B within your crisis management plan so that the team can start to function immediately.

STRESS TESTING IS A NECESSITY

Only through testing and rehearsing will any gaps in a crisis management plan be identified and any problems be addressed – in the immediate aftermath of a crisis even the best prepared plans will be subjected to significant stresses and that is not the time to find out that a plan has simple but fundamental flaws. Consider taking your plan and then imagining a scenario which would preclude the full operation of it e.g. key team members on holiday or IT failure – how would you deal with this?

TRAINING AND IMPLEMENTATION

The majority of businesses will require some assistance in preparing their plans or ensuring the relevant personnel are correctly trained and strategies are in place to minimise damage to the organisation. The business and individuals will need to be aware of their legal rights during any crisis, whether these relate to the powers of regulators or legal duties to consumers and other third parties. Training should range from regulators' powers and how to react to any particular crisis to media training and the creation of an agreed media strategy to seek to protect corporate reputation and brand equity.

Aside from ensuring the effective management of a crisis to protect the business' reputation there are a number of upfront benefits from having crisis management systems in place. These include improved safety and communications in the organisation, enhanced reputation with suppliers, customers and regulators and a reduced risk of regulatory action and litigation.



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NUISANCE UPDATE

The law nowadays has several weapons in its armoury to deal with an occupier of land whose activities interfere with his neighbour's use and enjoyment of his own land. Such interference generally results from excessive smoke, dust or noise or noxious smells. More unusually, neighbours have, over the years, fallen out over alleged interferences as diverse as power lines, television reception and brothels.

Whilst historically such matters have fallen squarely within the scope of public or private nuisance, as a matter of practicality, many "victims" of such interference are finding it easier, and considerably cheaper, to invoke the law of statutory nuisance in order to seek to curtail the behaviour of which complaint is made. This statutory regulation is centred upon section 79(1) of the Environmental Protection Act 1990, which sets out a list of activities capable of being regarded as a statutory nuisance which, along with the prosaic types referred to above, also includes animals, insects and artificial light which are "prejudicial to health or a nuisance". This legislation requires local authorities to investigate complaints of statutory nuisance and where satisfied that a nuisance exists to serve a notice requiring the nuisance to be abated.

However, the statutory regime does not replace the common law. If the local authority does not consider there to be a problem, and if the "victim" has, or can obtain, the funding required to pursue a case the common law can once again come to the fore. That said two recent cases have shown the difficulties in bringing successful actions in this regard.

In the first, *Hirose Electrical UK Limited v Peak Ingredients Limited*, the claimant alleged that its employees were caused severe discomfort and inconvenience as a result of a "curry/garlic like odour" wafting intermittently through the porous breezeblock walls of the neighbouring unit on a light industrial estate. The local authority investigated, at the request of Hirose, but did not consider that there was a statutory nuisance. Despite those indicators, Hirose chose to pursue Peak for damages, including the cost of locating to an alternative site. The judgment at first instance, which was upheld on appeal, found that the frequency, intensity and effect of the odours did not amount to a nuisance in a light industrial estate and any occupier of such a unit must expect the possibility of disagreeable smells.

The case reinforces the view that, whilst common law nuisance and statutory nuisance are separate concepts, if a claimant fails to persuade the local authority to take action under the statutory regime, it may struggle to persuade a judge that a nuisance exists at common law.

In the second case, *Barr & Ors v Biffa Waste Services Limited* the court held that compliance with an environmental permit may be considered a defence to an action brought in nuisance. In this case, a housing estate had been built on part of an old quarry and Biffa operated a landfill nearby. The householders brought a nuisance action because of the odour arising from the landfill. Biffa's primary argument was that the environmental permit which governed the operation of the landfill site gave it statutory authority to emit odours as long as they complied with the obligations of the permit. This was rejected by the court although it was more sympathetic to the argument that compliance with the detailed obligations of the environmental permit indicated that Biffa was meeting the standard of a "reasonable user" at the property.

The claimants argued that the environmental permit was akin to a planning permission and that previous cases had determined that the grant of planning permission did not authorise a nuisance. The court, however, held that an environmental permit is very different to a planning permission as it is much more detailed in setting out the obligations that had to be complied with for the operations to continue.

Operators of facilities that are subject to an environmental permit which regulates particular nuisance issues, be they odour, dust, noise or fumes should take comfort from this case in that if they are operated in compliance with the environmental permit obligations they should stand a reasonable chance of being protected against nuisance actions.



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