

# Adviser

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## Directors and Officers Insurance Considerations for Mining Companies

Mining operations create waste, and often require “tailings storage facilities” (TSF) as part of their design. By their very nature, these structures are critical to a safe operational mine, with their open-ended lifetimes and ever-increasing expansion requirements.

TSF management remains an increasing challenge and concern for the industry. Despite a sustained focus on risk management, loss prevention, and operational safety, a number of high-profile incidents have occurred. Regardless of their many and varied causes, the consequential impact is always significant.

The financial costs of a TSF failure can often be mitigated through risk transfer mechanisms such as insurance. Not all policies offer the same level of cover, and while insurers and brokers have published a wealth of collateral on the mechanics of loss mitigation, there has been little focus on coverage variation and any potential gaps.

At a time when the insurance market is in a state of transition, understanding the insurers’ risk appetite is essential.



This series of guides focuses on insurance cover for catastrophic tailings dam failure, enabling risk managers and others involved in insurance purchasing to check and challenge key areas of cover and to make more informed procurement decisions for operational TSFs.

Our first adviser focuses on the importance of Directors and Officers (D&O) insurance for mining operators, as directors and officers of mining operators face exposure to criminal, civil, and regulatory risks.

# Directors and Officers Liability

Legacy and ongoing environmental risks pose a particular exposure for mining company executives. They may be subject to both civil, regulatory, and criminal proceedings in the event of a claim alleging a wrongful act following bodily injury, death, and/or destruction of property resulting from disasters caused by either tailings or overburden.

D&O insurance, if structured properly, can provide robust protection in the event of follow-on claims or regulatory investigation; it does not, however, cover direct claims for clean-up costs, bodily injury, or property damage — these perils are covered under other insurances.

Carefully consider exclusionary language in D&O insurance: The breadth of terminology in some policies can mean that follow-on claims can be excluded as well as the direct claims (that would fall for cover under other insurances). The terminology can be minimised by limiting use or removing it, applying carve backs, or including of “for” language where appropriate.

Other policy language which might impact the ability to obtain full recovery in environmentally related D&O claims, if not removed or substantively reworked, includes:

- “Insured” versus “insured exclusion”.
- Other insurance clauses, particularly relevant where there are joint ventures and/or local policies.
- Specific matters exclusion.
- Tailings dam exclusion.

While there is the ability to tailor coverage to remove or limit the potential impact and application of such exclusions, terms, and conditions, the breadth of coverage available in relation to each individual risk will be dependent on multiple factors, including: the current market environment, recent claims activity within the industry, the individual company risk exposure, and individual insurer appetite.

The structure of the insurance programme can potentially impact the availability of an indemnity for senior executives involved in follow-on claims or regulatory investigations. The total programme limit and the availability of ring-fenced coverage for senior executives where the company cannot — or will not — indemnify them or where the underlying insurance does not respond should also be carefully considered.

## Moving Forward

It is the responsibility of the individual director or officer to stress-test the scope and suitability of new and existing D&O insurance cover. For example:

- Does cover extend to senior employees or consultants who are not statutory directors and/or officers?
- Do I benefit from an individual indemnity limit or is it shared with all other directors and officers?
- How will the policy respond to a claim involving allegations of fraud or dishonesty?

- In the event of conflict between company and executive, can separate counsel be retained?
- Can I notify an insurer of a claim or must it be the company?
- If the company brings a claim against me, can I seek cover under the D&O policy?
- What happens to my cover when I retire or if my company is sold?
- How will the policy respond directly to proceedings against me in other jurisdictions?
- Is the insurer able to subrogate against me?

We trust this adviser has been informative. We will be issuing a further publication shortly in respect of another class of insurance. Should you have any questions, please contact us via the details below or your usual Marsh contact.

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