

**INTERNATIONAL INSURANCE LAW ASSOCIATION/ AIDA**

**WORLD CONGRESS**

**Rio de Janeiro, Brazil – October 2018**

**Topic IV - POLLUTION INSURANCE**

**- METHODS, COVERAGE AND BENEFICIARIES**

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**QUESTIONNAIRE**

**Introduction**

The topic relating to environmental damage insurance covering losses resulting from pollution was selected by AIDA's Brazilian Chapter for discussion during the World Congress to be held in Rio de Janeiro, in October 2018.

Such choice was justified by the growing frequency and intensity of environmental damages worldwide that sometimes affect entire communities and stop the production of goods and the supply of basic public services. History has been disclosing events of great impact relating to chemical industries (such as Seveso/1976 and Bhopal/1984), to oil industries (such as black tides from oil spill in several locations, and Exxon Valdez in the Gulf of Alaska/1989), to nuclear industry (such as Three Miles Island, Chernobyl), and, recently, the explosion at Deepwater Horizon in 2010, in the Gulf of Mexico, that produced a significant repercussion.

In Brazil, environmental pollution has been raising great awareness and discussions, particularly in view of the last relevant event occurred in Mariana city (State of Minas Gerais), in November 2015, resulting from the collapse of the Fundão dam, that spilled 50 million cubic meters of mine wastes downstream, contaminated the Doce River in its whole extension, and caused huge environmental, social and economic impact to populations and cities.

This context requires an analysis on how national legislations address the matter, as well as on the contribution provided by the insurance industry to either remedy or mitigate the impact from environmental damages. The local reports shall be particularly useful to the assessment of an issue whose perceptions may vary on a significant basis, depending on national legal and

administrative peculiarities. Please prepare your report in such a way as to submit the information as required for a correct and full understanding of the answers to the questions made herein.

This questionnaire contains only indicative questions. Please try to inform all the issues you may deem as important to the study of the topic, in the light of your country's scenario. Any information and comments shall be relevant. As the purpose of this questionnaire is to know the situation in your country, we kindly ask you to provide answers that specifically refer to such scenario.

#### **PRELIMINARY REMARK:**

**Please note that the questions under “1. Environmental Legal Aspects” relating to liability issues are aimed at ensuring a better understanding of the pollution insurance law and practice in different countries. Answering those questions is left to the sole discretion of the national reporter who may freely choose to answer only questions relating to insurance law aspects (i.e. to questions from “2. Legal aspects on environmental insurance policies” to “7. Academic development”).**

#### **1. Environmental legal aspects (answer is optional)**

1.1. Which are the major general rules on civil liability arising from environmental damages in your country?

- Statute – the Resource Management Act 1991 and approximately 50 other pieces of mostly older legislation (e.g. Reserves Act 1977, Conservation (Natural Heritage Protection) Act 2013) have a variety of liability provisions that are civil (and sometimes criminal including strict liability) for damage to the marine and land environment.
- Tort – common law remedies, Nuisance (less relevant now as RMA 1991 has subsumed common law with codified remedies)

1.2. Please describe the main characteristics and objectives of environmental civil liability in the light of national legislation and court precedents.

- New Zealanders pride ourselves on a ‘clean green’ image
- Sustainable management of the natural environment
- The RMA 1991 establishes a regime where a pollutor pays
- Remedies are designed to be instant and wide ranging, e.g. ex-parte remedies available

1.2.1. How are environmental damages described under the law?

- Resource Management Act 1991 in part 12 has remedies that vary from declarations to enforcement orders, abatement notices and mandatory injunctive remedies (desist and clean-up orders), and a range of criminal offences

1.2.2. Who may be (either directly or indirectly) made liable?

- The polluter company and there are provisions whereby directors can be personally liable

1.2.3. How is the determination of causal link of environmental damages?

- Investigation, evidence, Res Ipsa Loquitur, councils also owe a duty to enforce the RMA 1991

1.2.4. Does your legislation provide for strict or fault-based environmental liability?

- Both

1.3. Are there peculiarities regarding environmental damages resulting from pollution? If so, are there differences in the legal treatment to air, soil or water pollution?

- Soil and water seem to have the edge over air pollution in ease of prosecution as evidence easier to gather, but all should be treated the same under RMA 1991.
- New Zealand Environmental Protection Agency under the Hazardous Substances and New Organisms Act 1996 (HAZNO), i.e. dangerous air pollution has HAZNO regime

1.4. Which are the governmental entities in charge of authorizing and supervising activities that produce environmental impacts or pollution?

- Government through ministries;
- Councils through EMA officers

1.4.1. What is the scope of activity of these entities?

- Wide ranging and variable
- Powers can include requiring remedies that are extremely costly to polluters, i.e. there is no cap on quantum for the “clean-up” type remedies (which can amount to millions even though the order comes via a District Court (which has a capped jurisdiction))

1.4.2 How do they operate, and on which legal grounds?

- Powers through legislation
- Councils and government organisations charged with protecting owe a duty to enforce RMA 1991
- New Zealand Environmental Protection Agency under the Hazardous Substances and New Organisms Act 1996 (HAZNO) regime

1.5. Is there a legal system of procedural mechanisms in case of environmental offenses?

- Yes

1.5.1. Who is in charge of keeping the environmental protection?

- Ultimately the government through legislation, and local government or councils, e.g. RMA 1991 enforcement
- New Zealand Environmental Protection Agency under the Hazardous Substances and New Organisms Act 1996 (HAZNO)

1.5.2. How does this system work?

- Hierarchy of the government through legislation, and local government or councils, inspections, abatement notices, prosecutions or (common law) suit of nuisance, or negligence

## 2. Legal aspects on environmental insurance policies (answer is required)

2.1. Is there a specific legal framework to regulate environment insurance policies? If so, please describe such legislation, as well as the major features thereof.

- No

2.2. In the event of a negative response to the question 2.1, please inform if there is any administrative rule, or any other kind of legal regulation that applies to environmental insurance policies. In this case, please describe such regulation, as well as the major features thereof.

- There is none that I am aware of

2.3. Does the law provide for compulsory environmental insurance?

- It should be a condition of a resource consent, and potentially could be, but not in practice
- In international marine situation, there are conventions e.g. Nairobi convention which may require mandatory insurance but NZ is not a party to that convention

2.3.1. If so, which would be the relevant risks, covered items and limits? (some)

- Regulatory authorities, shareholders and clients can hold businesses liable for costly environmental exposures, or pollution risk, gradual, sudden and accidental pollution releases, on and off-site clean-up costs and third-party bodily injury and property damage claims, and reimbursement for the restoration or remediation of damaged natural resources, habitats and species
- There is no upper limit on liability for clean-up under the act
- Ordinary negligence
- Breach of by-law, statute, or regulatory obligation, regime of abatement and infringement notices
- Environment insurance offers companies a solution to regulatory obligations, contract/ lender/ landlord requirements, shareholder needs and board of director objectives but usual cap is up to \$30m, and a clean-up could potentially cost more than this

2.4. In case of a legal requirement or regulation, when should an environmental insurance policy be obtained?

- Should be responsible policy to managing corporate risk
- Should be as a condition of a resource consent, but in practice is not
- In international marine situation

2.4.1. In which step of a venture should such policy be submitted under the law?

- As a condition of a resource consent, but no requirement usually

**3. Operational methods for pollution insurance (answer is required)**

3.1. Which are the pollution insurance’s modalities that are offered in the market? Performance bonds or civil liability insurance? – unsure of this answer. Environmental insurance appears to be a newish product. Designed to cover more than the traditional statutory or regulatory liability product. Some examples are:

*Environmental - Insurance from AIG in New Zealand*  
[www.aig.co.nz/business/products/environmental](http://www.aig.co.nz/business/products/environmental)  
*Environmental & Pollution Liability Insurance for Fixed Sites*  
<https://deltainsurance.co.nz/.../environmental-pollution-liability-insurance-for-fixed-si...>

*Marine and Environmental Insurance in New Zealand - Chubb*  
<https://www2.chubb.com/nz-en/business/marine-environmental-insurance.aspx>

*Is your business at risk of a costly environmental breach? | Abbott ...*  
[www.abbottinsurance.co.nz/is-your-business-at-risk-of-a-costly-environmental-breach/](http://www.abbottinsurance.co.nz/is-your-business-at-risk-of-a-costly-environmental-breach/)

*Environmental Liability Insurance Broker NZ - Free Online Quote*  
<https://www.moynahansinsurance.co.nz/environmental-liability.html>

*Environmental Risk | Insurance Broking & Risk Management | Marsh*  
<https://www.marsh.com/nz/services/environmental-risk.html>

3.1.1. What kinds of risks should be covered thereunder?

*Specialist environmental insurance policies in demand - underwriting ...*  
[www.insurancebusinessmag.com/nz/.../specialist-environmental-insurance-policies-in-...](http://www.insurancebusinessmag.com/nz/.../specialist-environmental-insurance-policies-in-...)

This Delta Insurance chart shows risks covered under a traditional insurance programme vs. what can be included under the Environmental Impairment Liability Cover:

	General Liability	Statutory Liability	Professional Indemnity	Environmental Impairment Liability
Civil 3 <sup>rd</sup> Party Prop Damage – S&A	●	–	–	●
Civil 3 <sup>rd</sup> Party Prop Damage – Gradual	–	–	–	●
1 <sup>st</sup> Party Property Damage	–	–	–	●
3 <sup>rd</sup> Party Bodily Injury	●	–	–	●
Professional Errors	–	–	–	●
Environmental Damage	●	–	–	●
Emergency Response	–	–	–	●
Clean-up Costs	●	–	–	●
Regulatory Prosecution - Fines	–	●	–	–
Regulatory Prosecution - Reparations	●	●	–	●
Asbestos contamination	–	–	–	●

3.2. Does the law or administrative rule define upper limits for losses or coverage?

- No – there are no limits to liability under the RMA 1991 for clean-up costs

3.2.1. Which are the criteria that should apply to limits' definition?

- Adequate cover for the risk concerned e.g. fracking, pollution of Marine Environment

3.3. Is there any difference in the legal treatment to state-owned and private ventures?

- In theory, no, but in practice probably yes

3.4. Is there any difference in the legal treatment to fix and mobile facilities?

- Not sure what this question addresses

3.5. Is there any difference in the legal treatment to underground works, mines or underground quarries?

- Yes, in respect of health and safety i.e. Mines' inspectors' regime, where individuals are working
- Regarding pollution, no, the RMA 1991 treats all the same.

3.6. Do insurers use to insert pre-contractual provisions in the policy (pre-contractual disclosure)?

- yes

3.6.1. Which are the most usual ones?

- Cover can be limited or declined if for instance a company has dealt with minor infringement or abatement notices in house so the risk profile has not been fully disclosed to insurer

#### **4. Coverage under pollution insurance (answer is required)**

4.1. Which are the major covered risks relating to civil liability arising from pollution?

4.2. Which are the major covered guarantees for events arising from pollution?

4.3. Which are the major covered operational risks arising from pollution?

#### 4.4. Does the insurance cover fines?

- These all depend on the product
- Generally, environment insurance offers companies a solution to regulatory obligations, contract/ lender/ landlord requirements, shareholder needs and board of director objectives
- gradual, sudden and accidental pollution releases, on and off-site clean-up costs and third-party bodily injury and property damage claims
- reimbursement for the restoration or remediation of damaged natural resources, habitats and species
- Ordinary negligence
- Breach of by-law, statute, or regulatory obligation
- Usually liability of the insurer is capped up to \$30m, but clean-up costs can exceed this
- Insurers limit coverage over mandatory work orders in abatement notices and/or clean up requirements
- Insurance liability for clean-up work should be uncapped, policies scrutinised

4.5. Is there coverage for individual moral damages, being understood as such any physical or psychological suffering experienced by the victim and/or injury against his/her honour or personality?

ACC bars personal injury civil claim lawsuit, potentially a claim could be made to ACC for physical or psychological suffering by an individual

Potentially exemplary damages at common law for conduct that needs to be punished could be brought as a class action for a group of victims (difficult remedy as have to go beyond gross negligence or recklessness standard)

No punitive damages available under RMA 1991 for damage to environment but conduct considered with sentencing/remedy

4.6. Is there coverage for collective moral damages, being understood as such any moral injury undergone by a group of certain persons who are interconnected by a fundamental legal relationship



or by a same event experienced by all of them, or any injury to non-determinable trans-individual rights?

Not really, unless a tort action available

Injury – if psychological is potentially subject to the ACC bar.

4.7. Is there coverage for punitive damages, being understood as such any penalty levied on the agent of the illicit conduct, in addition to the compensation of damages themselves?

No

No punitive damages under RMA 1991 but conduct taken into account with sentencing/remedy

## 5. Beneficiaries (answer is required)

5.1. Who is entitled to be beneficiary of losses recoverable under pollution insurance? Any individuals, legal entities, state-owned or private institutions, collectivities?

- The prosecuting authority or applicant

## 6. Market status (answer is required)

6.1. What is the percentage of participation of environmental insurance at the insurance market in its whole?

- Stat not available

6.1.1 As regards the figures thereof, what is the yearly participation of premiums collected under environmental insurance?

- Stat not available

6.2. Which are the sectors of economic activity that use to obtain environmental insurance?

- Stat not available

6.3. During the last 5 (five) years, what is the sum of losses paid by virtue of environmental damages?

- Stat not available

6.3.1. What percentage of the aforesaid losses was covered under insurance?

- Stat not available

## 7. Academic development (answer is required)

7.1 Are there research institutes focused on the study of environmental insurance? Please identify them.

- Potentially within the wider Australasian insurance industry but not aware of any in e.g. a NZ university

7.2 Are there academic and scientific works produced in the fields of law, economy, environment or other similar area, that specialize in environmental insurance?

Environmental Law in NZ

Ed. Peter Salmon, David Grinlington Thomson Reuters (no insurance mentioned in this)

Please indicate some reference legal manuscripts and books, and the main authors thereof.

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