Carter Newell LAWYERS

Energy & Resources Newsletter | February 2018



# Mine rehabilitation and financial assurance – the new regime in Queensland

Johanna Kennerley, Senior Associate

On 15 February 2018, Queensland Government released the much anticipated Mineral and Energy Resources (Financial Provisioning) Bill 2018 (**Bill**). The Bill is substantially the same as the previous Mineral and Energy Resources (Financial Provisioning) Bill 2017 (**2017 Bill**), which lapsed due to the 2017 election.

The Bill proposes the introduction of two key changes to Queensland's mine rehabilitation and financial assurance regime:

1. A revised financial assurance regime that seeks to minimise the financial risk to the State if mineral and energy resource tenure holders do not comply with their environmental management and rehabilitation obligations. The new regime proposes the creation of a pooled fund for financial assurance contributions, and a more flexible way to provide sureties; and
2. New mine planning obligations that focus on progressive rehabilitation throughout the entire life cycle of a mine.

Our previous newsletters (which can be found **here**) provide detailed summaries of the policies leading to this Bill.

The Bill has been referred to the Economic and Governance Committee, which is due to return its report to the House by 20 April 2018.

## Revised financial assurance provisions

The Bill establishes the Financial Provisions Fund, otherwise known as the '***scheme fund***'. The scheme fund will receive contributions made by the holders of environmental authorities, also known as '***authorities***', issued under the *Environmental Protection Act 1994* (Qld) (**EP Act**). Other contributions will also be made to the scheme fund, including amounts earned as interest on cash surety held.

To manage the scheme fund, a '***scheme manager***' is to be appointed, and is tasked with:

 

1. Allocating environmental authorities to a risk category – being either very low, low, moderate or high;
2. Reviewing the risk category to which authorities have been allocated;
3. Managing the scheme; and
4. Setting investment objectives.

When deciding the risk category allocation for an environmental authority, the scheme manager must consider:

1. The scheme manager's opinion of the probability of the State incurring costs and expenses because the holder of the environmental authority has not prevented or minimised environmental harm, or rehabilitated or restored the environment, in relation to a resource activity carried out under, or to ensure compliance with, the authority;
2. Submissions made by the holder of the environmental authority (the scheme manager must notify a holder of the initial indicative risk category allocated, and the holder has an opportunity to make submissions); and
3. The scheme manager guidelines.

In forming an opinion, the scheme manager must also consider the financial soundness of the holder and any parent corporation of the holder. There is no definition for the term '*financial soundness*', but it is anticipated that the guideline will provide additional information and direction. The scheme manager may also consider the characteristics of a resource project to which the authority relates and any other matter that they consider relevant to forming an opinion.

If there is more than one holder, the scheme manager may consider the financial soundness of any or all of the holders and the parent companies of any or all of the holders.

The scheme manager must review the risk category initially given to an environmental authority each year, and may review it upon transfer of the relevant resources authority, including by change in control of a holder.

The scheme manager is required to make guidelines about the operation of the scheme, including a statutory guideline in relation to the making of allocation decisions. The guidelines are not yet available.

Holders can apply for review of some of the scheme manager's decisions pursuant to the *Judicial Review Act (Qld)* 1991, including a review of the risk category allocation.

## Financial assurance contribution

If the scheme manager allocates a risk decision of very low, low or moderate and the estimated rehabilitation cost is less than $450 million, then the holder of the authority must pay a financial contribution into the scheme fund. The amount of the contribution is calculated by multiplying the estimated rehabilitation cost with a '*prescribed percentage*' for that authority, which is determined by the risk category allocation made by the scheme manager.

The prescribed percentages will be set out in the relevant regulation, which is not yet available.

## Surety

If the scheme manager makes an allocation decision that the authority is a high risk category, or if the estimated rehabilitation cost is more than $450 million, then the holder of the authority must provide a surety for an amount equal to the estimated rehabilitation cost for high risk authorities, or the value of the estimated rehabilitation cost above the $450 million threshold.

The scheme manager may also require the holder of any authority to provide a surety in place of payment into the scheme fund if the scheme manager considers that the viability of the fund requires preservation.

Small scale mining tenure holders will also be required to provide surety.

Types of surety are to be expanded to include insurance bonds, bank guarantees and cash. These types of assurance can be used flexibly by proponents over the course of the authority by allowing proponents to use a mixture of different sureties to support their financial assurance obligation.

## Transitional arrangements

The estimated rehabilitation cost is initially determined to be the amount of an existing financial assurance for an authority. The calculation of estimated rehabilitation cost will remain under the EP Act, with some amendments.

However, it is of note that the definition of estimated rehabilitation cost has changed between the lapsed 2017 Bill and the current Bill. The original definition was limited to the estimated cost for the rehabilitation of the land on which the resources activity is carried out. The 2018 Bill expands the definition to include '*preventing or minimising environmental harm, or rehabilitating or restoring the environment, in relation to the resources activity*'.

While this wording substantially similar to the existing definition in the EP Act, details regarding specific calculation under the new regime are not yet known.

An authority with an estimated rehabilitation cost equal to or more than $100,000 will continue to be required to provide surety until such time as the scheme manager makes an initial allocation decision. This process will commence with the giving of a transition notice by the scheme manager to the holder of an authority. The transition notice must be given within three years from commencement, and it is understood that the scheme manager will provide guidance as to the likely timeframe that the affected authorities will be issued with a transition notice.

# Progressive rehabilitation and closure plans

By making amendments to the EP Act, *Mineral Resources Act 1989* (Qld) (**MR Act**), and the *Mineral and Energy Resources (Common Provisions) Act (Qld)* 2014 (**MERCP Act**), the Bill seeks to introduce new obligations on authority holders to require the preparation of a detailed Progressive Rehabilitation and Closure Plan (**PRC Plan**) for site-specific authorities. It is not clear at this stage whether similar requirements will apply to petroleum projects in the future.

The main purpose of a PRC Plan is to:

1. Plan for how and where environmentally relevant activities will be carried out on land in a way that maximises the progressive rehabilitation of the land to a stable condition; and
2. Provide for the condition to which the holder must rehabilitate the land before the authority may be surrendered.

A PRC Plan is required to be part of the environmental authority application for a mining lease.

The Bill also requires a Progressive Rehabilitation and Closure Plan Schedule (**PRCP Schedule**) to be prepared as a specific part of the PRC Plan. The PRCP Schedule is intended to provide additional detail regarding the rehabilitation objectives described in the PRC Plan, to set rehabilitation milestones and to confirm when each milestone will be met.

A guideline will be developed to support the requirements for PRC Plans and PRCP Schedules and to ensure the structure and content are consistent and comprehensive, and will include information relevant to both new and existing mines, and different commodities.

The Bill also confirms that land rehabilitation will be required as soon as reasonably practicable after land is '*available for rehabilitation*', which is defined to be land that is not being mined or used for related infrastructure, unless it will be mined within 10 years or has permanent infrastructure that will be retained.

# Non-compliance and enforcement

It will be an offence not to comply with a PRC Plan milestones or conditions.

The administering authority can issue an environmental protection order to ensure compliance with a condition of a PRCP schedule. However, a transitional environmental program cannot be utilised by the administrating authority (or be requested by a proponent) to address non-compliances with PRCP Schedule activities or milestones.

 

## Transitional provisions

It is intended that these reforms will commence in early 2019.

Within three years after commencement, existing site-specific environmental authority holders will be given a notice by the administration authority, stating that the holder must submit a proposed PRC Plan. The notice must specify the date by which the plan must be submitted, it is expected that the timeframe will range between 6 months and 12 months.

For existing mines with rehabilitation obligations or closure plans included in existing authority conditions, the holder will be asked to translate their authority rehabilitation conditions into milestones and milestone criteria. For authorities that do not have existing commitments regarding rehabilitation or post mining land use, the process of developing a proposed PRC Plan will require holders to prepare a PRC Plan including rehabilitation objectives, milestones and post mining land uses based on which stage the mining operation is in.

## Next steps

The Bill was referred to the Economics and Governance Committee for review. Submissions may be made to the Committee before 12:00pm, Friday 9 March 2018.

We will continue to keep you informed of all future developments.

Please contact us if you have any questions regarding the potential impacts of the new regime on your project.

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Energy & Resources Newsletter May 2017



# Financial assurance, mine rehabilitation and closure – a new perspective on an old issue

James Plumb, Partner

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## Part 1: Financial Assurance Review

### Introduction

The Queensland Government is concerned that some 220,000 hectares of land has been disturbed by current and historical mining activities. It is estimated that only 8% of this land has been rehabilitated. This poses a key risk to the State, both in terms of environmental concerns and potential financial impacts in circumstances where the State becomes responsible for rehabilitating the land.

In order to address the concerns regarding the financial and environmental challenges for mine rehabilitation in Queensland, the government commissioned the Queensland Treasury Commission to undertake the *'Review of Queensland's Financial Assurance Framework'* (**FA Review**). In response to the FA Review, the Department of the Premier and Cabinet has released two discussion papers: *'Financial Assurances Framework Reform'* and *'Better Mine Rehabilitation for Queensland'*. Submissions on the discussion papers close on 15 June 2017.

In this two part series, we will review the proposed changes to the financial assurance regime in Queensland, and separately consider the mine rehabilitation proposals that form part of the reform package.

## Current FA position

In order to manage environmental risk at mine sites, financial security, called a Financial Assurance (**FA**), is required to be provided by resource companies to the government prior to commencing mining activities. Queensland's current FA framework applies to mining and petroleum activities where a site-specific environmental authority is required. The amount of the FA is determined by the likely cost of rehabilitation for the area of disturbance, using the Queensland Government's FA calculator.

**Current process for FA submission**[1]


## FA Reform – the review

The FA Review was undertaken to provide the government with a better understanding of the current FA regime, and to conduct an assessment of a range of alternative FA models that could be implemented in Queensland, focussing on reducing risk for government and industry.

The review included significant targeted consultation with a range of stakeholders, including representatives of industry, land groups, environmental groups, and the finance sector. The FA Review set out some of the key risks and concerns highlighted by each group. These included the following:

1. Industry advised that for some medium projects, the cost of the bank guarantee to support the FA requirement is almost equal to the investment required to secure tenure and develop the project.
2. The finance sector stated that, in the US, two-thirds of guarantees are supported by insurance companies. Concerns regarding the Chain of Responsibility amendments in Queensland were also cited.[2]
3. Land groups are concerned about the long term sterilisation of land caused by the failure to properly rehabilitate mine sites.
4. Environmental groups raised transparency and an *'expectation gap'* between community expectation and the *'on the ground'* rehabilitation occurring in Queensland as a key concern.

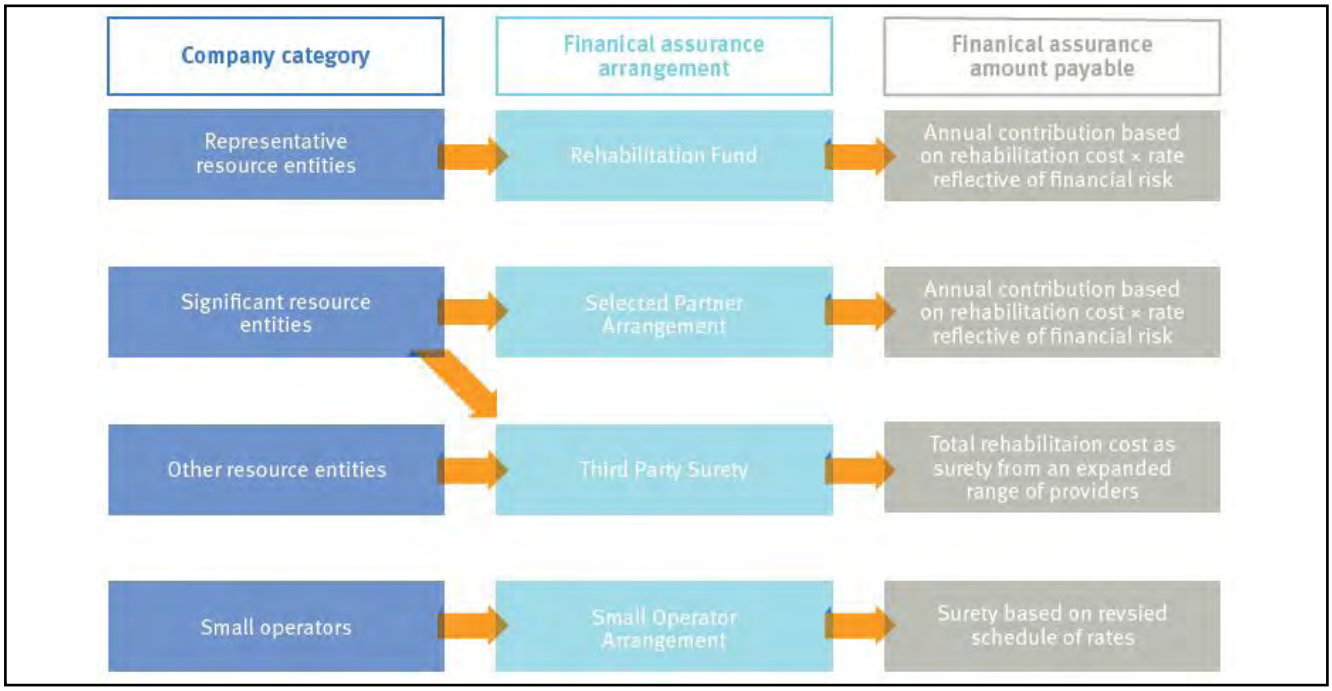
The review ultimately demonstrated that the existing FA regime has significant scope for improvement with respect to both financial impacts on the State and industry proponents, as well as environmental outcomes. The FA Review recommended a new FA regime, as well as a number of other reforms including a focus on better progressive site rehabilitation.

## FA Reform – the recommendation

The FA Review recommended that a *'Tailored Solution'* be adopted, to allow a more flexible approach to financial assurance and increased risk management.

The Tailored Solution contemplates an assessment of resources companies against four separate categories, which are intended to reflect the risk that a particular company poses, having regard to its financial risk profile and site rehabilitation estimate.

**Tailored Solution table**[3]




Once a company is classified, then its FA arrangement will be one of four options:

1. Rehabilitation Fund – contributions are to be made to a fund, which will pool contributions and allow the State to use those funds to rehabilitate an abandoned mine site, if required. Companies classified as *'representative resources entities'* will be required to pay into the Rehabilitation Fund. It appears this category will be the most common within the resources sector.

2. Selected Partner Arrangement – an amount will be paid to the Government similar to the rehabilitation fund, but these funds will be directed to other environmental initiatives by the Queensland Government (such as the abandoned mines projects). This type of FA arrangement will only be available to companies with large rehabilitation liabilities but extremely low risk of financial failure.

3. Third Party Surety – resource companies with an elevated risk profile will be required to provide a financial surety for the full amount of the estimated rehabilitation obligation. Possible forms of sureties are being reviewed to consider expansion beyond bank guarantees or cash. The FA Review noted insurance companies as a potential option to provide a new type of surety.

4. Small Operator Arrangement – smaller resources companies will fall into either the Third Party Surety or the Rehabilitation Fund, depending on the risk profile. However, the amount of the surety or payment required will be reduced in comparison to larger resources companies.

## Other reform areas

In addition to the proposed amendments to the FA framework, other areas of reform are also considered as part of the review, including:

1. Revising the Mine Rehabilitation Policy, to provide industry with clear and enforceable expectations. We will address this further in part two of this series.

2. Expanding of the types of surety that can be provided, including a wider range of banks and insurance companies.

3. Expanding the Abandoned Mine Lands Program to manage public safety in relation to historic abandoned mines, with a focus on mines on government land.

4. Better management of mines in care and maintenance. Improved oversight is proposed, which may include provision in the regulation for *'care and maintenance'* obligations.

5. Review of the ability for the State to consider the sale of shares in a company that holds mining tenure and an environmental authority.

6. Improved data analysis and information systems, particularly with regard to the collection and use of the pooling funds and FAs.

7. Clarifying the role of residual risk payments after the surrender of relevant tenure.

## Next steps

Submissions on the FA reform discussion paper are due before 15 June 2017. As part of the continued stakeholder consultation relating to the entire financial assurance framework reform package, feedback will be sought regarding the other reform agenda items progressively until mid 2018.

In part two of this series, we will take a closer look at the *'Better Mine Rehabilitation for Queensland'* discussion paper, which forms a key part of the overall reform agenda in Queensland.

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[1] Refer to Figure 2 in the *Financial Assurance Framework Reform Discussion Paper* - https://www.treasury.qld.gov.au/projects-infrastructure/initiatives/improving-outcomes-resources-sector/financial-assurance-framework-reform-discussion-paper.pdf
[2] Refer to our previous newsletters, Carter Newell Planning & Environment Newsletter October 2016 *'Are you personally liable? Lessons on environmental law and personal exposure'* and Carter Newell Planning & Environment Newsletter February 2017 *'CoRA Guideline approved - But is it just a bandaid solution?'.*
[3] Refer to Figure 3 in the *Financial Assurance Framework Reform Discussion Paper* - https://www.treasury.qld.gov.au/projects-infrastructure/initiatives/improving-outcomes-resources-sector/financial-assurance-framework-reform-discussion-paper.pdf

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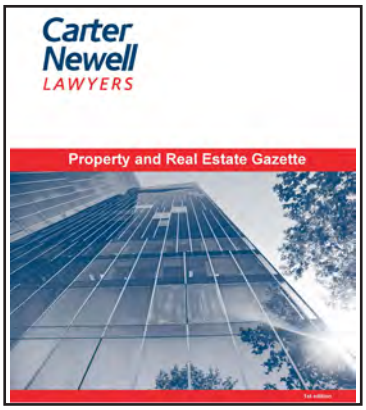


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Energy & Resources Newsletter May 2017



# Financial assurance, mine rehabilitation and closure – a new perspective on an old issue

James Plumb, Partner

Johanna Kennerley, Senior Associate

## Part 2: Better mine rehabilitation for Queensland

### Introduction

As discussed in part one of this newsletter series, the Queensland Treasury Commission (**QTC**) undertook a *'Review of Queensland's Financial Assurance Framework'* (**FA Review**). In response to the FA Review, the Department of the Premier and Cabinet has released two discussion papers: *'Financial Assurances Framework Reform'* and *'Better Mine Rehabilitation for Queensland'* (**Rehabilitation Discussion Paper**).

The discussion papers form part of the Financial Assurance Framework Reform Package being considered by government.

In part one of this series, we reviewed the proposed financial assurance package of reforms. In this part two, we review the proposed mine rehabilitation requirements.

### Overview

The low rates of rehabilitation have caused concern to the Queensland Government, prompting this review. When discussing the proposed mine rehabilitation reforms, the Queensland Environment Minister said that:

> This program of reforms is all about making sure rehabilitation happens progressively so it is not left as one big job for the end of the mine's life, and also ensuring that we have sufficient financial assurance every time one of those mines has *been* abandoned.[1]

 

As set out in the Rehabilitation Discussion Paper, failure to rehabilitate mined land is a key risk for government because:

1. There is more disturbed land at risk of becoming a financial liability for the State;
2. Environmental values are at greater risk due to the emission of contaminants from disturbed land;
3. Failure to convert to alternative economic uses affects post-mining employment and economic opportunities; and
4. There is an increased likelihood of transferring that risk from mines and that disclaim tenure or are abandoned.

Without better processes and performance of progressive rehabilitation of land disturbed by mining, the QTC's review found that Queensland will remain heavily reliant on the financial assurance system.

## Proposed framework

The Rehabilitation Discussion Paper recommends a six-element integrated mined land management framework that will deliver better environmental outcomes and decrease the State's risk of financial exposure for abandoned mines. It is intended that the new framework will apply to all existing and future mines that have a 'site-specific' environmental authority.

The six elements are:

1. **Introducing life-of-mine plans for all site-specific mines.** Mines that have a site-specific environmental authority will be required to prepare and implement a life-of-mine plan that provides for mine closure land rehabilitation strategies. The plan would require specific milestones with respect to rehabilitation to be set out in the plan, with a focus on progressive rehabilitation. It is intended that life-of-mine plans will be available for public review and consultation as part of the environmental authority application process. It is not clear at this stage what rights the public at large will have to object specifically to a life-of-mine plan.

   New site-specific mines will be required to prepare a life-of-mine plan as part of the application for new tenure (and the accompanying site-specific environmental authority) from mid to late 2018, after the commencement of the relevant legislative amendments.

   Existing site-specific mines are currently required to prepare a *'plan of operation'*, which are usually prepared in five year increments, and do not necessarily set out long term goals with respect to rehabilitation. It is proposed that existing mines will be transitioned to the life-of-mine plan requirements within two years of the commencement of the legislative amendments. Mines categorised as 'high risk' may need to comply within one year.

   It is not yet clear whether the life-of-mine plan will replace the five yearly plan of operation, or whether the two types of plans will operate together. The Discussion Paper specifically seeks comments on this issue.

2. **Regular monitoring, assessment and reporting.** Currently, operators are required to provide reports about their operations through annual returns, but the public reporting of compliance is limited. Preparation of the proposed life-of-mine plan may include a requirement to report on the key milestones set out in the plan, and specifically, the rehabilitation outcomes. In addition, assessment reports will be required, and consideration is being given to making the reports publically available.

   The Discussion Paper is also seeking views on the content and timeframes of assessment reports.

3. **Enforceable requirements for progressive rehabilitation.** Any milestones set out in the life-of-mine plan would be enforceable, so that the regulator could act if a resources company fails to meet its milestones. Measuring a company's achievement of its milestone targets would be done by assessment against a series of performance criteria, for the life of a mine.

4. **Clear completion and sign-off requirements.** The State proposes to prepare clear mine closure completion criteria relating to land rehabilitation and future use. The Discussion Paper specifically seeks feedback with respect to the level of detail required in the completion criteria.

5. **Performance based incentives.** The Discussion paper considers a range of measures that could be introduced to incentivise best practice rehabilitation management and outcomes. Incentives could include:

   a. preferential treatment to companies with a history of good rehabilitation performance;

   b. rehabilitation performance being a factor in the determination of a company's annual fees; and

   c. annual fees being reassessed on a regular basis, and potentially reduced for good rehabilitation performance.

   The State is seeking views on other incentives or disincentives that could be considered.

6. **Good quality data to inform policy and regulator implementation.** Rehabilitation data is presently collected from plans of operation and annual reports. This information is not necessarily electronic, and is not easily accessible to the public.

   The State is considering introducing additional data collection requirements, so that:

   a. electronic data is maximised;

   b. standardised data parameters are set;

   c. data is collected from all sites for the same period and at the same frequency; and

   d. visibility of the data to the public is enhanced.

   The State is seeking feedback as to the nature of the data that it should collect and publish.

## Next steps

Submissions on the Better Mine Rehabilitation for Queensland paper are due before 15 June 2017. As part of the continued stakeholder consultation relating to the entire financial assurance framework reform package, feedback will be sought regarding the other reform agenda items progressively until mid 2018.

We will continue to keep you informed of the coming developments.

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[1] Louisa Rebgetz, 'Queensland mine rehabilitation should be progressive, not left as one big job: Miles', *ABC News* (online), 19 May 2017 <http://www.abc.net.au/news/2017-05-19/queensland-mine-rehabilitation-progressive-reform-steven-miles/8540586>

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# Financial Assurance Reforms – Pooled funds and the new role for Insurance Bonds

Johanna Kennerley, Senior Associate

## Introduction

Mine rehabilitation and financial assurance **(FA)** is a hot topic at the moment, with many discussion papers and inquiries being undertaken by various levels and departments within government, including:

1. The Commonwealth's senate inquiry into mine rehabilitation (as it relates to Commonwealth responsibilities);
2. The recent Queensland Treasury Commission's *'Review of Queensland's Financial Assurance Framework'* **(QTC FA Review)** that reviews the FA regime in Queensland and across many jurisdictions, and provides a recommended solution for Queensland known as the *'Tailored Solution'*;
3. The Queensland Government's discussion paper *'Financial Assurance Framework Reform'* **(FA Discussion Paper)**[1] which further considers the QTC's '*Tailored Solution*' and seeks public comment on the recommendation; and
4. The Queensland Government's discussion paper *'Better Mine Rehabilitation for Queensland'* **(Rehabilitation Discussion Paper)**[2], describing the new and improved obligations on resource companies to rehabilitate land post closure, in conjunction with the FA reforms.

This paper aims to provide detailed analysis regarding the proposed changes to Queensland's FA regime, with specific consideration of the operation of the new pooled rehabilitation funds and the expansion of products available to provide third party surety for FA obligations.

## The 'Tailored Solution'

The QTC FA Review, and the subsequent FA Discussion Paper, proposes an alternative way for mining companies to provide FA to the Queensland Government. This model, known as the Tailored Solution, is intended to provide more flexibility to the market and be more reflective of the risk profile of industry participants.

The new regime will categorise companies into one of four types:

1. Representative Resource Entities;
2. Significant Resource Entities;
3. Other Resource Entities; or
4. Small Operators.

A company's category is primarily based on its credit rating and the size of its rehabilitation obligation. The table below summarises the different categories.

**Credit rating categories**

| Group name | Size | Risk | Rehab cost | No. of operators | FA device | FA provided by |
|---|---|---|---|---|---|---|
| Significant A | >5% of portfolio | A- & above | $2.8 billion | < 5 | Selected Partner Arrangement | Scheme, operated by Government |
| Significant B | >5% of portfolio | BBB+ & below | $2.6 billion | < 5 | Third party surety | Approved financial institution |
| Representative | >5% of portfolio | B- & above | $2.8 billion | 134 | Rehabilitation fund | Fund, operated by Government |
| Other | >5% of portfolio | CCC+ & below | $0.5 billion | < 10 | Third party surety | Approved financial institution |
| Small operator | >$50,000 | Any rating | $0.1 billion | ~3,600 | Not part of tailored Solution (separate solution in initiatives) | |

Once a company is classified into one of these four categories, then the corresponding FA arrangement will be one of the following options:

1. Representative Resource Entities will contribute to a Rehabilitation Fund.

   Companies classified as Representative Resource Entities will be required to pay into the Rehabilitation Fund. To be considered a Representative Resource Entity, a company must have:

   a. a rehabilitation liability of less than $500 million; and

   b. a credit rating of a B- & above (S&P or equivalent).

   Where the company does not have a credit rating, it can provide relevant financial information to the regulator for assessment. If the regulator confirms that the company's financial risk profile is acceptable, then it will participate into the Rehabilitation Fund. If not, then the company will be categorised as an Other Resource Entity and be required to pay a third party surety.

   Representative Resource Entities participating in the Rehabilitation Fund will be required to make an annual payment determined by calculating the estimated value of the company's rehabilitation obligation by a rate that is attributable to the company's risk profile (between 1% and 2.75%).

   It is intended that this category will be the most common within the resources sector.

2. Significant Resource Entities will enter into a Selected Partner Arrangement.

   A company will only be considered for participation in the Selected Partner Arrangement where it has large rehabilitation liabilities (i.e. above $500 million) and an extremely low risk of financial failure. If a Significant Resource Entity slips below an A- rating, the company may also need to provide Third Party Surety.

Significant Resource Entities participating in the Select Partner Arrangement will be required to make an annual payment determined by calculating the estimated value of the company's rehabilitation obligation by a rate that is attributable to the company's risk profile (less than 1%).

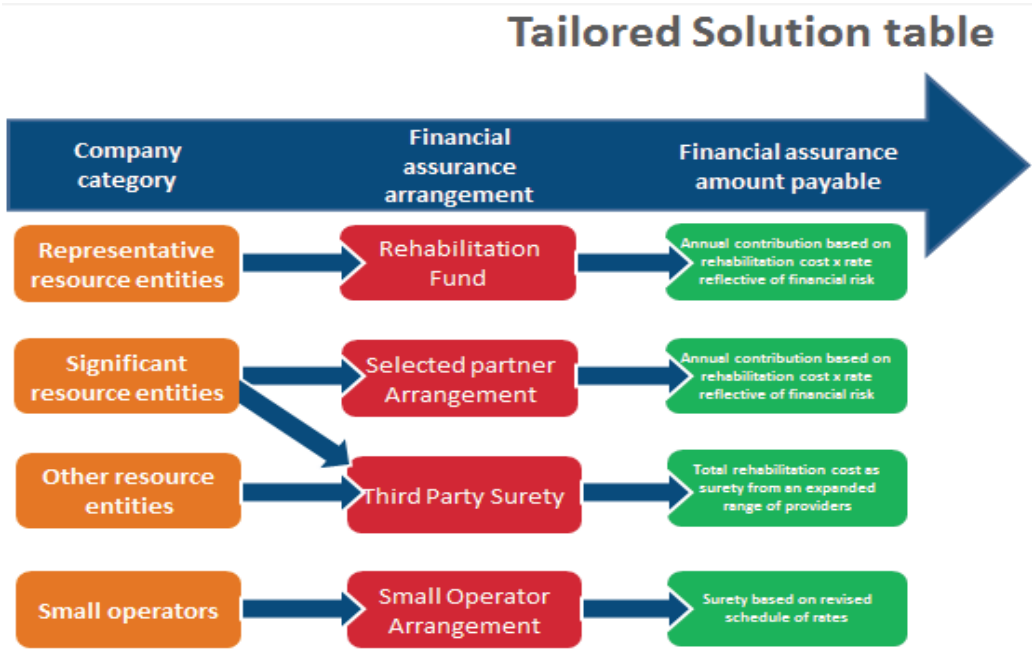
3. Other Resource Entities must provide a Third Party Surety.

   Resource companies with an elevated risk profile will be required to provide a financial surety for the full amount of the estimated rehabilitation obligation.

4. Small Operators will enter into the Small Operator Arrangement.

   Smaller Operators will fall into either the Third Party Surety or the Rehabilitation Fund requirements, depending on the company's risk profile. However, the amount of the surety or payment required will be reduced in comparison to larger resource companies.

The table below demonstrates the different categories of company and which type of FA will be required.




## Rehabilitation Fund

It is proposed that resource companies categorised as 'Representative Resource Entities' will contribute to the Rehabilitation Fund. Members pay an annual contribution based on the company's estimated rehabilitation cost (which should reflect the life-of-mine plans that require progressive rehabilitation) and financial risk.

The Rehabilitation Fund will accumulate payment contributions made by Representative Resource Entities and the State may draw down to meet the rehabilitation costs where a site is returned to the State (usually, because of company liquidation).

The use of the interest earned on these funds is subject to further consideration. One option is for the State to use interest earned for other projects, such as the Abandoned Mine Lands Program, which tackles the legacy issue of mines historically abandoned.

Companies classified as a Significant Resource Entity will also be required to pay into a fund under a Select Partner Arrangement. An amount will be paid into a separate pool fund, similar to the Rehabilitation Fund. However, these funds will be directed to other environmental initiatives by the Queensland Government (such as the Abandoned Mine Lands Program) instead of being held to respond to the outstanding environmental obligations of a failed Significant Resource Entity. Essentially, the Queensland Government will take on the risk of any rehabilitation required in the event of a Significant Resource Entity failing.

The concept of a Rehabilitation Fund has been generally supported by industry, but there are some concerns:

1. The primary cause for concern is the relationship between these reforms and the regulator's power under the Chain of Responsibility amendments. These amendments give the Queensland regulator the ability to require 'related parties' to undertake any required rehabilitation in circumstances of a company's financial distress or failure.[3]

   Notwithstanding that payment into the Rehabilitation Fund will be in lieu of a traditional security, it is unclear whether an amount paid into the Rehabilitation Fund will be used to respond, at all, to company failure prior to the site being returned to the State. It is possible that the regulator will rely more heavily on its new powers to require any related party, including company directors, management and financiers, to pay for the cost of a clean up or rehabilitation of a site where the company is unable to do so, rather than relying on the Rehabilitation Fund, or even amounts paid by the company into the fund.

2. The fundamental benefit of the Tailored Solution to resource companies is that the Rehabilitation Fund represents a more cost effective means to secure its rehabilitation obligations. However, the amount that will be required to be placed into a fund, how that amount will be calculated, the initial provision of funds into the Rehabilitation Fund, and at what point existing securities will be released, are all currently unknown. More detail is required to allow resource companies the opportunity to understand and assess the potential impacts.

3. The discussion papers do not provide detail regarding the treatment of unincorporated joint ventures, and in particular, the impact of joint venture parties having different credit ratings and therefore falling into different categories. The discussion papers also do not provide detail regarding how companies will transition into and out of the Rehabilitation Fund.

   The concerns numbered 2 and 3 above will hopefully be resolved during the process of amending the legislation. However, the regulator is unlikely to fetter its rights under the chain of Responsibility Legislation.

## Third party surety

For companies that are categorised as Other Resource Entities (and a subset of Significant Resource Entities and Small Operators), a third party surety will be required for the full amount of estimated rehabilitation costs. Under the current FA regime, third party surety can only be given by bank guarantee, provided by limited Australian banks.

Under the Tailored Solution, a third party surety can be issued by a wider range of providers, including foreign banks and insurance bonds, on the following conditions:

1. The surety is irrevocable, unconditional and payable on demand, and has wording acceptable to the regulator;
2. The entity providing the surety has a credit rating of A- or better;
3. The entity providing the surety is regulated in a jurisdiction satisfactory to the regulator;
4. Any legal disputes are dealt with under Australian law; an
5. The surety providing entity is approved by the regulator.

Under the Tailored Solution, there is no discount scheme proposed to reduce the amount of FA required. The total probable cost of rehabilitation will be required so that the FA held is equal to the actual estimated cost of rehabilitation. However, it is anticipated that cost savings can be obtained by increasing the number of institutions that can issue FA, as well as the type of FA that can be provided.

The QTC's FA Review specifically discussed the possibility of using insurance bonds instead of traditional bank guarantees. The FA Review states that in the United States of America, two-thirds of guarantees are provided by insurance companies.[4] In addition, the FA Review quotes examples where a bank 'fronts' the guarantee with an insurance company sharing the risk 'behind' the bank.[5]

It is anticipated that the introduction of offshore banking institutions and insurance bonds as possible traditional bank guarantee alternatives may result in cost reductions. This is widely considered as a positive for the Queensland resources sector, however, there are some concerns:

1. The high level of regulation within Queensland, and in particular, the Chain of Responsibility legislation, may dissuade new financial institutions (including both foreign banks and insurance companies) from providing financial products into the Queensland market.

2. Companies classified as Other Resource Entities under the Tailored Solution may not have the financial wherewithal to be eligible to purchase the types of insurance bonds available within the Australian market. With the cost of traditional bank guarantees increasing,[6] and the current discounting system scrapped, smaller or private operators may be left in a worse position than under the current regime if they cannot access alternative arrangements to satisfy FA obligations.

3. The QTC FA Review and the proposed Tailored Solution do not consider the availability of insurance policies as well as insurance bonds, in order to manage the risk of the Queensland Government being responsible for rehabilitation and clean-up. Some Australian jurisdictions are considering the use of insurance policies and bank guarantees (or insurance bonds) together to manage environmental risk, subject to various conditions including:

   a. the regulator being able to activate the policy; and

   b. the policy responding where the business or company fails.

   The ability to transfer some environmental risk that is offered by insurance policies should be further considered by Queensland's regulators.

4. Very few companies will have a rehabilitation obligation of less than $50,000 and therefore qualify for reduced financial assurance obligations under the Small Operator Arrangement. The value is too low, and should be increased to provide a financial benefit to the smaller participants in the resources industry.

## Conclusion

The current FA regime in Queensland is outdated. Feedback received for the purpose of preparing this article was clearly in favour of reform. However, overwhelmingly, in addition to the concerns noted throughout this article, resource companies are wary that the Tailored Solution focuses on the 'top end of town' and will have a detrimental impact on the smaller scale and private resource companies. As they say, the devil will be in the detail.

We will keep you informed of all future developments.

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[1] For more information about the FA Discussion Paper, please refer to Part 1 of our article 'Financial assurance, mine rehabilitation and closure – a new perspective on an old issue', Johanna Kennerley and James Plumb.
[2] For more information about the Rehabilitation Discussion Paper, please refer to Part 2 of our article 'Financial assurance, mine rehabilitation and closure – a new perspective on an old issue',Johanna Kennerley and James Plumb.
[3] For more information, please refer to our newsletters, CoRA Guideline approved - But is it just a bandaid solution? and Has the Queensland Government overreached in its battle with Clive Palmer?
[4] Queensland Treasury Corporation, Review of Queensland's Financial Assurance Framework (2017) 21. The FA Review does not specify whether the insurance companies are providing bonds or policies.
[5] Ibid.
[6] Ibid 23.

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