



- INSURANCE
- CONSTRUCTION & ENGINEERING
- ENERGY & RESOURCES
- CORPORATE
- COMMERCIAL PROPERTY
- LITIGATION & DISPUTE RESOLUTION
- AVIATION & TRANSPORT
- PLANNING & ENVIRONMENT

## Financial assurance – edging closer to reform

James Plumb, Partner  
Johanna Kennerley, Senior Associate

We are edging ever closer to the implementation of Queensland's new financial assurance regime with the release of the draft regulation and associated guidelines.

The Queensland Government is reforming Queensland's mine rehabilitation framework. As part of these reforms, on 15 February 2018 the Queensland Parliament introduced the Mineral and Energy Resources (Financial Provisioning) Bill 2018 (Qld) (**Bill**). The Bill is designed to improve environmental outcomes and reduce the financial risk to Queensland if an environmental authority holder does not meet their rehabilitation requirements. Carter Newell previously discussed the reforms to Queensland's financial assurance regime and mine rehabilitation framework [here](#).

The much awaited *Mineral and Energy Resources (Financial Provisioning) Regulation 2018* (Qld) (**FA Regulation**) has been released. The government has also released various guidelines and information sheets that are intended to assist in interpreting the Bill.

### **The FA Regulation**

The FA Regulation supports the operation of the financial provisioning scheme by:

1. Setting a prescribed percentage as part of the formula to calculate the contribution to be paid to the scheme fund by resources proponents.

The prescribed percentages under the draft FA Regulation are:

Risk category allocation	Prescribed percentage
Very Low	0.5%
Low	1.0%
Moderate	2.75%

2. Defining a ‘prescribed insurer’ for issuing of insurance bonds as an approved form of surety.

A prescribed insurer must be approved under s 36 of the *Financial and Performance Management Standard 2009* (QLD) made under the *Financial Accountability Act 2009* (QLD). The definition excludes ‘sole parent captives’.

3. Setting an assessment fee for an allocation decision to be made. Fees are attributed to the authority holder on the basis of the value of its estimated rehabilitation cost (ERC). The fees range between \$250 (ERC less than \$1,000,000) to \$45,000 (ERC of at least \$100,000,000).

Submissions in respect of the draft FA Regulation close on 9 July 2018.

## Guidelines

Various guidelines and information sheets have been released for comment.

Arguably, the most anticipated guideline is the *Forming the Scheme Manager’s Option Guideline*, which is intended to assist Queensland proponents to understand

how the Scheme Manager will make an allocation decision.

### **Scheme Manager Guideline: Forming the Scheme Manager’s Opinion.**

The Scheme Manager is required to make a risk allocation decision and, in doing so, must take into account his or her own opinion ‘of the probability of the State incurring costs and expenses because the holder of the authority has not prevented or minimised environmental harm, or rehabilitated or restored the environment’.

This guideline will provide guidance to the Scheme Manager in relation to forming such an opinion. While the Scheme Manager may have regard to this guideline when forming such an opinion, it is not obliged to do so.

The guideline provides ‘basic rules’ for certain matters that have been raised by industry as key concerns in the application of the Scheme Manager’s opinion. Where a basic rule does not apply, a secondary rule is also given.

Some of the rules are set out in the table below:

Consideration	Basic Rule	Secondary Rule
Which holder to consider?	Where more than one holder, the Scheme Manager need only consider the financial soundness of one holder.  The entity selected should be the operator of the project, provided the operator holds a share of not less than 20% in the tenure.	The Scheme Manager should select a holder that holds a share of not less than 20% in the tenure.  If there is no such holder, the Scheme Manager should section a holder having regard to the ownership structure for the authority.
Considering financial soundness of parent.	The Scheme Manager should consider the financial soundness of a parent corporation that is an Australian company in priority to a parent corporation that is a foreign company.	Not applicable
Considering financial soundness (where entity has credit rating).	The Scheme Manager is not required to consider other financial information relating to an entity where the entity has a credit rating from an approved agency that is either: 1. A long term public credit rating; or 2. A private credit rating that is not more than 12 months old.	Not applicable
Considering financial soundness (where entity does not have credit rating).	Where an entity does not have a credit rating, the Scheme Manager may consider three years of audited financial statements and any other related factor.  The Scheme Manager may draw an adverse inference if the entity does not provide three years of audited accounts.	Not applicable
Consideration of resource project characteristics	For projects that are currently in commercial production, the Scheme Manager should consider characteristics which may affect the likelihood of sale of the project in the event of the failure of the holder, including: 1. Project Strength (including factors such as remaining economic life of the project, and off-take agreements); 2. Outstanding rehabilitation and site management obligations; and 3. Material compliance issues.	Not applicable

It is clear that the Scheme Manager's decision to determine the risk allocation on the basis of one holder of a jointly held tenure could materially affect some projects. The difference in the prescribed percentage between a very low risk project proponent and a moderate risk project proponent will have a significant impact on the value of the annual financial assurance contribution that a jointly held project will be required to make.

Project proponents may nominate a holder to be assessed, but it is not clear what regard the Scheme Manager is required to have to such a nomination.

### Other guidelines

Other guidelines released for comment include:

1. 'Assigning an Authority to a Relevant Holder', to provide guidance to the Scheme Manager on assigning the authority to one holder where there are multiple holders. The guideline requires that the Scheme Manager can pick any holder, provided that the Scheme Manager has assessed the financial soundness of that holder and that assessment has been taken into account.
2. 'Requiring Surety to Preserve the Financial Viability of the Scheme Fund', to provide guidance as to when the Scheme Manager should require a surety instead of a payment into the scheme fund to preserve the viability of the scheme.
3. 'Forms of Surety', which describes the approved terms for the provision of bank guarantees, insurance bonds and cash.

An information sheet is also available which generally summarises the role and authority of the Scheme Manager with respect to risk category allocation under the FA Bill, Regulation and guidelines.

Submissions in respect of the draft guidelines close on 23 July 2018.

## How will the FA Regulation and guidelines affect your project?

There is still a great deal of uncertainty as to the application of the new financial assurance regime.

There is no current guidance as to what credit rating (or similar) will lead to the designation of very low, low, moderate or high risk category. In addition, the treatment of jointly held tenure, and particularly tenure with an operator that does not hold at least 20% of a project, is uncertain at best.

Care should be taken when considering how these rules may apply to your project and its proponents. There are a number of exceptions and additional considerations in respect of each of the rules, and as noted above, the Scheme Manager is not required by the Bill to apply the guidelines.

As Queensland awaits further debate of this Bill in parliament, further amendments are being considered as part of the wider package of reforms to financial assurance and mine rehabilitation. We will review the next wave of proposed changes and consider how they could affect your business.

If you would like more information regarding the new financial assurance regime and how it might affect your Queensland mining or petroleum project, contact our Energy & Resources team.

## Authors



**James Plumb**

*Partner*

D: +61 (0) 7 3000 8367  
E: [jplumb@carternewell.com](mailto:jplumb@carternewell.com)



**Johanna Kennerley**

*Senior Associate*

D: +61 (0) 7 3000 8308  
E: [jkennerley@carternewell.com](mailto:jkennerley@carternewell.com)

Please note that Carter Newell collects, uses and discloses your personal information in accordance with the Australian Privacy Principles and in accordance with Carter Newell's Privacy Policy, which is available at [www.carternewell.com/legal/privacy-policy](http://www.carternewell.com/legal/privacy-policy). This article may provide CPD/CLE/CIP points through your relevant industry organisation. To tell us what you think of this newsletter, or to have your contact details updated or removed from the mailing list, please contact the Editor at [newsletters@carternewell.com](mailto:newsletters@carternewell.com). If you would like to receive newsletters electronically, please go to [www.carternewell.com](http://www.carternewell.com) and enter your details in CNJNewsletter signup.

The material contained in this newsletter is in the nature of general comment only, and neither purports nor is intended to be advice on any particular matter. No reader should act on the basis of any matter contained in this publication without considering, and if necessary, taking appropriate professional advice upon their own particular circumstances. © Carter Newell Lawyers 2018

**Brisbane**  
Level 13, 215 Adelaide Street  
Brisbane QLD Australia 4000  
GPO Box 2232, Brisbane QLD 4001  
**Phone** +61 (0) 7 3000 8300

**Sydney**  
Level 11, 15 Castlereagh Street  
Sydney NSW Australia 2000  
GPO Box 4418, Sydney NSW 2001  
**Phone** +61 (0) 2 8315 2700

**Melbourne**  
Level 10, 470 Collins Street  
Melbourne VIC Australia 3000  
**Phone** +61 (0) 3 9002 4500



ABN 70 144 715 010  
[www.carternewell.com](http://www.carternewell.com)