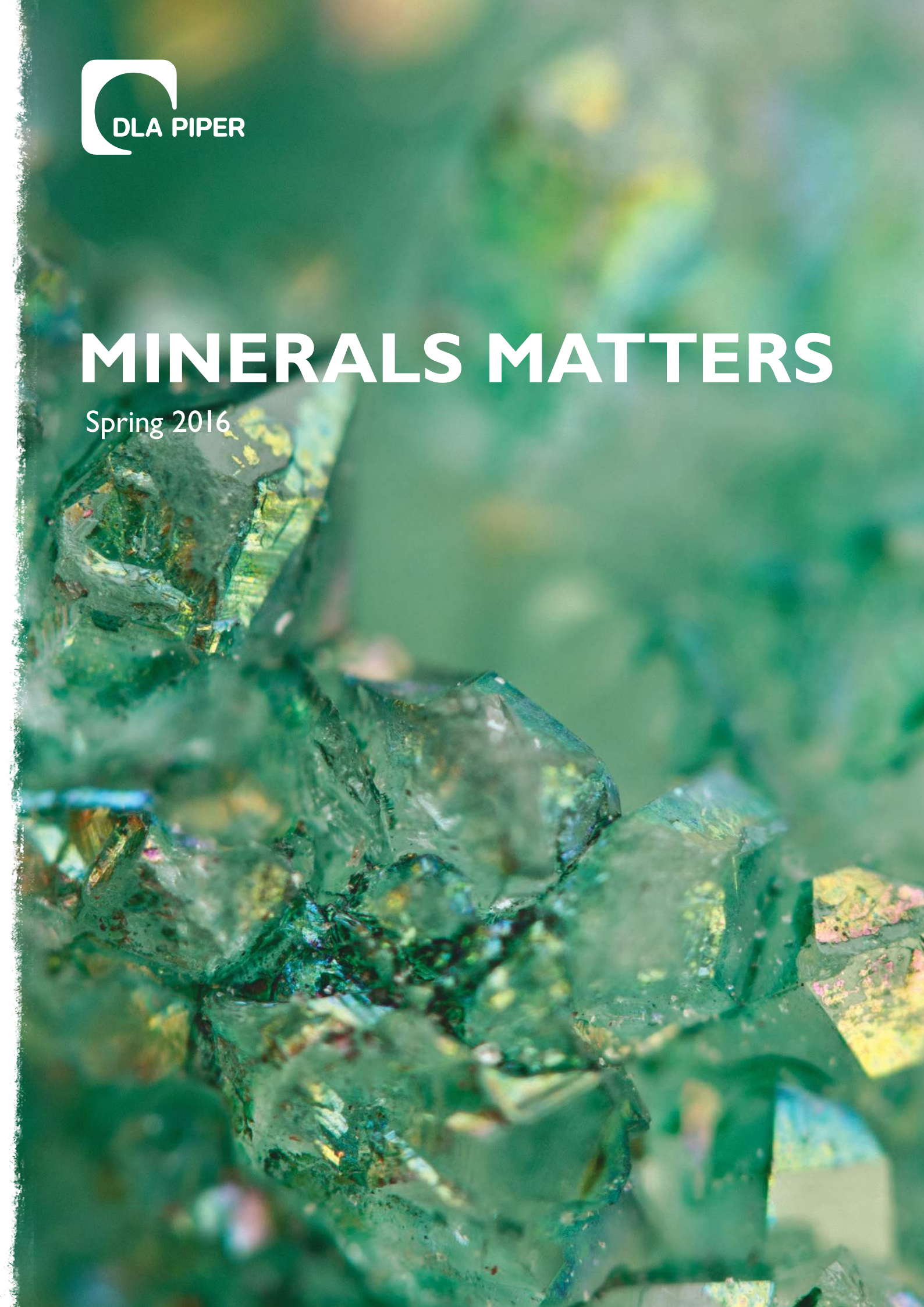

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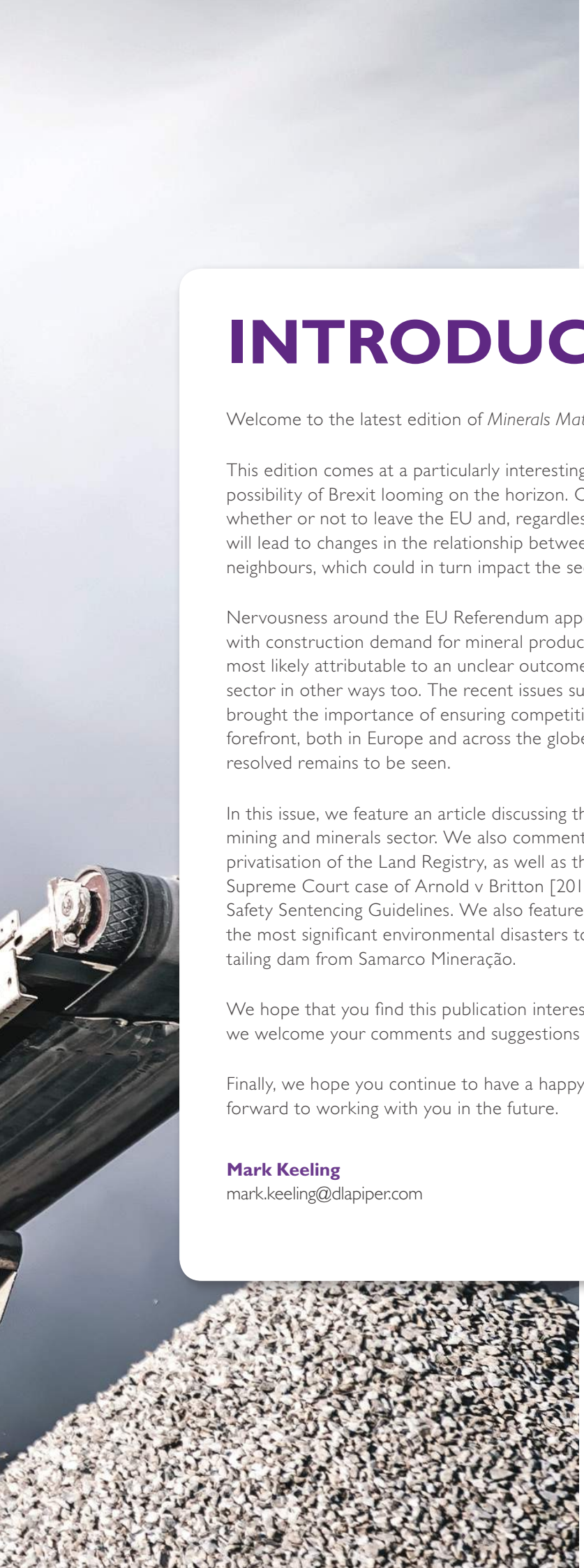
MINERALS MATTERS

Spring 2016



INTRODUCTION

Welcome to the latest edition of *Minerals Matters*.

This edition comes at a particularly interesting time for the sector, with the possibility of Brexit looming on the horizon. On 23 June Britain will decide whether or not to leave the EU and, regardless of the outcome, the referendum will lead to changes in the relationship between Britain and its European neighbours, which could in turn impact the sector.

Nervousness around the EU Referendum appears to have had an effect already, with construction demand for mineral products plateauing in recent months most likely attributable to an unclear outcome. This is an uncertain time for the sector in other ways too. The recent issues surrounding the steel industry have brought the importance of ensuring competitiveness with other suppliers to the forefront, both in Europe and across the globe, but how well the crisis will be resolved remains to be seen.

In this issue, we feature an article discussing the implications of Brexit for the mining and minerals sector. We also comment on the government's proposed privatisation of the Land Registry, as well as the Modern Slavery Act 2015, the Supreme Court case of Arnold v Britton [2015] and on the new Health and Safety Sentencing Guidelines. We also feature an international article on one of the most significant environmental disasters to occur in Brazil, the disruption of a tailing dam from Samarco Mineração.

We hope that you find this publication interesting and informative and, as always, we welcome your comments and suggestions for future articles.

Finally, we hope you continue to have a happy and successful 2016 and look forward to working with you in the future.

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LAND REGISTRY PRIVATISATION

The Government is proposing a privatisation of the Land Registry. Currently, both the Land Register and the Land Charges Register are Crown property. Several private equity firms have expressed interest in purchasing the Land Registry, including Advent International who are reportedly planning a £1 billion takeover.

In 2014, ministers previously considered handing over the running of the Land Registry to a private company in the form of a 'GovCo'. However, these proposals were scrapped following widespread opposition. The Law Society contested the 2014 proposals on the grounds that privatisation would undermine the integrity of the Register, complicate the process through increased layers of operation and lead to higher costs.

The present Land Registry consultation on privatisation is on-going and closes on 26 May. There are currently two potential models and under both models, the Registers themselves will remain the Crown's property and the data within them will continue to be protected by both Crown copyright and database right as material created by a public body. This may be an attempt to address the concerns expressed in 2014 that privatisation would undermine the integrity of the Register.

The two models of privatisation under consideration are:

1. Privatisation with a contract between the Government and a private operator; and
2. Privatisation with independent economic regulation.

Model 1: Privatisation with a contract between the Government and a private operator

The Department for Business, Innovation and Skills currently favours this model, whereby the Register would remain the property of the Crown but its core functions would be transferred to a 'Newco', which would be sold at auction. Investors would then buy shares in Newco and the Government could either retain some level of ownership in Newco or pass this on to the workforce.

The Consultation anticipates that the majority, if not all, of the economic benefit and risks of ownership associated with privatisation will be transferred to the private sector. The scope and standards of service that Newco would deliver would be governed by the service contract, which would also set out mechanisms for addressing under-performance. The Consultation considers that the contract could be drafted so as to provide greater certainty for investors and stability for customers and to ensure that the right protections are put in place to address the concerns

associated with privatisation. However, apart from naming several existing protections which are to be retained, it does not discuss this further.

For this model to succeed, Government would need to retain the ability to manage and actively supervise the contract. To ensure this, there would need to be individuals within Government with the appropriate expertise and understanding of land registration who would have responsibility for the on-going relationship with Newco. The Government does not anticipate this being too costly but this may depend on the effectiveness of Newco at performing and managing its functions.

The Consultation expects that this model would be deliverable in 2017. This is the Government's preferred option.

Model 2: Privatisation with independent economic regulation

Under this option, either a new independent economic regulator would be established or additional regulatory powers would be vested in an existing regulator to regulate Newco and review their actions. This would involve a licence being granted to Newco for the provision of land registration services on the Government's behalf and the regulator would also set the prices and standards for Newco in accordance with its statutory duties.

Upon the sale of Newco, the Government would be paid a receipt for its shares. Central Government would not have an on-going role in the business or in setting standards, as these would be performed by the regulator. This model has been used in the UK's water, energy and transport sectors. The Consultation believes it works better where the demand for service is predictable and the main requirement is for on-going investment, so it is not as well suited to the Land Registry where demand for services is variable due to being closely linked with the housing economy. For these reasons, and because the regulatory model is likely to be more costly, the Consultation considers that it would be better to regulate Newco through a contract with the Government.

If either model is implemented effectively, the proposed changes could improve the efficiency and effectiveness of the Register. Land registration is frequently subject to long delays and can be a source of frustration to conveyancers due to what can seem to be excessive bureaucracy. In the short-term there are unlikely to be tangible benefits to efficiency as it will take time to fully implement the proposals and, ultimately, there is no way of knowing whether privatisation will improve the effectiveness of the Register in the long-term. At present, the details of how Newco will improve the efficiency of land registration do not appear to have been adequately considered.

The Government's rationale for privatisation is to create a recipe for Government to use elsewhere; however, by selling the Registry for short-term capital gain the Government could potentially exacerbate the Registry's existing problems.

There is also a risk that the independence, impartiality and confidentiality of the Register will be compromised. Whilst the data will remain the property of the Crown, by outsourcing the functions of the Land Registry to a private company, there is an inherent risk that the impartiality and confidentiality of the Register will be affected.

We as a firm are wary of the proposed privatisation, primarily because of the importance of ensuring that the confidentiality and impartiality of the register are not compromised in any way. Privatisation would only benefit conveyancers and land owners if it was to rectify the Registry's existing problems but the proposals do not appear to adequately address these. Hopefully more detail will be forthcoming and the views of users of the Land Registry will be taken fully in to account before any decision is made as the Government will need to consider such issues in detail prior to selling the Registry if it is to ensure a smooth transition into the private sector and if the privatisation of the Registry is to be of any real benefit to conveyancers, or their clients.

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MODERN SLAVERY ACT 2015

TRANSPARENCY IN GLOBAL SUPPLY CHAINS: IMPLICATIONS FOR EMPLOYERS IN THE MINING SECTOR

The UK has enacted ground-breaking legislation, the Modern Slavery Act 2015, requiring large companies in the mining sector to be transparent regarding the impacts of their supply chains.

What are the obligations?

Commercial organisations with an annual turnover of £36 million, which supply goods or services in the UK, will be required to publish an annual slavery and human trafficking statement to report on what actions they have taken to ensure that slavery and human trafficking is not taking place in their supply chains or any part of their own business, which must include "*a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in **any** of its supply chains*" or that they "*have taken no such steps*".

The statement ***may*** include information about:

a) the organisation's structure, business and supply chains;

b) its policies in relation to slavery and human trafficking;

c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;

e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;

f) the training about slavery and human trafficking available to its staff.

The statement must be approved by the board and signed by a director and published on the company's website.

When will this take effect?

The legislation came into force at the end of October 2015. The statement must be published after the end of the organisation's financial year (Government Guidance suggests within 6 months). For companies whose next year end fell between 29 October 2015 and 30 March 2016; these organisations will not be required to publish a statement until the end of the following financial year.

The mining sector in particular has been flagged as being 'high risk', with a number of public studies alleging working practices in some mines amounting to slavery. Most recently, a 2013 Verité report investigated illegal gold mines in Peru, finding widespread human trafficking and forced labour. Similarly, a 2011 'Free the Slaves' report focused on slavery in conflict minerals in the Democratic Republic of the Congo.

In November 2014, the UK parliament criticised international mining companies from the UK, Canada and Australia – without naming them – for using the Eritrean national service programme to supply forced labour. This followed a Human Rights Watch report on 'Forced Labour and Corporate Responsibility in Eritrea's Mining Sector'. Such reports and the issues highlighted in them are likely to be more prevalent and receive greater attendance as a result of the Act.

A failure to report in sufficient detail may result in reputational damage and public scrutiny. Companies in the mining sector will be familiar with the US obligation to report on conflict minerals under the Dodd-Frank Act, which resulted in Amnesty International and Global Witness reporting that a significant number of US firms were failing to check their supply chains for conflict minerals and even publicly named certain companies.

Affected employers have three options:

a) Publish an annual statement setting out the steps that it has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains or any part of its business; or

b) Publish a statement that it has taken no such steps; or

c) Decline to publish a statement.

Only options (a) and (b) will be legally compliant. Employers need to consider now:

What time, resource and money will be required to comply?

How feasible is it to identify all supply chains and take steps in relation to each?

What steps are actually required in practice?

What is the relationship with suppliers and where does the bargaining power lie?

What are competitors doing? What is the general approach of the sector/market?

What are the potential risks to reputation and negative attention from the UK's independent anti-slavery commissioner, shareholders, investors, customers, trade unions and civil society, such as non-governmental organisations and human rights groups?

What is the potential for exclusion from tendering for private sector contracts in relation to businesses who have themselves have published a statement of steps and/or require their suppliers to?

What steps can we take to prepare?

Organisations who engage with the legislation will need to take steps to address each part of the annual statement. These are likely to include:

- Mapping of suppliers and identification of high-risk activities/geographies;
- Creation of new policies and procedures on slavery and human trafficking;
- Review of existing policies and procedures to 'dovetail' with slavery and human trafficking processes;
- Implementation of a confidential reporting line;
- Proactive risk management, including supplier audits;
- Training of employees, suppliers, contractors; and
- Identification of key performance indicators allowing progress to be benchmarked and monitored.

In the first year of compliance, an organisation may choose to simply set out its strategy for combating modern slavery risks, rather than taking material and substantive steps. It will, however be critical for the organisation to continue to build on, and begin implementation, of its strategy year-on-year.

With so much at stake, companies and their directors need specialist advisors to help them navigate this new terrain. With leading labour law, human rights and regulatory and government advisory expertise, DLA Piper is well-placed to be your human rights trusted advisor. We have global reach and local knowledge of the salient risks pertinent to each jurisdiction, making us ideally placed to support companies during the complete life-cycle of human rights issues almost any business can face.

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DISRUPTION OF A TAILING DAM FROM SAMARCO MINERAÇÃO

In this article, Terence Trennepohl and Georgia Diederichsen examine the implications of one of the most prominent environmental disasters to occur in Brazil, the disruption of a tailing dam from Samarco Mineração.

The "Fundão" tailing dam was part of a mining undertaking operated by Samarco Mineração, an iron ore producer currently controlled by huge Brazilian VALE and Australian BHP Billiton. At the time of the disruption, in November 2015, the structure was allegedly licensed by the environmental authorities, although the legality and adequate coverage of such procedure have been greatly challenged (which shall not be evaluated herein).

As per the information made available by the Public Attorney's Office and the Governmental Authorities, the event caused a massive residues release, causing severe damage to the environment and to local communities. An entire village was destroyed and several people were killed (at least 17 individuals died, and 2 are still missing) after the disorderly movement of residues (estimated 62 million m^3). The press usually refers to such substance as "toxic mud", as the tailing dam was filled with mining residues (mostly from iron ore extraction) combined with dirt and other elements used in the production process. Samarco, on the other hand, claims that the residue is not actually toxic, as it is composed by silica, sand and iron. Further examinations in this regard will be conducted during the judicial procedures by technical experts.

Environmental Liability Enforcement:

- *Civil Sphere*: Samarco, VALE and BHP Billiton shall answer for the recovery and compensation of the damages caused (jointly and severally).
- Civil liability is of a strict nature – irrespective of fault. Also, the fact that the activity is embraced by valid environmental licenses does not prevent the recovery of all damages caused.
- Action/inaction entails environmental civil liability (strict). Demonstration of cause-effect relationship suffices to trigger the obligation to restore environmental conditions.
- Relevant Brazilian legal writing and court cases sustain that judicial claims seeking environmental compensation are not subject to statutes of limitation.
- In March 2016, Samarco, VALE and BHP Billiton committed to the recovery of 42 million hectares of degraded areas and 5,000 wellsprings. The companies already settled for a disbursement of R$ 4,4 billion over the next 3 years, but other investments in this regard are estimated up to 2031, depending on the effectiveness of the recovery.

- *Criminal Sphere*: Civil Police requested the imprisonment of the Samarco's former president and 6 others allegedly related to the disaster (operation manager, technical coordinator and others). Individuals were charged for homicide, flooding and pollution, but it must still be properly processed and confirmed by our courts.
- Although possible, no criminal fines were settled up to this date.
- *Administrative Sphere*: multiple infraction notices were issued by federal and state environmental agencies. Fines can range from R$5,000 to R$50,000,000, but the competent authorities may impose other sanctions as embargo, demolition, warning, suspension of funding granted by official institutions.

The development of the foregoing is monitored by our associates on a constant basis, as the media has broadcasted it as a notorious social and environmental tragedy, yet far from reaching an end. The incident was recently aggravated by constant rain, which rapidly moved the residues to local rivers. The enhanced water flow reached the sea (in the State of Espírito Santo) within few days and caused the mortality of a huge amount of fish along the way. Water supply has been affected in several Municipalities.

The Samarco disaster is the perfect case study towards environmental liability and the extent of recovery obligations – pursuant to the legislation in force, environmental liability may cause civil, administrative and criminal outcomes, and a sole fact or conduct can trigger consequences in the three spheres.

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CONTRACTUAL INTERPRETATION

THE COURT WILL NOT REWRITE A BAD BARGAIN

Last year's Supreme Court decision in the case of Arnold v Britton [2015] provides useful guidance as to how the courts will interpret contracts. Whilst this was a landlord and tenant case concerning the interpretation of service charge clauses, it is actually a case about the essentials of how the courts will approach the interpretation of contracts.

Facts

The case concerned long leases of chalets at Oxwich Leisure Park on the Gower peninsula in South Wales which had been granted between 1977 and 1991. Each lease contained a covenant by the tenants to pay service charge and whilst the covenant differed slightly between the leases the majority of the leases provided that the tenant was to pay:

"a proportionate part of the expenses and outgoings incurred by the Lessor in the repair maintenance renewal…and the provision of services hereinafter set out in the yearly sum of Ninety Pounds and value added tax (if any) for the first Year of the term hereby granted increasing thereafter by Ten Pounds per hundred for every subsequent year or part thereof"

The landlord's interpretation of this provision was that the clause provided for a fixed annual charge of ninety pounds for the first year then increasing each subsequent year by ten per cent on a compound basis. 25 of the tenants disputed this as such an interpretation would result in them paying over £500,000 in service charge per annum by 2072.

Decision

The Supreme Court (by majority of 4-1) declined to interpret the leases in a way which protected the tenants from the consequences of the service charge provisions and sided with the landlord.

In his leading judgment, Lord Neuberger, President of the Supreme Court, commented that when *"interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood [those intentions to be] using the language in the contract"*. A court will do that by assessing the meaning of the words used, here in the service charge provision, in light of:

i. the natural and ordinary meaning of the clause;

ii. any other relevant provisions of the contract;

iii. the overall purpose of the clause and the contract;

iv. the facts and circumstances known or assumed by the parties at the time that the document was executed; and

v. commercial common sense; but

vi. disregarding subjective evidence of any party's intentions.

Overall the court's stance was that the wording of the lease was adequately clear such that there was no need for the court to step in and re-write the bargain the parties had agreed between themselves, even if that was now a bad bargain for one of the parties, by departing from the natural meaning of the words used. The clearer the natural meaning of a clause, the more difficult it would be to depart from it.

The court also set out some key factors relating to the interpretation of contracts:

- Commercial common sense should not be used to undervalue the importance of the language of the contract – especially as the parties have control over the language they use but not over the interpretation of their contracts by the court.
- The less clear that the wording of a contract is, the more ready the court would be to depart from the natural meaning of that wording (and vice versa).
- Commercial common sense should not be applied retrospectively. The court should look at how the contract would have been interpreted when it was made using the facts known or reasonably available to the parties at that time.
- Commercial common sense is a very important factor to take into account when interpreting a contract, but a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight.

The court also pointed out that when the leases were granted, inflation was running at a very high level and that the tenants were perhaps keen to have a cap on their outgoings. Unfortunately the arrangements set out in the leases then began to unravel for the tenants after the rate inflation fell and remained low.

Implications

Whilst there is no new law here and the decision ultimately turns on the interpretation of the particular lease in question, this decision is a helpful reminder of the rules and interpretation of written contracts. In particular, it is a clear demonstration of how the court should apply the principal of commercial common sense.

That principle should only be applied by the court when the meaning of the relevant provision is ambiguous. Commercial common sense is not a relevant consideration where the natural meaning of the language used is clear, even if this would result in commercially detrimental consequences. At the end of the day the court will not step in to save a party from a bad bargain.

KEY POINTS

- When negotiating a contract consider from the outset what rights, obligations and liabilities each party is to have now and in the future.
- Then consider how those rights, obligations and liabilities are to be stated in the contract and ensure that language and drafting used carefully reflects the intentions of the parties now and in the future and that both parties are in agreement.
- If there is to be a mechanism for the calculation of a payment for instance, work through the formula or mechanism in the contract first using theoretical figures to check that it will not result in a disproportionate or unintended consequence, before the contract is signed.
- Ensure that the contract reflects the parties intentions before it is signed otherwise the court may take a literal interpretation to the drafting used and that may not reflect the parties agreement later down the line.

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THE NEW HEALTH AND SAFETY **SENTENCING GUIDELINES**

Clients in the mining and minerals sector are going to be affected by the Definitive Guideline for the Sentencing of Health and Safety, Corporate Manslaughter and Food Safety and Hygiene offences which was published by the Sentencing Council on 3 November 2015. The new guidelines were issued in response to concerns that the approach taken by the courts in relation to sentencing in those areas was inconsistent and the penalties imposed were too low.

The guidelines are of significance to the minerals industry because sentencing for health and safety offences is likely to increase dramatically and fines imposed under the guidelines will have real economic impact on organisations.
The guidelines are also likely to result in an increase in custodial sentences for individuals who have committed a health and safety offence. This risk is very real and individuals working in the minerals industry need to be aware of it.

The guidelines apply to all organisations and offenders aged 18 and older, who are sentenced on or after 1 February 2016, regardless of the date of the offence. They pave the way for courts to continue the recent trend of significant increases in the level of fines being imposed, and the courts have certainly done so in recent months.

The guidelines take the level of culpability, harm and turnover of an organisation as the starting point for determining the appropriate level of fine. This means that larger organisations will face tougher fines. Depending on the size of an organisation, this could mean a fine into the millions of pounds for clients in the minerals industry. Indeed the new guidelines provide for fines of up to £10 million for health and safety offences, and up to £20 million for those convicted of corporate manslaughter. For very large organisations, the courts are able to move outside the suggested range to achieve a proportionate sentence and impose even higher fines. The courts have demonstrated in recent cases that they are willing to do this.

Purpose of the guidelines

The purpose of the guidelines is to give comprehensive guidance to courts and ensure a transparent, structured and consistent approach to sentencing. This was prompted by concerns that the courts were inconsistent in their approach to sentencing which often resulted in fines that were disproportionate to the financial resources of offenders and/or undermined the seriousness of offences. For clients in the minerals industry, the new guidelines provide a greater degree of predictability that was previously lacking.

The guidelines set out sentencing ranges that aim to reflect the different levels of harm and culpability which may arise in relation to each type of offence. The message sent by that guidelines is that non-compliance will be met with very stiff financial penalties.

Summary of the guidelines

Fines under the guidelines are now intrinsically linked to the turnover of the defendant company. One of the concerns with the new guidelines however is that they do not take into account companies that have high turnover but are not profitable and this could lead to unfairness.

Under the new guidelines, the courts are required to follow a number of steps when considering sentencing, including:

- Determining the offence category by considering the culpability of the offender, the seriousness of the harm **risked** (low, medium, high or very high) and the likelihood of that harm arising.
- Identifying the appropriate starting point and category range for an offence, based on a company's turnover. The guidelines provide tables for each of the five categories of organisation (micro, small, medium, large, and very large). The court may consider other relevant financial, or aggravating or mitigating factors providing the context of the offence to ensure that the proposed fine is proportionate. Having considered these factors, it may be appropriate for the court to move outside the identified category range.
- Checking whether the proposed fine based on turnover is proportionate to the overall means of the offender. The fine must reflect the seriousness of the offence, the financial circumstances of the offender and the extent to which the offender fell below the required standard. It should also meet the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence in a fair and proportionate way. It should not be cheaper to offend than to take the appropriate precautions and the guidelines make it clear that the fine imposed must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation.**
- Consideration of any other factors that may warrant adjustment of the fine, such as wider impacts of the fine within the organisation or on innocent third parties. The fine should not impair the offender's ability to make restitution to victims, improve conditions in the organisation to comply with the law or impact negatively on employment of staff, service users, customers and local economy. The court will not consider the impact of the fine on shareholders or directors.
- Consideration of any factors which indicate a reduction, such as assistance to the prosecution or a guilty plea.
- The courts must give reasons for the sentence given and must consider imposing compensation or ancillary orders as an alternative to financial penalties. Where sentencing an offender for more than one offence, the courts must apply the 'totality principle' by considering whether the total sentence is just and proportionate to the offending behaviour.

What to do next?

Whilst the need to maintain and continue to improve health and safety standards in the minerals industry is has always been vital, the risk of corporate and individual enforcement through significant fines and imprisonment is now very real.

To try to ensure that the worst case scenario can be avoided or, if it cannot be avoided, at least mitigate against the impact of an eye-watering fine, clients in the minerals industry should consider doing the following:

- Review the risk profile of the organisation and current approach to health and safety to ensure that appropriate systems and standards are in place;
- Ensure that an effective risk assessment system is in place and that steps are taken to mitigate against the potential for harm;
- Consider how health and safety policies and procedures can be shared and enforced throughout the organisation to improve performance and avoid accidents;
- Run training programmes to ensure that everyone in the organisation understands the importance of health and safety and knows what their responsibilities are; and
- Where concerns are identified, increase compliance by putting in place appropriate measures and precautions and taking remedial action where necessary.

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IMPLICATIONS OF BREXIT FOR THE MINING AND MINERALS SECTORS

The debate surrounding Britain's proposed exit from the EU ("Brexit") has primarily focused upon its potential impact on the British economy, Britain's international standing and its capacity for self-governance. This article explores how Brexit may impact upon the mining and minerals sectors (focusing on product safety, health and safety and environmental laws). In these and other sectors, the long-term implications of Brexit would depend on the model adopted for the subsequent relationship with the on-going EU. It is our view that major change in the mining and minerals sectors is only likely in the long-term, and even this is by no means assured; by contrast, in the short term, aside from transitional provisions there is unlikely to be an immediate, dramatic change in the law.

Product Safety Law:

Even if Britain leaves the EU, it will need to maintain access to European markets, because these are a fundamental part of the British economy. Within the context of the mining and minerals sectors, Britain exports far more mineral commodities to Europe than it imports. Since trade between member states themselves will continue to be governed by the EU's product safety laws irrespective of Brexit, such countries are likely to expect equivalent standards from British products and, if British exports cannot satisfy these standards, trade opportunities with such countries may be lost. Consequently, the law in this area is likely to remain in force much as it is in order to preserve market access to the EU.

Moreover, the EU's "New Approach" model for sectoral product safety legislation, in which only general "essential safety requirements" are imposed and suitable arrangements made for their enforcement in particular sectors, is one which the UK is likely to wish to follow regardless of Brexit. Therefore, there is unlikely to be any significant shift in product safety law if Britain leaves the EU, because the current approach taken by the EU aligns with what the UK is likely to wish to pursue anyway.

Health and Safety Law:

Health and safety law is often the subject of much anti-EU rhetoric; however, whilst health and safety law as it applies between employers and employees (as opposed to between businesses and third parties) is now largely set by EU Directives, it has followed a pattern originally adopted in the UK under the Health and Safety at Work etc Act 1974. The EU did not set British health and safety law in a whole new direction and, as a country with one of the better workplace safety records in Europe, the UK is unlikely to wish to change the law radically. Consequently, this is not an area which is likely to experience dramatic short- or long-term change because of Brexit.

Environmental Law:

The UK's environmental law is now almost exclusively governed by EU law. In England and Wales in particular, EU legislation is increasingly transposed only indirectly, by reference to the relevant EU instrument, rather than being expressly set out in the transposition legislation. In the short to medium term, if Britain leaves the EU it would therefore be essential for transitional arrangements to be in place to

provide for the EU legislation to continue to have effect. In the longer term, if the model for the subsequent relationship with the EU permitted it, the position is less clear. Certain aspects of environmental law, in the areas of waste management policy, or air quality, were forced on the UK by the EU against its will, but the UK may not now wish to change them. In other areas, such as climate change and integrated pollution prevention and control, the current law itself results to a significant extent from previous UK initiatives, and so is also unlikely to change.

There are therefore powerful factors operating against radical change flowing from Brexit. However, some aspects of environmental law are arguably unduly prescriptive, and the process for seeking agreement amongst Member States for change is cumbersome. If the EU does not itself adopt a more flexible future model for environmental legislation, then a possible advantage of Brexit might be greater freedom for the UK to innovate and adapt to new environmental challenges. However, many environmental challenges are international in scope and subject to international agreements, such as climate change. The UK could therefore be constrained by its international commitments in those areas, regardless of Brexit.

In conclusion, whilst Brexit may seem like a dramatic extrication of Britain from the EU, it is unlikely to yield quite the histrionic split that its proponents anticipate. In the short-term, visible changes will include any transitional provisions required to ensure current laws continue to have effect regardless of Brexit. In the long-term, product safety laws are unlikely to change because Britain will still need to meet European safety standards to ensure trade with Europe continues unaffected, whilst the UK's health and safety laws are already broadly in line with what Britain advocated before the Directives took effect. In environmental law, the position is more uncertain, but even in this regard the likelihood of dramatic long-term change is by no means assured.

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