

# Tax Implications of Financial Assurance in Queensland



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# Financial assurance



- ✧ Financial assurance may be imposed as a condition of an environmental authority (EA).
- ✧ Financial assurance is a type of security provided to the state government to cover the expected cost of rehabilitating the land in the event the EA holder fails to do so.



# Queensland reforms



- ❧ *Mineral and Energy Resources (Financial Provisioning) Act 2018 (Qld).*
- ❧ Introduced new financial provisioning scheme for resource activities.
- ❧ Key feature – established a pooled financial provisioning fund.

# Tax implications



✧ Mechanisms of providing financial assurance:

- Contribution amounts
- Cash surety
- Bank guarantee
- Insurance bond

✧ M&A implications





# Contribution amounts



## ☞ Nature of payment:

- Annual payment based on risk category allocation;
- Non-refundable;
- Must be paid before activities commence under EA;
- Failure to pay may result in cancellation of EA.

## ☞ Tax implications

- Deductible under s 8-1 of the ITAA97?
- Capital versus revenue?

# Capital versus revenue



## ❧ Leading decision – *Sun Newspapers*

- Expenditure that establishes, replaces or enlarges the profit-yielding structure of a business is considered capital in nature; in contrast to continual working expenses.

## ❧ *GP International Pipecoaters*

- The character of the advantage sought by the making of the expenditure is the chief, if not the critical, factor in determining the character of what is paid.

# Contribution amounts



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# Cash surety



- ❧ Upfront payment.
- ❧ Cannot be accessed by the authority holder.
- ❧ May be refunded upon completion of rehabilitation.
  
- ❧ **Tax implications**
  - Capital versus revenue?
  - Div 40 cost of authority?
  - CGT regime?
  - Assessable recoupment upon refund?



# Bank guarantees & insurance bonds



- ❧ Surety whereby a third party agrees to pay the state government an amount (up to an agreed value) in the event the authority holder fails to comply with environmental obligations.
- ❧ Costs incurred to obtain surety.
- ❧ **Tax implications**
- ❧ Capital versus revenue?
- ❧ Div 230 – TOFA rules.

# Administration fees



- ❧ Assessment fees for each risk category allocation decision.
- ❧ Administration fees for particular sureties.
- ❧ Recurrent.
- ❧ Should qualify for general deduction under s 8-1.

# M&A Considerations



- ❧ Legislative requirements.
- ❧ Vendors may compensate purchasers for taking on financial assurance obligations attaching to assets.
- ❧ What are the tax impacts of making such payments?





# Vendor Implications



- ❧ General deduction under s 8-1 of the ITAA97?
- ❧ Div 40 cost of the authority – preferred view.

## Other considerations

- ❧ Section 40-755 deduction for environmental protection activities?
- ❧ Section 40-735 deduction for mining site rehabilitation?
- ❧ Section 40-880 (black-hole) deductions?

# Purchaser Implications



- ❧ Ordinary income - s 6-5 of the ITAA97?
- ❧ Capital gain?
- ❧ Assessable recoupment?
- ❧ **What if the payment is made directly to the government?**
- ❧ *Arthur Murray* principle.

# Conclusion



- Tax interacts with many areas of law.
- Complex and uncertain outcomes.
- Full paper available - June 2019 edition of Taxation in Australia, published by The Tax Institute.

