

## The shift in the mining industry from a construction phase to a production phase brings with it a different set of legal risks associated with mine operations.

While safety is one of the top priorities of an operator unfortunately accidents continue to occur, and when they do investigations and legal claims often involve companies at every level of the chain including the suppliers, designers and manufacturers of the equipment involved in the accident. In this article, we explore the potential liability that designers and manufacturers of mining equipment might have if there is a mine site accident, the processes following such an accident and some practical tips on minimising exposure to liability.

### Potential Criminal and Civil Liability

As well as applying to mine operators, the *Mines Safety and Inspection Act 1994* (WA) (**MSI Act**) imposes various obligations on designers, manufacturers, importers and suppliers (collectively “**Equipment Providers**”) of mining equipment. Broadly speaking, the MSI Act requires that, so far as is practicable, Equipment Providers must ensure that:

- persons who install, maintain or use the equipment are not exposed to hazards;
- an appropriate level of testing has been done on the equipment; and
- adequate information pertaining to the equipment is provided.

Contravention is a criminal offence. Depending on the particular charge, fines on contravention can be as high as AU\$625,000 for each offence.

In addition to criminal liability, an Equipment Provider may also face various civil claims such as negligence.

### Practical Considerations to Minimise the Risk– Providing Information and Document Retention

While most Equipment Providers are aware of their obligations in relation to the design testing and safety of the equipment, the obligation to provide adequate information about the equipment can sometimes be overlooked, as can the need to ensure a paper trail easily accessible by others when providing that information.

Under the MSI Act, Equipment Providers have to provide adequate information at the time of supply of the equipment, and also subsequently whenever requested.

What amounts to “adequate information” is not spelt out and so judgment is required by the Equipment Providers. What is required will depend on many factors but it can be said that it is unlikely to be sufficient to simply warn someone that they should be careful or only use the equipment if they are properly trained and experienced. The equipment information manuals should be up-to-date and contain information regarding:

- any dangers associated with the equipment;
- the equipment specifications and test data;
- the conditions necessary to ensure that users are not exposed to hazards; and
- the proper maintenance of the equipment. The amount of information required will depend on whether maintenance can be carried out by the user or only by specialists. However, even if it is not contemplated that the user will conduct its own maintenance, best practice would be to highlight major risks which might arise.

It is important that provision of manuals and other information is properly recorded at the time of supply of the equipment and retained in a manner that can be located in the future. This is because information provided at this point in time is the most relevant. When manuals are, or have been, updated it is important that copies of prior versions are retained for reference if ever required, but marked as superseded to minimise the risk of old versions being provided. It is also important that correspondence and other records are clear as to what version of the manual has been provided to customers.

As the obligation applies on request subsequent to the initial supply, requests for information from customers, or even third parties who may be in contact with the equipment, ought not simply be ignored. Thought should be given to whether information should be given and if so, the form and content of information provided, keeping in mind the request could relate to investigations into an accident.

### An Accident has Occurred – What Should I Expect?

As an Equipment Provider, it is unlikely that you will immediately be aware that an accident has occurred involving equipment you designed or manufactured unless it is particularly serious. The first you may hear of the accident could be a request for documentation, or for an interview. The request could be an urgent one made shortly after the accident while on-site inspections are still occurring, or it could be made many months after an accident and after preliminary investigations have already been conducted.

The Equipment Provider has an obligation to respond to certain requests from a Department of Mines and Petroleum (**DMP**) inspector during an investigation. The MSI Act gives the DMP inspector very broad, general powers to obtain the information it needs.

For example, the inspector can request the production of documents, require the attendance of any person for an interview and verify answers by statutory declaration. It is an offence to obstruct or hinder an inspector, or to fail (without reasonable excuse) to comply with a lawful request of an inspector.

If you are contacted by the DMP, you should obtain legal advice to understand the risks involved and your obligations to respond. While inspectors have wide powers, there are some limits. There are a number of simple strategies which can assist with managing risk, including asking for information to ensure you understand the scope of the investigation, and requesting a company representative or external legal advisor attend any interviews with staff. Doing so can assist you in avoiding the creation of additional problems or jeopardising a defence in the event a prosecution is commenced against you.

Companies involved in an investigation also need to keep in mind that significant amounts of time may pass with no further contact, however, this does not necessarily mean you can be confident that the risk of liability has passed. The DMP has three years from the date of the offence to commence criminal proceedings under the MSI Act, and civil claims can generally be made within six years (depending on the nature of the claim).

## Conclusion

The scope of the obligations placed on Equipment Providers under the MSI Act can be quite onerous. Given the potential exposure to both criminal and civil liability, Equipment Providers should be careful to ensure that they fully comply with all obligations including the information-related obligations that are less obvious. If you would like to find out more about how you can minimise your risk exposure in your specific circumstance, please contact our team.

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