MINERALS MATTERS

Winter 2016

INTRODUCTION

Welcome to the latest edition of Minerals Matters and the first one of 2016.

Last year was, on the whole, positive for the sector. We had the drama of the UK General Election and the surprisingly decisive outcome which provided welcome certainty. The continuity of economic policy and the continued investment in infrastructure and housing, as further evidenced by the Chancellor's Autumn Statement, are good news and the planned review of overly burdensome regulation affecting the industry is a great opportunity that hopefully will not be missed.

There are of course still challenges with issues such as skills and energy supply being big ticket items that generate a lot of talk but which still need to be tackled in a meaningful way. The uncertainty that preceded the UK Election will in time be replaced by nervousness around the EU Referendum and the potential implications that come with it and we can only hope for a similarly conclusive outcome.

In this edition we have articles dealing with The Mines Regulations 2014, changes to trade union action, supply change disruption, CDM Regulations and privilege, as well as a guest article from PwC on tax in the mining industry. As ever we hope you find this publication both interesting and informative and we continue to welcome your comments and suggestions for future articles.

From all at DLA Piper we wish you a prosperous 2016 and look forward to working with you.

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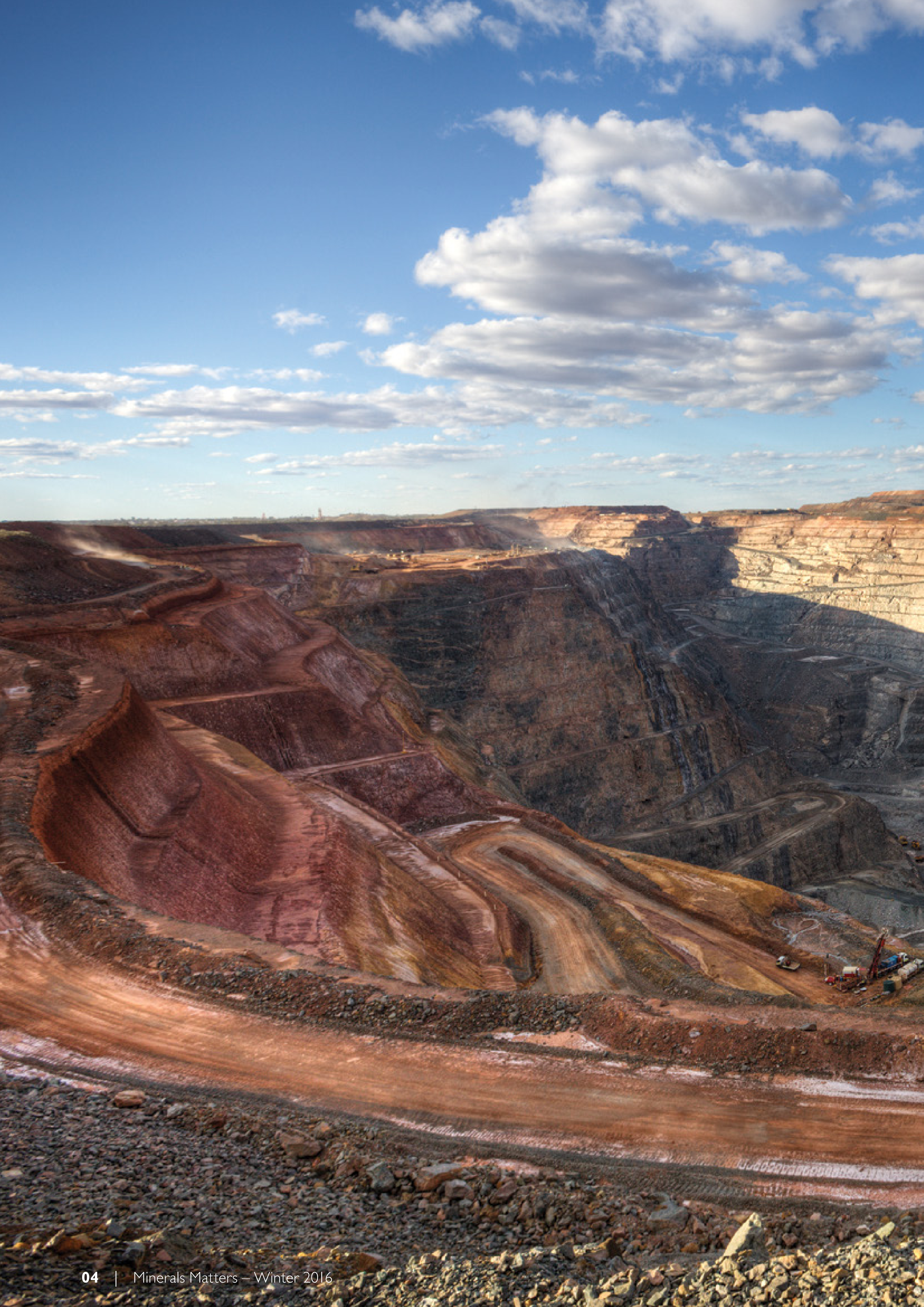

THE MINES REGULATIONS 2014

The Mines Regulations 2014, which replace most of the previous mines-specific health and safety regulations, came into force on 6 April 2015. The general content of the Regulations was discussed in Minerals Matters in 2014, following the publication of the Regulations in draft for consultation. The Regulations are intended to provide one set of consolidated regulations to supplement the general body of health and safety legislation which applies in mines.

In line with recent HSE practice, the Mines Regulations are not accompanied by an ACOP (but see the article on the CDM Regulations 2015 in this issue).

Instead, the Regulations are supported by new guidance, available on the HSE website, which does not have the status of an ACOP. The ACOPs previously in force in respect of the mines-specific health and safety regulations repealed by the 2014 regulations have been withdrawn, but the ACOP covering first aid at mines remains in force. Following the repeal of the mines-specific provisions of the Electricity at Work Regulations 1989, the HSE has published new guidance on the use of electricity at mines, which is also available on the HSE website.

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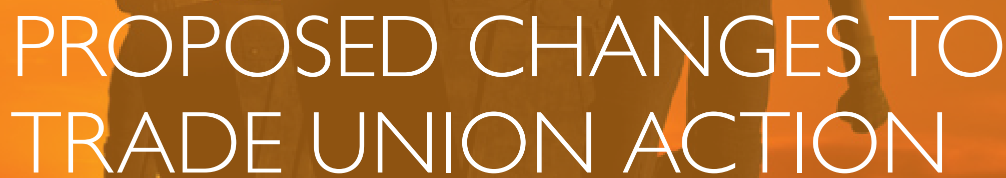

PROPOSED CHANGES TO TRADE UNION ACTION

In this article, Beverley Ensor examines the proposed reforms to trade union action and the impact these will have.

Proposals for the biggest crackdown on trade union action for 30 years were given a second reading in the House of Commons on 15 September 2015. The scale of the reforms goes far wider than the plan trialled before the election for strikes to be made unlawful unless 50% of those being asked to strike vote in the ballot, including new plans to criminalise picketing, permit employers to hire agency staff to cover for striking workers and to require that at least 40% of those asked to vote support the strike in most key public services. This double threshold would have to be met in any strike called in health, education, fire, transport, border security and energy sectors. Although the proposed reforms were in the Conservative manifesto, the timing of the legislation undoubtedly capitalises on the impact which recent London Underground disruption has had on public sympathy for strike action. However, in reality the proposed new rules would have little impact in the transport sector, where ballot turnout is traditionally high.

In addition the Bill will:

- Require a union to give the employer at least 14 days' notice before industrial action can begin (currently only 7 days' notice is required).
- Require a union to hold a new ballot to renew the mandate for industrial action within four months of the first ballot – currently the ballot can remain valid indefinitely, provided the underlying dispute remains the same.
- Require a clear description of the trade dispute and the planned industrial action on the ballot paper.
- Allow employers to hire agency staff to cover for striking workers – this is currently prohibited.
- Make unlawful or intimidating picketing a criminal offence and provide new protections for workers unwilling to participate in strike action. A named official will be required to oversee the picket and must be identified and available to the police.
- Increase the powers of the certification officer including powers to fine trade unions up to £20,000 for breaches of reporting rules, which will include a new requirement on unions to report to the certification officer on industrial action taken in the last year in its annual return.
- Require all unions to ask each existing union member whether they wish to pay the political levy and then repeat the question every 5 years. The £25m annual political fund income funds a wide range of political campaigning, including being a chief source of funding for the Labour party.
- Provide for regulations to set a limit on so-called 'facility time' in the public sector; i.e. the proportion of working time any public sector worker can spend on trade union duties. The current right is to a "reasonable" amount of time at the discretion of individual employers but some large organisations effectively have employees employed full-time on union duties.

The proposals may have unintended consequences for employers. Where strikes become more difficult, or where legal picketing is curbed, we are likely to see more wildcat action and concerted ancillary protests by trade unions who are deprived of the ability to take lawful action. The news that the UK's biggest union, Unite, has passed a motion to remove a clause in its rules that requires members to remain within the law when staging protests may signal a move in this direction. Such targeted action can be more disruptive than lawful strike action. There is also a danger that by requiring higher numbers to vote in favour of industrial action, attitudes will become more entrenched at an early stage in the dispute, making it more difficult to negotiate a settlement.

If passed in its current form, the Bill has the potential to significantly change the current industrial relations landscape. The risk of wild cat strikes should prompt employers to consider what contingency plans need to be in place. Whilst the use of agency staff may help mitigate some of the effects, employers would be wise to consider how more specialist roles which require skills or experience that may not be so widely available could be covered on very short notice.

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SUPPLY CHAIN DISRUPTION

THE RISK OF KEY SUPPLIER INSOLVENCY FOR THE MINING INDUSTRY

The dramatic fall in the price of crude oil over the past year has caused widespread distress across the oil and gas industry, affecting operators, service providers and suppliers. Oil companies around the globe have been forced to slash investment by reducing capital expenditure and exploration spending whilst simultaneously implementing a raft of cost cutting measures.

The adverse impact of oil price falls so immediately felt by the upstream producers has led to supply chain vulnerability with press reports indicating that large companies have been calling on suppliers to demand rate cuts of up to 20%, longer payment terms and, in some cases, postponement of payment. The pressure exerted has been reflected in recent job loss announcements and, in certain cases, corporate failure.

For the mining industry, the drop in crude oil prices has proved beneficial for those companies with significant fuel and freight expenditure as the reductions have been passed on and it has become cheaper to operate mines and equipment. However, mining companies already afflicted by instability in commodity prices generally should heed the salutary warning provided by what is now occurring in the oil and gas sector.

There can be any number of causes for business interruption: natural disaster, adverse weather, and product quality incidents amongst others, however, "supplier financial failure" was cited as the most commonly occurring risk by a report commissioned by Zurich in 2012 and the insolvency or financial distress of key suppliers continues to be a significant risk for businesses the world over.

The financial failure of key suppliers can significantly disrupt the smooth operation of normal business procedure. This can prejudice the timing and the budget for product delivery, impact on customer service, cause loss of revenue and reputational damage, and increase operating costs.

Following a worldwide survey of over 500 risk managers and corporate insurance experts, a report published by Allianz in January 2015 ranked business interruption and supply chain risk as the top danger currently faced by companies for the third year in a row. The same risks, however, barely registered when the same survey is addressed to senior corporate management teams, with supply chain risk ranked second only to cyber risk in a list of risks for which businesses are least prepared.

The integrity of the supply chain is of critical importance to businesses operating in the mining sector. Underestimating the risk of business interruption caused by the insolvency of crucial suppliers can come at a substantial cost. Failing to deliver against contractual requirements or customer orders can trigger significant damages claims that can dwarf the overall value of the relevant supplier contract. For a principal contractor this can mean material financial and reputational loss and can lead to additional irrecoverable cost and management time being required in order to mitigate the situation.

As a major acquirer of products or services, a principal contractor can exert significant commercial leverage over key suppliers, thus securing clarity on the financial integrity of the supply chain, the attitude of secured lenders and the potential trading dynamic for that supply chain member over the course of a contract. Contingency planning may include the negotiation of rights of access to suppliers' books and records, building up an adequate amount of consignment stock to provide a cushion of time in the event a supplier were to go out of business and consideration of termination options, third party retention of title issues, loss mitigation and potential counterclaims.

By recognising the importance of preserving supply chain integrity throughout the life of the contract, taking a proactive and robust approach to key suppliers from the outset and reacting quickly when supplier financial distress becomes evident, there is scope for businesses to significantly mitigate the risk and effect of supplier insolvency and reduce overall business and insurance costs.

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Allianz Risk Barometer – Top Business Risks 2015
http://www.agcs.allianz.com/assets/PDFs/Reports/Allianz-Risk-Barometer-2015_EN.pdf
Accessed 18/05/15

TAX IN THE MINING INDUSTRY

The extractive sector is important to the economies of many countries, particularly in the developing world. The contributions the sector makes are not limited to corporate income taxes, which are common to businesses in all sectors, but include a range of payments which are particular to the extractive sector such as royalties and license fees that compensate a country and its people for the extraction of natural resources. This is in addition to the wider economic contribution made in terms of jobs and investment.

Given the nature and size of the sector's contribution, as well as the political climate in many of the countries where the industry operates, it is no wonder that the mining sector has been at the forefront of the public debate on tax for a number of years. Central to the debate is whether payments made by the sector to governments are transparent and how governments use those payments. Many people argue that it is important for citizens to have access to robust and reliable data on these payments to allow them to hold their governments to account. In recent years the debate has also shifted more to holding companies to account to make sure that they pay the "right" amount of tax in the "right" place.

This has led to a number of developments, both voluntary and mandatory, in how companies report the payments that they make to governments. For all mining companies, tax has moved from being a private affair to being a reputational issue, an investment in communities, a corporate responsibility and an imperative for risk management purposes. Every mining company must therefore give careful consideration to how it responds to reporting regimes such as the Extractive Industry Transparency Initiative (EITI), the EU Accounting Directive (EUAD) and country-by-country reporting under the updated OECD transfer pricing guidance. Companies will also need to consider whether they want to report more data than is required by these regimes so that they can put their data in context and provide a fuller and more coherent picture of their operations and the contribution that they make.

The application of these regimes poses several practical challenges for mining companies. These start with the technical interpretation of the rules to define which of a company's operations, payments and data are in scope, and the level at which they have to be reported.

Companies then have to identify where the payments and data are to be found in an organisation's accounting records and how these can be extracted and consolidated. Depending on the size and complexity of an organisation and the structure of its accounting systems, this can be a time consuming and unwieldy process.

The third consideration, once a company has gathered data for a reporting period, is to assess its accuracy and reliability. We are increasingly seeing companies looking for some form of external review or assurance to help them obtain a sufficient level of comfort over their data and the related systems and processes.

Finally, companies need to look at the data and consider how it could be interpreted by various stakeholders. In many cases the information reported under any one of the reporting regimes will give rise to more questions than answers and we are seeing many companies considering further voluntary disclosures to help explain the mandatory disclosures and to put them in context.

"This is a real issue for mining companies," says Nicola Corp, UK Mining Leader, Tax, at PwC. "Tax is no longer merely a regulatory issue. It's now a key driver of reputation for companies. There is definitely not a one size fits all answer here but the broader impact of these requirements needs to be carefully thought through. In particular mining companies need to consider how this reporting may be interpreted by a range of stakeholders and the challenges it presents from a systems and controls perspective.

Miners should look at the changing transparency and accountability measures as a way to highlight their contribution to the communities in which they operate," says Nicola and she encourages mining companies to communicate these benefits to society more clearly.

"It's much more of a mindset that says 'We are partners in these communities in which we have the privilege to extract non-renewable resources'," she says. "I think they have a great story to tell."

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Extractive Industry Transparency Initiative (EITI):
The regime is overseen by an international secretariat and governed by an international standard. Countries choose whether or not they wish to sign up to the EITI. If they do, then a multi-stakeholder group (MSG) is appointed to run the EITI in that country. Companies carrying out extractive activity in the country report the payments that they make to government. An independent administrator appointed by the MSG then reconciles these payments to the payments received by the government.
The payments and outcome of the reconciliation are reported publically by the MSG.

EU Accounting Directive:
Large EU extractive and logging companies, and EU listed extractive and logging companies, have to report all the payments that they make to governments anywhere in the world. The payments are reported publically by project and level of government. The first reporting will be in respect of financial years beginning on or after 1 January 2016 at the latest. In the UK the Directive has effect one year earlier, i.e. for financial years beginning on or after 1 January 2015.

Section 1504 of the Dodd-Frank Act:
This requires SEC listed extractive companies to report payments to governments by project and by government. The requirements are not yet in force pending the finalisation of revised rules which were issued by the SEC in December 2015 for consultation.

Country-by-country reporting as part of the OECD's transfer pricing guidance:
This requires all multi-national enterprises with a consolidated turnover in excess of €750m to report data in confidence to tax authorities. The data is to be reported by tax jurisdiction and includes corporate income tax paid and accrued and financial indicators such as revenues, profits, employees and tangible assets. OECD member countries are expected to adopt the guidance in the near future and it is expected to apply to financial periods beginning on or after 1 January 2016 at the earliest.

Canadian Extractive Sector Transparency Measures Act:
Similar to the EU Accounting Directive, this requires Canadian extractive companies to report their payments to government by project and by level of government. It will apply to 2016 fiscal years onwards.

CDM REGULATIONS 2015

On Easter Monday, 6 April 2015, the new regime for construction health and safety came into force in the form of the Construction (Design and Management) Regulations 2015 (CDM 2015). These replace the previous regulations (CDM 2007). The new regime has been described as the biggest health and safety change in the construction industry for a decade.

Significance for the Minerals industry

The new regulations will also be of significance to the minerals industry.

This is because the wide definition of "construction work", both under the CDM 2007 and CDM 2015, means that a great many construction and maintenance projects are caught by the regulations.

Even if the work is carried out by external contractors, significant duties are placed under the regulations on the client.

However, the regulations do not apply to the core activities of the exploration for or extraction of mineral resources, or to "preparatory activities carried out at a place where such exploration or extraction is carried out" (Regulation 2(1) CDM 2015).

The main changes

The changes have been made partly to bring the CDM Regulations more into line with EU requirements. For example the previous, fairly wide, exemption for domestic clients from CDM 2007 was considered to be in breach of the relevant EU Directive. Instead, the duties of all clients are set out generally in CDM 2015, but in the case of domestic clients, most of them are then passed to another duty holder under Regulation 7. A domestic client is a person who has construction work done on his own home or the home of a family member which is not done in connection with a business. The flipside of this approach is that there is a new emphasis on the duties of non-domestic clients.

Generally there is a greater emphasis on the non-domestic client fulfilling his responsibilities himself, with the assistance of competent advisors as necessary, rather than transferring him to others. The general duties of clients as regards managing projects are strengthened.

There has also been an emphasis on simplifying the structure of the Regulations to make them easier for SMEs to understand and apply. This follows a conclusion of the review of CDM 2007 that the previous regulations were not well understood by SMEs and that health and safety incidents are now more common on smaller construction sites.

To accompany CDM 2015, new guidance has been published by the Health and Safety Executive (HSE). The new guidance is shorter and provides useful checklists for compliance. In line with recent HSE practice it is not an Approved Code of Practice (ACOP). However many of the respondents to the 2014 consultation on the new regime indicated that they would prefer an ACOP, and the HSE stated on its website that it would seek views in 2015 on whether to replace the guidance with an ACOP. Nothing further had appeared on the website at the time of going to print.

Key further points are:

- New Principal Designer (PD) – The most fundamental change in CDM 2015 is the introduction of the new role of PD, replacing the CDM co-ordinator (CDM-C) role (which is abolished). The PD is responsible for co-ordinating health and safety during the pre-construction phase and, as such, CDM 2015 requires the client to appoint a PD as soon as practicable and in any event before construction begins.
- CDM 2015 provides that the PD must be a 'designer', which is defined as including any person who arranges for or instructs another person under its control to prepare or modify design. It is anticipated that entities that have previously acted as CDM co-ordinators under CDM 2007, but who are not designers, will seek to continue acting by being appointed as a sub-consultant to the PD.
- Skills, knowledge, experience and organisational capacity – CDM 2015 removes the bureaucratic and supplier requirements under CDM 2007 to ensure that duty-holders are "competent". Instead, all duty-holders (other than the client) must have the "skills, knowledge and experience" and "organisational capacity" to carry out their respective roles. Clients are required to "take reasonable steps" to ensure designers and contractors meet these requirements and duty-holders must not accept an appointment if they do not. The HSE has made it clear that it is down to the relevant professional bodies and institutions to ensure that these standards are met across the industry.
- Notification of projects – All projects that are scheduled to last more than 30 working days and have more than 20 workers working simultaneously at any point or that are scheduled to exceed 500 person days must be notified to the HSE by the client. CDM 2007 required notification for projects likely to involve more than 30 days or 500 person days of construction work. The change should reduce the number of notifiable projects.
- More than one contractor? – However, notification no longer triggers additional duties to appoint a CDM-C and principal contractor (PC), as was the case under CDM 2007. Instead, under the new rules, the duty to appoint a PC and PD applies whenever there is more than one contractor, irrespective of whether the project is notifiable. This will catch smaller projects on smaller sites. Should the client fail to appoint a PC or PD, he is obliged to fulfil the roles himself.

Transitional arrangements

Transitional provisions were put in place for projects which started before 6 April 2015 and finish after that date:

- Where a CDM-C was appointed on a project that started before 6 April but was certain to reach completion before 6 October, the CDM-C could continue its role without the need for a PD to be appointed.
- During this "period of grace", the appointed CDM-C had to comply with the duties in Schedule 4 of CDM 2015 (which largely reflect the existing requirements under CDM 2007).
- For projects which commenced before 6 April but would not be completed before 6 October, the client was to appoint a PD as soon as practicable. The PD would take over and the CDM-C would have no further role.
- Where a project continued beyond 6 October and the client failed to appoint a PD, the client would become responsible for fulfilling the duties of the PD.
- Where a project began before 6 April and had only one contractor, that contractor was required to draw up the construction phase plan as soon as practicable after 6 April. For similarly timed projects involving more than one contractor but no PC, the client was to appoint a PC as soon as practicable after 6 April. The PC would be responsible for the construction phase in such circumstances.

Final practical thoughts

Clients find themselves with increased responsibility to check and review their health and safety arrangements through the life of a project under the CDM 2015. While clients will look to pass on many of their duties, they will still retain that responsibility. To ensure that all parties on a construction project follow the new rules, clients should make certain that building contracts and appointments are brought up to date – the JCT and other industry bodies are producing amendments to their standard form agreements. As breaches of the rules attract criminal liability with a maximum of two year's imprisonment and/or an unlimited fine, clients should act now to ensure that both projects already underway and future projects are fully compliant.

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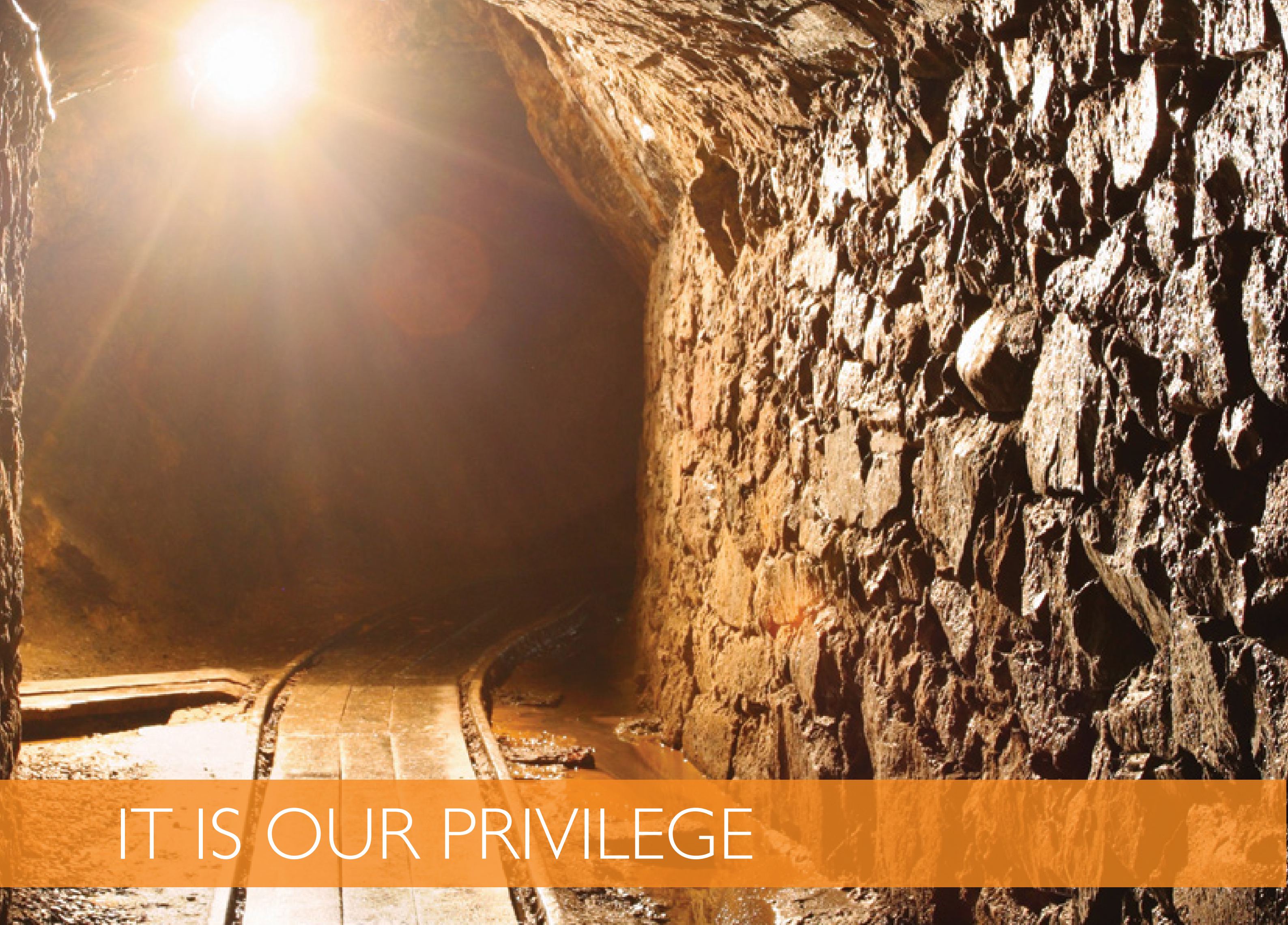

IT IS OUR PRIVILEGE

In this article Petra Billing examines the concept of privilege as between client and lawyer and how it may vary across jurisdictions, affecting many companies including minerals operators where they operate in different international markets.

The concept of privilege entitles a party (or their successor in title) to withhold evidence (which might otherwise be damaging) from production to a third party or the court.

Once privilege is established, an absolute right to withhold evidence arises. The court cannot be called upon to exercise any discretion, whether on the grounds of public policy or otherwise, to force disclosure of the evidence, be it oral or documented.

There are various types of privilege in England and Wales.

The most common is Legal Professional Privilege which protects the confidentiality of communications between lawyer and client encouraging absolute honesty. It extends to in-house lawyers and their internal clients.

The concept of Legal Professional Privilege is universally recognised in most jurisdictions but its exact nature and scope varies. It follows that for businesses with interests in many jurisdictions, such as minerals operators, there can be considerable scope for dispute as there is no universal set of rules on how an international tribunal can resolve any dispute concerning whether or not privilege applies.

The differences are surprising and it is easy to get caught out.

Focusing on some key jurisdictions:

BELGIUM: Article 458 of the Criminal Code imposes an obligation of professional secrecy on lawyers when acting in their capacity as lawyers with their client. This obligation is incorporated in the Belgian rules of professional conduct and jurisprudence has applied the obligation of professional secrecy in combination with Articles 6 and 8 of the European Convention of Human Rights.

CHINA: The concept of legal professional privilege does not exist under the laws of the People's Republic of China (PRC). PRC's laws and regulations do not contain any provisions that exempt lawyers from being forced to disclose information they receive from a client to a third party. There is no protection of communications between lawyers and clients on the basis of legal professional privilege.

POLAND: The concept does not exist. Lawyers are obliged by a duty to keep confidential all information which they become aware of when providing legal services. This professional secrecy exists in all kinds of proceedings, but under some circumstances, strictly provided for by law, the secrecy obligation may be waived in criminal and competition proceedings.

SOUTH AFRICA: The concept here consists of two components. The first is legal advice privilege and the second is litigation privilege. The first protects reciprocal communications between lawyers, advocates or admitted in-house legal advisers and clients where the client is seeking legal advice and the advice is given in a professional capacity. The second component protects communications between clients and their lawyers, advocates and admitted in-house legal advisers, clients and third parties for the purposes of pending or contemplated litigation. The contents of privileged documents need not be disclosed but the existence of them must be.

UKRAINE: The principles and content of legal professional privilege are established by the Law of Ukraine 'On Advocacy and Legal Practice in Ukraine' No 10424, where it applies it will exist in all types of proceedings and the Criminal Procedural Code of the Ukraine contains a direct statement that a lawyer shall keep all information on a client privileged. Legal professional privilege can only be attributed to information obtained by a member of the Ukrainian Bar Association – independent lawyers (attorneys-at-law) or members of an advocacy bureau or union. In-house lawyers or foreign lawyers who are not members of the Ukrainian Bar are not protected by legal professional privilege.

Organisations which operate on a global basis like most mineral operators are therefore best advised to proactively manage the risk associated with such differences in law. DLA Piper has produced a Legal Professional Privilege Handbook in partnership with the European Company Lawyers Association (https://www.dlapiper.com/en/uk/insights/publications/2015/03/legal-professional-privilege-handbook/) which provides a "compare and contrast" across most jurisdictions. We suggest that understanding how different jurisdictions approach such issues should form part of a business's communications policy.

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