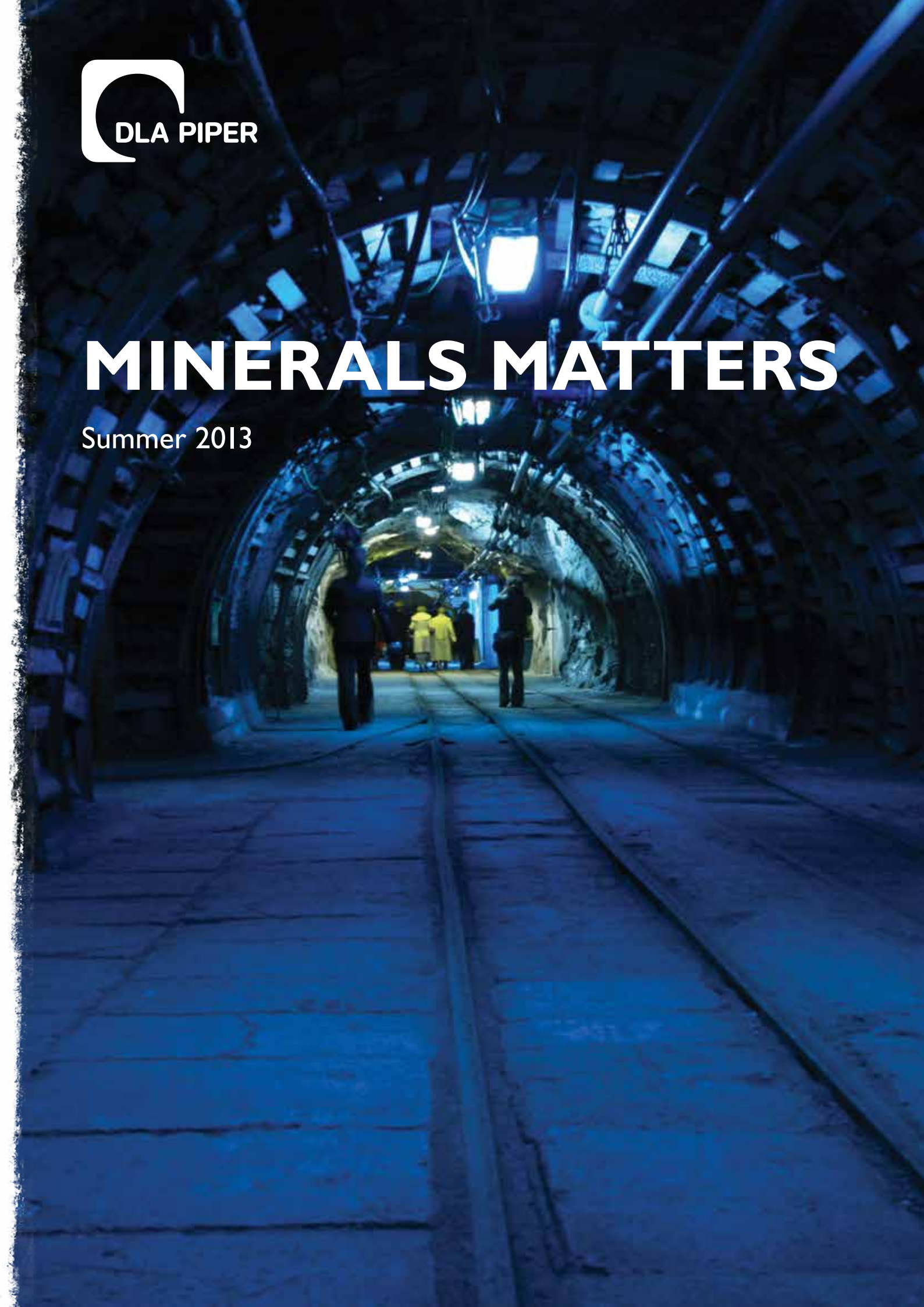
DLA PIPER

MINERALS MATTERS

Summer 2013



INTRODUCTION

Summer is finally here and with it comes the latest edition of Minerals Matters. In this edition we have covered a wider range of topics than ever before reflecting the breadth of expertise held within the DLA Piper Mining and Minerals group. We have articles on both trespass and nuisance claims (the latter in particular being an area where increased activity is being seen), proposed changes to the health and safety Approved Codes of Practice, information on minerals related capital allowances rules, an update on the changes to the ROMP system and a reminder about the imminent removal of the overriding status of manorial rights. Our sector head has also provided an overview of how best to plan, finance and deliver large mining projects.

As well as the issues covered within this edition there have been other notable developments in the Minerals sector over the last few months. These include the Government's announcement that aggregate and industrial minerals proposals be allowed to use the Nationally Significant Infrastructure planning regime opening up the potential for key consents to be dealt with as part of a one stop service. On this the Government has noted that whilst it does not intend to set legislative development size thresholds it anticipates publishing indicative thresholds, increasing that for aggregates and minerals to 150 hectares (from the 100 hectares proposed in the original consultation). Another key development is the introduction of the requirement from 1 July to CE mark construction products, an area in which we have recently advised a number of clients both from a manufacturing and retail perspective.

We hope that you find this edition interesting and informative and should you have any specific requests for articles for future editions or contributions from jurisdictions in which you would be interested please do not hesitate to contact Alastair Clough or Mark Keeling, the editors of this publication.

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ENGLISH ROMPS LESS FREQUENT?

The Growth and Infrastructure Act 2013 (25 April 2013) has introduced changes to the current system of review of mineral planning permissions in England to provide authorities and operators with greater flexibility to extend the time period between reviews, or to, effectively, postpone them indefinitely.

At present, Schedule 14 to the Environment Act 1995 ("the 1995 Act") requires mineral planning authorities in England and Wales to carry out periodic reviews of the mineral permissions relating to mining sites in their areas every 15 years (the precise review date is the date falling 15 years after the conditions to which the site's mineral permissions were last determined). Such reviews were introduced to ensure that older mineral permissions could be brought up to date in terms of operational and environmental requirements, and there is no doubt that the initial reviews have been effective in securing the proper conditions for the operation and restoration of these sites. With many of these sites now falling due for their second review, the legislative changes may well come as welcome relief to operators and mineral planning authorities alike, not least because of the significant cost and resource implications, and the fact that these operations have already been "modernised".

When brought into force, the provisions at Section 10 and Schedule 3 of the Growth and Infrastructure Act will amend the 1995 Act so as to give mineral planning authorities in England full discretion as to:

(i) whether or not to cause a periodic review to be carried out; and

(ii) if a review is desirable, when to conduct that review.

In any event, a review date cannot be any earlier than the relevant 15 year period as presently applicable. The changes will, in effect, allow for longer time periods between reviews than is currently the case and could potentially involve open-ended time periods.

The changes are retrospective in effect so that existing permissions can benefit from this increased flexibility. However, any permission which is already the subject of a review when these changes take effect will have to complete that process.

The changes do not apply to Wales. As yet, no commencement date for the new provisions has been set.

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TRESPASS AT YOUR PERIL

Bocardo's success in establishing subterranean trespass in the 2011 decision in **Bocardo SA v Star Energy UK Onshore Ltd and another** could be considered little more than a pyrrhic victory. Whilst trespass was established, the damages awarded were nominal as the court found that whilst pipelines had been laid under Bocardo's land to allow slant well drilling of oil from Star's adjoining land this had not diminished in any way Bocardo's enjoyment or use of its land. Bocardo had no right to the oil whereas Star was licensed by the Crown to extract it from the reservoir flowing between Bocardo's and Star's land.

The only real loss that Bocardo could be said to have sustained was the missed opportunity to negotiate a suitable wayleave payment for the laying and use of the underground pipes below Bocardo's land.

The court held that the issue of damages centred around what the Court would have assessed as proper compensation to be paid by Star to secure their right to install deviated wells or pipelines beneath Bocardo's land had Star sought to enforce that right pursuant to the Mines (Working Facilities and Support) Act 1966. Damages were assessed according to what the Court believed to be proper compensation for Bocardo having no choice but to allow Star to install their pipelines under Bocardo's land.

It could be suggested that the award of nominal damages in this case, a case very much assessed on its own facts, lulls those seeking to exploit subterranean rights into a false sense of security that no effective remedy is available to someone in Bocardo's position. Such an approach would be foolhardy.

Sub-surface fracking of a natural gas reserve or shale gas reserve that extends into another's property will be a trespass. Injunctive relief may be sought including damages to exert pressure on operators to settle.

The courts may be minded to exercise their discretion and order activities to cease if an adjoining landowner can establish that his land has been damaged as a result of these activities and that enjoyment of it has been lessened. Substantial damages may be available if the court is not minded to prevent operations by granting an injunction if it takes the view that compensation in monetary terms can adequately compensate for loss.

In the case of fracking where some claim contamination may be caused to the water table, lead to methane emissions or seismicity a claim for damages in nuisance may lie irrespective of whether there has been no direct trespass, widening out the number of potential claimants to those whose land is not immediately adjacent to operations.

The position is further complicated if there are valuable minerals interests and more so if they are excepted or reserved from the surface land holding. This may not be immediately evident from the land registry title. An operator could therefore be facing separate claims in trespass and nuisance from a surface owner, any minerals owner and further afield in nuisance from land owners whose landholdings are not immediately adjacent. Each will have different interests to protect where losses will not be identical and will in some cases substantial.

The registration of mines and minerals held apart from the surface is not compulsory (s.4(9), Land Registration Act 2002) in most cases. It is possible to make a voluntary application to register mines and minerals at any time.

This leaves an operator in an unenviable position where considerable capital expenditure is required to get a project off the ground in an environment where it is impossible to extinguish all risks.

Thorough due diligence is therefore key at the outset of any project. On the other hand, land owners or those with minerals interests should act quickly as soon as it becomes evident that their interests will be impacted so they preserve all legal remedies available to them.

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MINERALS OWNERSHIP – is your title at risk?

Since the enactment of the Land Registration Act 2002 a countdown has been running in respect of certain categories of overriding interest, including manorial interests, and with effect from 12 October 2013 these interests will lose their overriding status and cease to bind successors in title.

Why is this of interest to the mining sector? The reason lies in history and the fact that many of the ancient tenures of land excluded minerals, and manorial rights reserved exploitation of minerals to the Lords of the Manor. These rights have historically benefitted from protection notwithstanding that their existence is neither apparent from the registered title nor in many instances even from the title deeds.

In 2002 the decision was taken that these interests were relics from the past and their status ran contrary to the principle which the registration system seeks to promote, i.e. transparency. The Act therefore gave holders of such rights a 10 year period in which to register their interest at the Land Registry.

The impact of the change is more extensive than may originally be apparent. There is a presumption that the mines and minerals are included with the title to the surface unless title indicates otherwise. The presumption does not however offer any practical protection for a surface owner or operator as it neither entitles the surface owner to a separate title to the mines and minerals nor provides any protection against third parties claiming title.

Unless the title to the surface specifically states that it includes the minerals, the Land Registry's indemnity does not apply. Therefore if a third party at a later date establishes a claim to the minerals the fact that an operator has relied upon the presumption that mines and minerals are included with the surface would not entitle them to compensation or protect them against a claim for trespass by the mineral owner.

Manorial rights holders will still have to establish their right to a mineral title to the satisfaction of the Land Registry and as any previous applicant will know this is a stern test which requires more than a mere 15 years good root of title to obtain an unqualified title.

Whilst manorial applicants will seek to obtain a title which is not capable of challenge, the practical consequence of any registration for mineral operators is not ultimately tied to the quality of title awarded. The mere fact that the Land Registry has supported, whether in an absolute or qualified manner, the severing of minerals from a title is certainly sufficient cause for concern to an operator who may as a consequence face claims from the nascent mineral owner for trespass, cessation of operations and compensation.

Operators may take comfort from the fact that over the 10 years since the 2002 Act there has been no reported influx of applications for registration of manorial mineral titles, however, as there is nothing like a ticking clock to encourage action, it is over the final months that the effect of the transitional provisions can really be judged.

In conclusion therefore, whilst the remaining months to October may well pass by without significant successful registrations, a prudent operator may still seek to protect key deposits or reserves against the risk of a third party claim by appropriate insurance. In any, event operators should ensure that all addresses for service filed for their sites with the Land Registry are currently up to date. This will ensure receipt of notification by the Land Registry of any application to register the minerals in order that they have the opportunity to rebut any application.

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WE NEED TO TALK.....

An integrated delivery strategy, with a clear framework, is the key to success. Getting to that point requires collaboration, a whole-of-project approach, and early engagement with financiers and investors.

Twelve months out from the last Hong Kong Mines & Money and the market has shifted once more. Consolidation, cost containment, revaluing and restructuring are continuing apace. As the worlds of mining and money meet once again, project proponents would do well to recall that preparation and planning are critical to their financing aspirations.

When a company embarks on a project, it enters a distinctively different management phase to that of operations. Unlike the management of operations, projects have a definitive beginning and end, they are performed by a limited number of people, typically using limited resources. With the effects of the GFC on access to the global money market still being felt, the finite and limited resources nature of projects is heightened.

Through our work on a variety of projects across different industries, we have come to believe that one of the most important and controllable contributing factors to a project's success is whether or not those limited human and financial resources are planned, executed and controlled in an integrated way.

All large complex projects have a number of moving parts. The key is to consider how those moving parts overlap and impact each other, in what sequence they should be considered and to understand the rolling wave planning phases over the life cycle of the project.

Getting the foundation of the project established during the feasibility stage is a critical first step. Clearly defining the overall deal structure, including concession rights, financing, tax , approvals, contracting and operations strategy is essential. Moreover, understanding how each one of the elements of the deal structure will impact each other, will ensure that one is not progressed in isolation to, and to the detriment of, the other.

However, an integrated delivery strategy can often be a case of catch 22. For example, a particularly frustrating situation for project developers is that many approvals (for example the State Agreements required for major projects) are linked to the demonstration of sufficient technical and financial resources. Investors and financiers however expect to have the approvals in place before they'll commit.

In these circumstances it is important to take an integrated and proactive approach to the entire approvals and land access component of the project. A realistic assessment of timelines – both in terms of the application and dealing with any objections, is critical to meeting funding milestones and exploration or expenditure commitments. And,

when approaching potential investors, it is critical that their expectations are managed carefully as many may underestimate the complexity of the regulatory environment and the time and cost involved in obtaining the necessary approvals (including FIRB).

The linkages between different aspects of the project are demonstrated in the following diagram.

Early engagement with financers is critical to ensuring that the delivery strategy not only meets the engineering requirements but is also bankable. The packaging of the project into its various components for the construction and delivery phase may be impacted by the requirements of the financiers, particularly if projects are debt financed. The best procurement strategy and contracting methodology from an engineering perspective will not necessarily be the best strategy from a bankability perspective.

The development of design, for example, needs to be carefully managed and the Principal's long term strategy for the construction phase considered. There is a balance during the feasibility stage to be struck between doing sufficient design in order to have certainty from an engineering and costing perspective whilst also permitting mid to long-term flexibility in relation to contracting models and methodology. Owners need to carefully manage the move from preliminary design to detailed design and make a conscious decision to do so. This requires early and up-front consideration of the construction and delivery strategy including for design, risk allocation and profile, contracting model and financing model.

Time constraints, small owner's teams and limited resources can lead to silos and non-sequential progress of the various aspects of a project. There is a balance to be struck between having the certainty to ensure projects are bankable, and the flexibility to adapt to the market in which the project exists.

An integrated delivery strategy, with a clear framework is the key to success.

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Capital Allowances for MINERAL EXTRACTION

Capital allowances are an important part of the tax planning strategy of any capital intensive industry. However the availability of a specific capital allowance regime for mineral extraction means that capital allowances are likely to be particularly important for the mining industry.

UK corporation tax does not recognise depreciation as a deduction against capital profit and capital losses are not always readily utilisable. As such, capital allowances are often the principal means of obtaining tax relief on capital expenditure.

Qualifying capital expenditure is pooled and then allowances are calculated on the pool on a reducing balance basis. Capital allowances are then set against general taxable profits to reduce the total amount of corporation tax payable. Capital allowances are currently generally available at a rate of 18% so that after 5 years relief will have been obtained for more than 60% of the initial expenditure. Capital allowances on the acquisition of a mineral asset (see below) are available at 10% and other qualifying mineral extraction expenditure is at 25%.

Capital allowances are designed broadly to mirror the effect of depreciation so allowances are not allowed in respect of all capital expenditure. Land, which would not generally be expected to depreciate, does not qualify for allowances. For most businesses the main class of assets qualifying for allowances is plant and machinery. While these can obviously be important for mining companies, there are certain specific types of expenditure relating to mineral extraction which are likely to be more important.

A company carrying out a mineral extraction trade can claim allowances for expenditure incurred on both mineral exploration and access and on acquiring a mineral asset. Mineral exploration and access means searching for, discovering or testing a source of mineral deposits, together with the costs of winning access to such deposits. The costs of acquiring a mineral asset include the cost of acquiring land containing mineral deposits but excluding any residual value the land may have independently of the mining deposits. So the costs of acquiring a mine would qualify but if the land was already valuable before the ore or other deposits were discovered the value of the capital allowances could be greatly reduced.

Although the costs of mineral exploration is qualifying expenditure, the company must be already carrying out a mineral extraction trade at the time the expenditure is incurred and this may not always be the case. HM Revenue & Customs has indicated that in the case of the development of oil and natural gas resources the relevant trade will not commence until developmental drilling. It may be possible to claim capital allowances in respect of research and development in relation to pre-trading expenses. If not, then pre-trading expenditure will generally be allowed, provided the expenditure is incurred not more than six years before the commencement of the trade and the assets are in use at that time. There will be problems therefore with claiming allowances for abortive expenditure. Allowances are also available for certain expenditure on restoring a site once exploitation has ceased, provided this is within three years of the end of the trade.

Given the large upfront capital costs in identifying, developing and exploiting mineral resources, the potential tax benefits from fully utilising capital allowances, both under the general rules relating to plant and machinery and the specific rules for mineral extraction can be considerable. It will always be worth considering the tax rules to ensure maximum relief in advance of incurring any actual expenditure.

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ODOUR NUISANCE CLAIMS AGAINST LANDFILL OPERATORS

Until comparatively recently, civil actions in nuisance have been fairly rare. This is because it is generally expensive for an individual claimant to prove his case, the claimant may well have limited means, especially by comparison with those of a large industrial undertaking, and is at risk of being ordered to pay costs to the defendant if he loses.

It is for that reason that Parliament intervened in the nineteenth century by imposing a duty on local authorities to deal with statutory nuisances, under powers now contained in Part III Environmental Protection Act 1990.

The advent of group litigation and conditional fee arrangements has changed the position by enabling litigation costs and risks to be pooled. This has significantly reduced the disincentives to litigation and has exposed landfill operators to a higher risk of civil claims in nuisance, particularly in respect of odour problems. The difficulties for operators have been significantly exacerbated by some unwise grants of planning permission, which have brought new housing developments in too close proximity to landfill sites, and also by recent weather conditions, which have increased leachate production and thus the potential for odour generation.

The potential for group litigation in respect of odour nuisance has been demonstrated by two recent actions which have reached the courts, *Barr -v- Biffa Waste,* a case against a landfill operator, and *Anslow -v- Norton Aluminium Limited*, a case involving odour nuisance from a smelter.

In *Barr -v- Biffa Waste,* the landfill operator made an attempt to stave off the group action by raising the argument that compliance with the relevant environmental permit provided a defence to the civil claim. Established case law suggested that a strategic planning permission could change the character and nature of the locality for the purpose of assessing whether or not particular activities amounted to a nuisance, and it was argued that modern environmental permits should be treated in the same way. That argument succeeded at first instance, but the claimants took their case to the Court of Appeal, which restated traditional nuisance law and held that compliance with an environmental permit could not provide "authority to commit a nuisance".

The Court of Appeal decision in *Barr -v- Biffa Waste* has certainly closed off an argument that appeared to offer one means of effectively preventing group actions in respect of odour nuisance from getting off the ground. However it would be wrong to assume that this means that a record of environmental compliance is completely irrelevant to the determination of civil claims.

It is true that it is a well-established principle of the law of nuisance that, if a particular activity was decided by the courts to amount to a nuisance, then the fact that the defendant used all due care in carrying it out has never provided a defence. However it should be noted that a defendant's compliance with an environmental permit may still be relevant to considering whether his use of the land he occupies is unreasonable, having regard to the character and nature of the locality, and therefore whether it actually amounts to a nuisance in the first place.

Furthermore, the *Barr -v- Biffa Waste* case suggests that compliance with an environmental permit may be relevant, even if the activity does amount to a nuisance, in deciding whether or not it is appropriate for the court to grant an injunction, and so possibly shut down operations, as opposed to ordering payment for damages in compensation for loss of amenity.

The *Anslow* case also provides consolation for landfill operators at the receiving end of group actions in a number of important respects.

Firstly, it makes it clear that the operation of an industrial process in a mixed area which has an industrial as well as a residential character, can only give rise to a successful nuisance claim if there is cogent evidence, in terms of the frequency and magnitude of impacts, that the operation of the process adversely affects residents to a significantly greater extent than could ordinarily be expected in such an area.

Secondly, it also makes it clear that in most cases of odour nuisance the courts will treat the claims as claims in respect of a temporary loss of amenity, rather than permanent damage to property, so the level of damages awarded to individual claimants will be relatively modest.

Finally, notwithstanding the amalgamation of claims for procedural purposes in a group action, the claims remain individual claims. Accordingly there will need to be clear evidence of nuisance actually suffered by the particular claimants concerned, and the extent of that nuisance.

Although landfill operators may now have to take group actions seriously, this does not necessarily therefore mean that they have to accept all claims lying down.

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CHANGES TO ACOPS:
MAKE SURE YOUR VOICE IS HEARD

Approved Codes of Practice ("ACOPs") are intended to provide practical guidance to assist compliance with health and safety legislation. Whilst not being legislation themselves they do have a special legal status in that if the ACOP advice is followed businesses can generally be confident that they are complying with the law but importantly if during a prosecution it is proved that the ACOP has not been followed it will be up to the defendant to demonstrate that it has complied with the law in some other way which can be difficult to achieve.

As many readers will know, back in November 2011 Professor Ragnar Löfstedt published his independent review of health and safety legislation "Reclaiming Health and Safety for All". One of the key findings of his report was that whilst the concept of ACOPs was generally supported, there was significant room for improvement to assist businesses in accessing clear guidance about their health and safety duties. One of the recommendations he made was for the Health and Safety Executive ("**HSE**") to review all of its ACOPs, a recommendation accepted by the Government and which led to a consultation about many of the 52 ACOPs currently in existence. That consultation took place over the summer of 2012 and the responses to it and the resultant HSE recommendations were published in January 2013.

The proposals included the revision, consolidation or withdrawal of 15 ACOPs by mid-2013 with minor amendments or no changes to be made to a further 15 by 2014.

Last year's consultation was simply in relation to whether various ACOPs should be withdrawn, consolidated or revised and did not go into detail about the specific changes to be made to any of the ACOPs themselves. The consultation responses generally indicated majority support for the Government's proposals and therefore individual consultations about specific changes to the relevant ACOPs are now underway.

There were, however, two proposals in particular that did not receive majority support, namely, the proposal to withdraw the ACOP in relation to the Management of Health and Safety at Work Regulations 1999 and the proposal to limit all ACOP documentation to a maximum length of 32 pages other than in exceptional circumstances.

The Management of Health and Safety at Work Regulations 1999 are of course one of the key pieces of health and safety legislation and set out requirements in relation to risk assessment, the appointment of a competent person as a safety adviser and arrangements for the effective management of health and safety. The Government's proposal was to withdraw the ACOP and replace it with more specific updated guidance. 52% of respondents disagreed with this proposal many citing the concern that the replacement of the ACOP with guidance would mean that the special legal status conferred through the ACOP would be removed thereby removing an element of comfort for businesses and also potentially making it more difficult for the regulators to successfully bring enforcement action. It has, however, been decided to press ahead with the

withdrawal of the ACOP with the intention to make the replacement guidance clear that the legal requirements will not change whilst making the requirements easier to understand.

70% of the respondents to the consultation disagreed with the proposal of limiting ACOPs to 32 pages in length with many indicating that the length of an ACOP needed to reflect the circumstances of the individual health and safety concern and should reflect the nature and complexity of that concern. It was also noted by some that ACOPs need to be comprehensive and provide sufficient detail to allow businesses to understand how they can comply with the relevant law. It has been reported that a recent HSE Board meeting agreed that a page limit on the length of ACOPs should not be introduced. It would therefore appear that those responsible for drafting the new ACOPs may have a remit to make them clearer and where possible shorter, but what some may consider an arbitrary page limit will not be defined.

The current position in relation to the individual ACOPs is that a number of consultations have been released including:

ACoP L24 – Workplace (Health, Safety and Welfare) Regulations – open until 30 July

ACoP L56 – Safe Installation and Use of Gas Systems and Appliances – open until 30 July.

ACoP L5 – Control of Substances Hazardous to Health – open until 23 August

ACoP L8 – Control of Legionella – open until 23 August

ACoP L138 – Dangerous Substances and Explosive Atmospheres – open until 23 August

A consultation is also due to be released shortly in relation to providing a new ACOP relating to materials containing asbestos. This is intended to consolidate the two current ACOPs relating to the "duty to manage asbestos" and that relating to work with materials containing asbestos.

Whilst the current intention is that a number of ACoPs which cover specific mining activities will not be changed at this stage, many of the above will apply to those that manage the safe operations of mineral operations and it is therefore strongly recommended that the consultations are considered in detail and, where relevant, the opportunity is taken to feed any concerns into the consultation process.

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With 77 offices throughout Asia, Europe, the Middle East, the Americas and more recently Australia, DLA Piper is ideally positioned to help your business obtain local legal advice in the mining and minerals sector, anywhere in the world.

Whilst Minerals Matters largely focuses upon legal and regulatory topics impacting on day to day operational matters in the UK, we, together with our international colleagues, can support all of your business needs in all of the major mining regions throughout the world.

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