
Financial Accountability for Hazardous Substances

Contents

	Executive Summary	1
1	Origins	4
2	Lesson from History	6
3	Polluter Pays Principle	10
4	Current Liability Requirements	13
4.1	Economic Loss	13
4.2	Damage to Human Health	17
4.3	Environmental Damage	18
5	Financial Assurance Requirements	23
6	Conclusions	26

December 2004

Sustainability Council, PO Box 24304, Wellington, www.sustainabilitynz.org
Tel: 64-4-9133-655, Fax: 9133-760, Email: council@sustainabilitynz.org

Disclaimer: While every effort has been made to ensure the accuracy of information in this report, no liability is accepted for errors of fact or opinion, or for any loss or damage resulting from reliance on, or the use of, the information it contain

Executive Summary

1. Sixteen years after Government first determined to bring together coherent regulations for hazardous substances, effective financial accountability for harm caused by these substances remains limited. While Government has committed to the “polluter pays” principle, the polluter continues not to be held financially accountable under a wide range of circumstances.
2. The Ministry for the Environment (MFE) recently undertook a stocktake of the legislation passed in 1996 to overhaul the regulations resulting from that first review. In April, it presented a “strategy” proposing a series of changes to that legislation – the Hazardous Substances and New Organisms Act. However, this did not recommend changes to plug the current gaps with respect to financial accountability and legislation currently being drafted makes no provision for this.

Past Experience

3. New Zealand has had direct experience that shows all too clearly the problems that can arise if full financial accountability is not in place. MFE estimates that the cost of cleaning up contaminated sites in New Zealand is around \$1 billion. In absence of new Government measures, a great deal of this cost seems set to fall on innocent third parties.
4. A decade ago, MFE proposed new legislation that would make polluters liable retrospectively and would exempt from liability those landowners who had purchased without knowledge of the contamination and had made appropriate efforts to inquire about this. It also proposed creating a fund of some hundreds of millions of dollars for the cleanup of “orphan” sites throughout the country.
5. This package was not put into law and alternative proposals to cover sites nationally have yet to come forward. MFE has instead allocated funding to a few high profile sites on a case by case basis. An overall package is required to remove uncertainty as to what work will be required at each site and who will pay.
6. The decade-long delay has favoured polluters and risks a gradual transfer of responsibility to innocent property owners. Rather than an explicit policy decision to this effect, all that may be required is Government inaction.

Accountability for Future Damage

7. Such past experience underscores the need for full financial accountability for future activities. While Government has made international commitments to the “polluter pays” principle, only to a limited extent has this been followed through into workable provisions. The current emphasis on holding parties liable for not complying with regulations is a necessary step but leaves unanswered the question of who pays if harm still occurs.

8. Full financial accountability incentivises due care and promises an overall gain for society. This will arise to the extent that the discipline of funds at risk leads to better decisions when making and using substances, thereby reducing the damage caused. Society as a whole makes a gain and the polluter pays, rather than innocent parties. Put another way, without financial accountability, hazardous substances are in effect subsidised – disadvantaging less risky options.
9. Three relevant categories of liability are: economic loss, harm to human health, and environmental damage. At present, the parties making choices about whether to use hazardous substances face only a part of the full potential costs that their decisions could impose on others' financial assets or human health. Considerable progress has been made with respect to accountability for environmental damage but here too, reforms are required.
10. The key gaps are:
 - **Economic Loss:** There is no effective liability regime for economic loss.
 - HSNO contains no liability provisions for financial harm to third parties. Civil actions can be taken under common law but, as set out in Government statements, this law is ill-suited and inappropriate.
 - Further, there is no requirement for a party making use of hazardous substances to provide assurance that it can meet a level of claims that might reasonably be expected to result from an accident, let alone unexpected effects.
 - **Human Health:** There is no direct financial incentive to take into account potential impacts on human health. The Accident Compensation Corporation (ACC) provides compensation for a range of classes of personal injuries and once an ACC claim is accepted, any parties responsible for causing harm face no threat of legal action to recover the costs involved. Claims not accepted by ACC may be pursued only under ill-suited common law.
 - **Environmental Damage:** Liability for environmental damage is in principle well covered but the effectiveness of these provisions relies on their being sufficient funds at risk. The current arrangements for this need to be improved.
11. The full costs of hazardous substances are therefore not revealed to potential users and, as a result, they are likely to be used more often than is optimal for the economic welfare of New Zealand.

Key Reforms

12. The HSNO Act indeed requires attention to improve its general workability - the aspect MFE has focused attention on. Changes directed at this are important and desirable. However, MFE's strategy and proposals to Government for a change of law lack a vital component – measures to ensure financial accountability going forward and also to address historic contamination costs. What is required is a set

of comprehensive liability and financial fitness provisions to address the major gaps in the current regime so that these elements are also “workable”.

13. Companies with a long term stake in the market will recognise the value that such provisions can deliver. They drive improved product evaluation, improved internal processes for monitoring, better customer relationships, and better public profiles.
14. MFE has also pointed out that for a country trading on its environmental image, “Clean-up of orphan sites is a significant step towards ensuring the “clean green” image is matched by the reality of our environment.” This point equally applies to setting incentives for future activities.
15. The following are key reforms required to secure effective financial accountability:

-
1. Developers and users of hazardous substances are made strictly liable for:
 - Economic loss caused to third parties; and
 - At least that harm caused to human health that is not covered by ACC.

Such liability would be subject to a limited set of defences but would apply irrespective of whether a consent or permit for the activity had been issued by a regulatory authority.

2. HSNO sets financial assurance requirements to ensure those who make and use hazardous substances have a minimum level of funds available to meet claims. ERMA would enforce these as a condition of obtaining approval to commence an activity.
 3. Liability for clean up of historic contaminated sites is addressed through:
 - Completion of registers of contaminated sites;
 - Definition of standards that set thresholds for cleanup;
 - Devising and legislating for a formula to allocate liabilities;
 - A substantially increased national fund for the clean up of orphan sites, as envisaged in 1995 proposals.
-