

SUBMISSION TO THE MINISTER FOR
COMMUNICATIONS, MARINE AND NATURAL
RESOURCES
IN RELATION TO THE
PROPOSED UPDATING AND RESTATING
OF THE
MINERALS DEVELOPMENT ACTS 1940 - 1999

30 SEPTEMBER 2005

Strictly Private & Confidential

MATHESON ORMSBY PRENTICE
SOLICITORS
30 HERBERT STREET
DUBLIN 2
TEL: 01 619 9000
FAX: 01 619 9010

e-mail: orla.muldoon@mop.ie

INDEX

PART 1:	Introduction.....
PART 2:	Submission.....
Annex	About Matheson Ormsby Prentice.....

PART 1: INTRODUCTION

Matheson Ormsby Prentice ("MOP") welcomes the initiative of the Minister for Communications, Marine and Natural Resources (the "Minister") to update and restate the Minerals Development Acts, 1940- 1999 (the "Acts").

The Projects and Construction Group at MOP is delighted to present this Submission to the Minister in relation to the proposed updating and restating of the Acts. A statement of the Group's capabilities and practice areas is set out as an Annex to this Submission.

Given the limits on the word length of any submission set out in the Request for Submission Notice (published in the Irish Times on 18 July 2005) we have confined our submission to the area of Compensation. Our Submission addresses a number of specific aspects of this area, namely:

- (i) the right to compensation in respect of minerals;
- (ii) the payment of compensation;
- (iii) the assessment of compensation by the Mining Board;
- (iv) the scope of the meaning of "working of minerals".

We would be delighted to give a presentation to the Minister in relation to our submission should the Minister so wish. The Minister should feel free to contact Michael O'Connor or Orla Muldoon in respect to any aspect of this Submission. Primary contact details are set out below:

Tel: (01) 619 9000
Fax: (01) 619 9010
E-mail: michael.oconnor@mop.ie / orla.muldoon@mop.ie

PART 2: SUBMISSION

A. RIGHT TO COMPENSATION

Under the Minerals Development Act, 1979 (the "1979 Act"), there is a right to compensation for any person with an estate or interest in the minerals. The rights of mineral owners were protected by providing for a right to compensation payable at the time that any minerals were actually worked. Section 20 of the 1979 Act conferred this right to compensation on the person who had an estate or interest in the minerals on 20 June 1979 (i.e. the date of the 1979 Act).

Section 20 of the 1979 Act provides that:

"A right to compensation under this Act shall vest in every person who was entitled to any estate or interest in minerals immediately before the date on which the exclusive right of working those minerals vested in the Minister under section 12 and the said right to compensation shall devolve and may be disposed of accordingly".

The 1979 Act contains various obligations on the Minister including the obligation to give extensive public notice of his intention to permit the working of the minerals and direct notice to anyone who may appear to the Minister to have an interest. It would appear that this is intended to allow individuals an opportunity to claim compensation. As a result of section 20 of the 1979 Act, the person entitled to the compensation would not necessarily be the owner of the land under which the minerals are located or indeed the owner of the minerals and accordingly there has been some difficulty in identifying this person (who in any event may have been unaware of his or her entitlement).

Section 3 of the Minerals Development Act, 1999 (the "1999 Act") was intended to clarify the matter by providing that the right to compensation on any sale or conveyance of the minerals made on or after the date of the 1999 Act, would transfer automatically with the transfer of ownership of the minerals. Accordingly, since 1999, in a conveyance of any estate or interest in minerals, any right of compensation vesting in the vendor at the time of the transfer would vest in the purchaser of the minerals. However, a right of compensation separated from the ownership of the minerals in a sale or conveyance prior to the 1999 Act, would not be deemed to vest in a purchaser by virtue of section 3 of the 1999 Act as at the time of the transfer the right to compensation may not have been vested in the vendor.

In practice, this could result in a situation where a party who has acquired the interest in the minerals prior to the introduction of the 1999 Act may find that the vendor of the minerals (or perhaps the vendor's estate) is regarded as an appropriate person to be notified under section 18 of the 1979 Act (as any person appearing to the Minister to have an interest in the minerals) for the purposes of publicising the Minister's intention to grant a State Mining Licence (an "SML"). This would be consistent with the view that the right to compensation can be a separate matter to the ownership of the minerals and acknowledges that although the vendor sold the land and minerals prior to the introduction of the 1999 Act, the sale of the land and minerals did not necessarily include the right to compensation. It would in effect require that the applicant for the SML would be obliged to disprove the interest of any person appearing to the Minister to have an interest in the minerals.

The fact that section 3 of the 1999 Act was enacted (and indeed the fact that it was deemed necessary to enact section 3 of the 1999 Act) would tend to suggest that section 20 of the 1979 Act could be interpreted as supporting the view that, prior to 1999, the right to compensation was independent of the issue of the ownership of the minerals or, at the very least, that there was some doubt as to whether purchase of the minerals would necessarily include a transfer of the right to compensation under the 1979 Act. In other words, the effect of the language in section 20 could mean that the right to compensation is separated from the ownership of the minerals.

However, it is extremely difficult to see how a right to compensation arising out of the working of minerals could be regarded as separate to those minerals given that the compensation entitlement arises as a result of the working of the minerals by a party holding the appropriate

mining authorisation (who would not necessarily be the owner of the land under which the minerals are located or the owner of the minerals acquiring the minerals from the landowner). Accordingly, it is not clear why it was deemed necessary to enact section 3 of the 1999 Act. It would appear that the enactment of section 3 of the 1999 Act, although intended to clarify the position, facilitated a suggestion that prior to the 1999 Act, the right to compensation could have been conveyed independently of the minerals themselves.

It would be useful in any restatement of the Acts to confirm that it was not possible following the enactment of the 1979 Act to separate the right to compensation from the minerals themselves. This would not involve a statutory provision having, or purporting to have, any retrospective effect but would merely reflect the conveyancing practice existing at the time of the introduction of the 1979 Act and continuing today. The effect of such a confirmation would be to:

- (i) avoid any unnecessary or inappropriate extension of the category of persons which may be regarded as appropriate persons to be notified under section 18 of the 1979 Act (as any person appearing to the Minister to have an interest) for the purposes of publicising the Minister's intention to grant an SML;
- (ii) ensure that any person claiming to have an estate or interest in the minerals would be obliged to establish such an estate or interest;
- (iii) avoid any suggestion that the applicant for the SML should establish that various people did not have an estate or interest in the minerals for the purposes of the grant of an SML under section 18; and
- (iv) facilitate a more rapid process for the grant of an SML by the Minister.

B. PAYMENT OF COMPENSATION

Section 21 of the 1979 Act provides that compensation shall be paid by the Minister to every person entitled to the compensation in respect of the Minister's exclusive right to work the minerals. Section 22 of the 1979 Act states that in default of agreement, any issue as to the entitlement to compensation and the amount of such compensation will be settled by the Mining Board.

We note that there is no time limit in section 22 for the reaching of an agreement as to the appropriate compensation payable. In addition, no criteria are set out to provide guidance as to the level of compensation that may be payable.

The absence of a definite time limit and clear criteria setting out the basis for the calculation of compensation amounts should be remedied in any restatement of the Acts. Such an amendment would avoid any suggestion that there is a distinct lack of transparency in relation to the calculation of the amount of compensation payable. In addition, the existence of clear criteria should facilitate the reaching of agreement of the compensation amount between the parties. Furthermore, the fact of clear criteria establishing guidelines for the amount of compensation payable should avoid the referral of any unnecessary issues to the Mining Board for resolution.

The absence of a definite time limit for agreement as to the appropriate compensation payable could result in ongoing and protracted dealings between the Minister and the party claiming the compensation. In addition to the resources cost for the Department, there is a risk that a claimant could become frustrated in respect of any claim for compensation and that this frustration could manifest itself in a determination on the part of the claimant to resist any further mining developments by, for example, consistent objections to planning applications by a mining development company or the making of representations to the Minister in respect of each proposed grant of an SML. This may result in a refusal or delay in the grant of relevant planning permissions to a mining development company or the grant of permission subject to onerous conditions. In these circumstances, the mining development company may incur significant costs including those as a result of legal challenges. Over time, this experience

development company commences the mining without reference to the then prevailing market price or could the claimant wait until profits have increased or the market price has substantially increased?

In many cases, a mining development company will have expended significant capital costs in respect of the mining operation which will exceed the value of any individual ore body. Accordingly, when considering the meaning of the phrase "net profits" when calculating compensation amounts in respect of an individual ore body, the net profits should also include a fair and reasonable proportion of the mining development company's total historical and anticipated future capital costs. It may be that this is intended by the use of the phrase "apportionment of net profits". However, it would be useful for clarity in any restatement of the Acts to confirm that the definition of net profits includes a proper allocation of a proportion of total historical and anticipated future capital costs expended by the mining development company.

The minerals and the introduction of clear and specific guidelines for the calculation of compensation would be a positive development.

There should be a time limit specified for the making of any claim for compensation so that there can be certainty both for the claimant and the mineral developer as to the quantum of any likely claims.

2.C.2 Re-opening of settlements or determinations

Section 22 of the 1979 Act provides that if a claimant for compensation is not satisfied with the terms of settlement given by the Mining Board, the claimant is entitled to apply to the High Court to determine the issue. In addition, section 22(4) provides that:

"Where at any time after the settlement by the Mining Board or determination by the Court of a question arising in reference to a right vested under section 12, the Board or the Court is satisfied, on the application of a person having a right to compensation by reason of such vesting, that -

- (a) circumstances have subsequently arisen which were not anticipated and taken sufficiently into account in that settlement or determination, and
- (b) fair and reasonable compensation for the applicant has not been provided,

the Board or Court shall consider the application and may revise the settlement or determination in such manner as justice may require and the preceding provisions of this section shall have effect accordingly."

In effect, this section provides for a full re-hearing of the claim on the claimant's application to consider any subsequent circumstances which were not applicable at the time of the initial settlement or determination. This means that any settlement or determination can never be regarded as finally made given that it could be re-opened to take account of subsequent circumstances. The section does not indicate what types of circumstances could form the basis of such an application. For example, if the compensation is calculated and there is a later increase in the market price for the minerals, should the claimant be entitled to a share of this additional profit?

The fact that there is no time limit stipulated in which the subsequent circumstances should arise or a stated period for the bringing of the application or any qualification as to the type of circumstances which could form the basis of such an application means that the claimant would appear to have a perpetual right to re-open any settlement or determination.

It would appear to be inequitable that while the claimant has a right to apply to the Mining Board or the High Court to re-open a settlement, the mining development company has no such equivalent right. In particular, given that a claimant may seek to increase a settlement by reference to subsequent increases in the market price for the minerals, a mining development company should be entitled to seek to reduce the compensation payable by reference to subsequent decreases in the market price for the minerals.

It would be of importance that any updating or restating of the Acts would provide for:

- (i) a qualification as to the type of circumstances which could form the basis of an application to re-open a settlement or determination;
- (ii) a limit as to the time for the bringing of any application to re-open a settlement or determination;
- (iii) confirmation that the mining development company can also apply to the Mining Board or the High Court to re-open a settlement and to bring new circumstances to the attention of the Mining Board or the High Court,

so as to provide for greater certainty in relation to such settlements and determinations.

D. MEANING OF WORKING OF MINERALS

Where an SML is granted, the licence holder will be authorised to work the minerals and will also be obliged to comply with any planning permission. Although the 1979 Act contains a broad definition of the working of minerals, there may be circumstances where the proper working of the minerals or compliance with planning permission will not fall within the scope of the definition of the working of the minerals.

For example, we understand that the practice by the Department is to include an area beyond an ore body to the relevant field boundary when granting an SML. This can result in the inclusion of part of a separate ore body within the scope of an SML. In such circumstances, the working of the minerals may require the drilling of a tunnel connecting the two ore bodies. The digging of such a tunnel should be regarded as the working of the minerals notwithstanding that the material removed in the course of the digging of the tunnel was non-ore bearing.

Similarly, where a planning permission requires compliance with conditions which involve access to third party lands, this should also be included in the authorisations set out in the SML as, in the absence of such authorisation, it would be necessary to obtain the consent of the land owner in order to comply with the conditions. Where a landowner refuses consent or seeks to impose onerous conditions to the grant of such consent, this may significantly impede the proper working of minerals by the licence holder.

Accordingly, it would be useful for any restatement of the Acts to confirm that the grant of an SML would authorise the mining development company to exercise any necessary ancillary rights arising in connection with the working of the minerals in order to facilitate the mining development company's compliance with any planning permission conditions and other legislative requirements. Compensation in respect of the grant of the ancillary rights could be given to the relevant landowner and could be included in the overall assessment of compensation under the 1979 Act.

MATHESON ORMSBY PRENTICE

PROJECTS AND CONSTRUCTION GROUP

The Projects and Construction Group at Matheson Ormsby Prentice advises governments, sponsors, banks, building and civil engineering contractors and design professionals in connection with the development, financing, construction and operation of projects across a range of sectors. These include energy and natural resources, infrastructure (roads, bridges, airports and rail), waste, water, sewage, defence and accommodation.

The Group comprises a core group of specialist lawyers and is able to call upon the expertise of specialists in other practice areas of the firm as required.

The Group's areas of practice include:

- **Energy and Natural Resources**

MOP is now recognised as a leading firm in the energy and natural resources sector. The lawyers in the Projects and Construction Group have advised on all major transactions in the energy sector over the past 5 years and members of the team have a strong knowledge of emerging and transition markets. We have broad experience in relation to:

- ***Electricity***

Our extensive industry experience and expertise working for the industry, is widely recognised and legal directories rank us as a top tier practice. We advise on all aspects of the electricity sector, including project development and planning, financing, generation, supply, transmission, distribution and market regulation.

- ***Oil and Gas***

Our team is recognised as a leading practice in the Oil and Gas sector and we regularly advise developers and banks in relation to the development and financing of oil and gas fields, the transportation and processing of oil and gas, documentation and negotiation of sales contracts and off-take arrangements.

- ***Liberalisation***

We have advised on all aspects of the current deregulation of the electricity and gas markets in Ireland, acting for several domestic and international energy companies in a rapidly changing environment. We have broad experience of dealing with regulators and antitrust authorities.

- ***Mining and Natural Resources***

We advise mineral and metals companies on various transactions and projects including financing, acquisitions, disposals, licensing and operational agreements.

- ***Renewables and Climate Change***

We advise on all aspects of renewable energy projects, including wind and biomass. We also advise on emissions trading, environmental regulation and policy in the renewables sector.

- **Project Finance and Public Private Partnerships (PPP)**

We advise government bodies, banks and developers on some of the largest project financings in Ireland across the range of industry sectors (transportation, oil and gas, electricity, telecoms, mining and metals). In 2004, we advised on some of the largest project financings in Ireland.

- **Public Policy**

The legal, political and regulatory environment in Ireland is becoming increasingly more complex. We assist clients in understanding how political and regulatory developments impact on their business.

- **Privatisation and State Sector Restructurings**

Our firm has advised the Irish Government and government entities in relation to the privatisation of government assets through share sales, asset sales and outsourcing.

- **Telecommunications**

Our Projects and Construction Group has a proven track record of documenting and negotiating construction and procurement contracts in the telecommunications sector.

- **Transport**

Transport is a core area for lawyers in our Projects and Construction Group. We advise on the development, financing and construction of roads, railways, bridges, ports and airports.

- **Water and Waste**

Our team advises on all aspects on water and waste projects, including licensing and regulation, development, financing and implementation.

- **Construction and Engineering (both contentious and non-contentious)**

We provide services to a variety of clients including government, local authorities, banks, developers, contractors and designers to help clients understand, reduce and manage the contractual risks involved in their construction and engineering projects. Where necessary, we assist our clients in resolving and managing disputes efficiently.