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Mining kryptonite – the tax that is no longer super

On 2 July 2010, the Australian Government announced that the proposed Resource Super Profits Tax will be replaced by a new resource rent tax arrangement – the Minerals Resource Rent Tax. Cutting through the media hype, Corporate Associate, Aaron Chan, and Lawyer, Paul Henry, discuss what this means and what can be expected to follow.

After considerable pressure from certain mining companies, the Australian Government has announced that the proposed Resource Super Profits Tax (RSPT) will be replaced by a new Minerals Resource Rent Tax (MRRT) and an extended Petroleum Resource Rent Tax (PRRT). It is forecast that the change will cost the Government $1.5 billion over forward estimates.

What does it apply to?

The MRRT regime will apply to iron ore and coal in Australia. The current PRRT regime, which only applies to offshore petroleum projects, will be extended to include all Australian onshore oil and gas projects.

When will it apply?

It is proposed that the new resources tax regime will begin 1 July 2012.

What does it mean?

- Reduced scope – by limiting the MRRT to iron ore and coal, around 320 companies will be affected (down from an estimated 2,500).
- Companies with resource profits of less than $50 million per annum will not have an MRRT liability.
- The company tax rate will only be cut to 29% (for small companies from 2012-2013, all others from 2013-2014) instead of 28%.
- The MRRT will apply at rate of 30% rather than 40% under the RSPT.
- Projects will be entitled to a 25% extraction allowance that will reduce the taxable profits subject to the MRRT.
- The resource exploration rebate (a refundable tax offset for eligible exploration expenditure) will not be pursued – resource exploration costs will continue to be deductible in the normal way.
- As part of the process of bringing existing projects into the MRRT regime, miners will be entitled to elect to use either book value (mining rights excluded) or market value to calculate the starting base of project assets. If book value is used, depreciation is accelerated over 5 years and an uplift of the long term government bond rate plus a premium of 7% will be applied. If market value (as at 1 May 2010) is used, depreciation is based on the effective life of the assets (not exceeding 25 years).
- Under the MRRT regime, investments made from 1 July 2012 will be able to be written off immediately.
- MRRT losses will be transferable to other iron ore and coal projects in Australia so that a company can use the deductions that flow from investments in the construction phase to offset the MRRT liability from other projects in the production phase.
- Unutilised MRRT losses will be carried forward at the long term government bond rate plus 7%.
- Unused credits for royalties paid will also be uplifted at the long term government bond rate plus 7%, but will not be transferable or refundable.
- The PRRT will continue to apply at a rate of 40%.

What happens next?

The Government is establishing a Policy Transition Group (PTG) which will be led by the current Resources Minister Martin Ferguson and the former BHP Billiton Ltd chairman Don Argus. The role of the PTG is to consult with industry and advise the Government on the implementation of the new MRRT and PRRT arrangements.

Conclusion

The proposed resources tax regime is still lacking many details and given the recent election there are significant hurdles to overcome (including continuing opposition from small and mid-size miners) before the resources tax regime will be in place. In the coming months we are likely to see further developments which should clarify what form (if any) the proposed resources tax regime will take.

Dividends – beware the new changes

The Government's recent changes to the law concerning a company's ability to pay dividends potentially may undermine sound corporate structures. Corporate Partner, Craig Yeung and Associate, Kylie Barrie explore some of these issues.

There has been surprisingly little discussion surrounding one of the most fundamental changes to the *Corporations Act* in recent times. Under recent changes, dividends can be paid regardless of whether the company has profits.

Dividends now may be paid, irrespective of whether the company has current year or retained profits, if the company satisfies a three stage test.

Under the new three stage test, section 254T of the Act allows a company to pay a dividend if:

- the company's assets exceed its liabilities immediately before the dividend is declared and the excess is sufficient for the payment of the dividend
- the payment of the dividend is fair and reasonable to the company's shareholders as a whole, and
- the payment of the dividend does not materially prejudice the company's ability to pay its creditors.

One of the reasons the Government gave for amending the *Corporations Act* was that the definition of "profits" was not widely agreed upon and as such caused difficulties for companies when determining whether they could pay dividends out of profits. The question was often whether to use the legal precedent of the meaning of profit, or the accounting standard. The Government has maintained that the abolition of the profit test eliminates this issue for companies.

While at first glance section 254T appears to allow more flexibility for companies to pay dividends, it has a number of consequences that companies should be aware of.

Corporate groups are often structured so that a holding company holds shares in numerous operating subsidiaries, each of which runs a part of the group's business. These subsidiaries are often debt financed by holding company loans and may, for asset protection reasons, have a deficiency of assets against liabilities whilst being solvent because of support from the holding company. Notwithstanding this deficiency, the subsidiary may be profitable and its cash flows may be needed by the holding company.

Under the old law, the holding company would have been able to draw on the profits from the subsidiary by way of dividends. Under the new law, however, the subsidiary would not be able to pay dividends to the holding company because the subsidiary's liabilities exceed its assets.

Therefore, company groups should consider whether or not the new law will impact on how the group is able to extract profits of subsidiaries to the holding company. Furthermore, the new dividend payment rules may impact on how future corporate groups are structured (for example whether and to what extent it should be debt funded by the holding company) so that dividends are able to be paid to the holding company if necessary. Finally, company groups should consider other corporate structuring or asset protection strategies that would offer similar protections under the new law.

Other potential considerations include a review of the company's constitution to see whether the provisions on dividends require dividends to be paid out of profits. If so, they should amend their constitution to avoid having to satisfy the profits test in addition to the new law. Similarly, when incorporating a new company consideration should be given to the dividend provisions when drafting the constitution.

The new law, specifically the test of whether "assets exceed liabilities", may not always be easy for smaller companies to apply. Determining what is an asset or liability can sometimes be a difficult accounting question and given that small proprietary companies may not prepare accounts in accordance with accounting standards, it may impose an unnecessary, expensive burden on the company.

Failing to understand or appreciate how the new dividend rules impact on a company or corporate group may result in a payment of a dividend being an illegal return of capital, resulting in potential liability for company directors.

Smooth moves

Moving premises can be a challenging process for any business. Good planning, combined with appropriate professional assistance is the key to minimising disruption and maintaining business as usual through any transition, as Property Partner, Tony Britten-Jones explains.

Covering all bases

Proper preparation and appropriate agreement for lease (AFL) terms are crucial to ensure a smooth and successful move. There are many issues which need to be considered early in the negotiation process to give greater the bargaining power. These include:

- fitout coordination
- timelines
- tax effective incentives
- mechanical and utility services
- outgoings
- energy efficiencies
- insurance provisions
- clear landlord obligations
- and responsibilities
- subletting and assignment flexibility
- rent review and renewal terms
- accurate measurements and surveys
- landlord legal expense issues
- make good and end of tenancy obligations
- guarantee and security obligations
- lease enforceability against mortgagees and future owners
- signage
- naming and directory rights
- permitted usage rights.

Getting the right advice

There will be several advisers – real estate, accountants, architects, builders – who are involved in this process over all, but knowledgeable and practical legal advice can be the glue that binds the whole process and helps to ensure you are in your new premises on time and within budget.

Here are some of the key stages at which the right legal advice can make a difference:

Review of Initial Proposal

A lawyer will be able to review the proposed letter of offer, meet with you (and if you wish, your accountant) to make recommendations as to the offer's wording and assist in having those recommendations reflected in the final offer. The lawyer will also search the title to the property to check that the correct landlord entity is named in the offer and that the property description is correct. Typically, at this stage draft formal lease documentation is not reviewed.

Good legal advice at this point can help set the tone for the remainder of the transaction and place you on a path to a smooth transition.

Review of Formal Documentation

Once the letter of offer has been agreed and signed (and ideally expressed as being conditional upon agreement to the terms of the formal agreement for lease being reached), a full legal review of the formal lease and, if applicable, AFL documentation will be necessary. Your lawyer will recommend amendments or additions to the lease and AFL documents and liaise with the leasing agent and the lessor's lawyers to have the recommendations incorporated in the documents.

If the premises are yet to be built or substantial construction, refurbishment or fitout are yet to occur, there will be "lessor's works" provisions and/or a "lessee fitout period". These provisions and other relevant provisions should be contained in an AFL. The AFL precedes the actual lease document, although a draft of the lease in an agreed form will be annexed to the AFL. Once the works are complete, handover has occurred, the commencement date determined and the new premises surveyed, the lease document is entered into and is able to be registered at the Lands Titles Office.

End of tenancy

Another crucial aspect of moving is advice associated with the end of any existing tenancy and related obligations and rights. At this point, your lawyer would undertake a review of this lease and any associated bank, directors or other guarantees and make an assessment of the relevant provisions in the legislation relating to retail leases or residential tenancies would apply to it. Your lawyer would then meet with you and, if need be, the lessor or its managing agent, and confirm in writing your position. If there are significant "reinstatement" or "make good" works to be undertaken by you, negotiations with the lessor/managing agent may be helped if you have first obtained advice as to the likely cost of attending to those works.

The message is relatively simple: early legal input and having a good team of advisors ready to assist you are the keys to getting into your new premises with a minimum of stress, making it a "smooth move".

"Talk to my Lawyer at QCAT"

The Queensland Civil and Administrative Tribunal, in a rare decision, has granted leave to a party to be legally represented in an anti-discrimination matter. In Abdelkadiri v IKEA Limited and Others, Senior Member Endicott agreed with the submissions of the respondent's solicitors, that its clients should be legally represented throughout the proceedings. Employment Relations Associate, Justin Le Blond and Law Clerk, Brett Watson explain the decision.

The use of legal representation is, for the most part, contrary to the purpose of Queensland Civil and Administrative Tribunal (QCAT) pursuant to its enabling legislation. Section 43 of the *Queensland Civil and Administrative Tribunal Act 2009* (the Act) sets out that parties are expected to represent themselves unless the interests of justice require otherwise. QCAT retains the discretion to grant leave for legal representation under s 43(2)(iv) of the Act. In exercising this discretion, QCAT may consider:

- the complex legal or factual nature of the proceedings
- the representation status of another party
- agreement between the parties regarding representation.

Abdelkadiri v IKEA Limited and Others (The Proceedings) were initiated when a complaint was lodged with the Anti-Discrimination Commission of Queensland in May 2008. The complaint was subsequently referred to the Anti-Discrimination Tribunal of Queensland and then to QCAT in December 2009. A compulsory conference was held before QCAT in May 2010 which proved unsuccessful.

The complaint lodged by Mr Abdelkadiri comprised several allegations of direct and indirect discrimination relating to occupational health and safety obligations, shortened break periods, racial discrimination, misuse of his passport and unfair treatment in the workplace. The events described in the complaint took place over an extended period of time between November 2006 and May 2008. In another complication, a Deed of Release and Discharge was entered into between Mr Abdelkadiri, WorkCover Queensland and IKEA Limited in February 2010 that in the respondent's view, addressed some of the allegations.

The submissions filed and served on behalf of the respondents (amongst other things) argued that the Proceedings involved complex questions of both fact and law. The submissions noted that the wide range of unconnected allegations of discrimination, along with the varying direct and indirect nature of the discrimination alleged, would present overwhelming difficulties for a person without legal expertise seeking to defend themselves. Further, it was a real possibility that the respondent's witnesses may no longer be employed or contactable, and the representative of IKEA (who would be required to conduct the Proceedings in the event IKEA was not legally represented) was not in its employ at the time the alleged discrimination was said to have taken place.

Senior Member Endicott agreed that the combination of these factual and legal complexities were such that the interests of justice required the respondents to be allowed legal representation. This decision provides guidance to parties before QCAT that despite the overarching legislative intent to exclude legal representation at QCAT, parties should not be deterred from applying for leave to be legally represented where they face circumstances of similar legal and factual complexity.

Piper Alderman acted for the respondents in this matter.

The High Court's last word in *Osland v Secretary to the Department of Justice*

Dispute Resolution Senior Associate Ben Hartley and Law Clerk Simon Frauenfelder consider the High Court's recent decision in Osland, the latest instalment in a lengthy appeal process stemming from a Freedom of Information request made more than eight years ago and previously discussed in the September 2008 and May 2009 editions of e-Bulletin.

In 2002, Mrs Heather Osland made an FOI request under the *Freedom of Information Act 1982* (Vic) (Act), seeking access to legal advice provided to the Victorian Attorney-General. The advice related to a petition for mercy submitted by Osland, seeking a pardon for her conviction for the 1996 murder of her husband, a murder committed in circumstances of serious domestic violence.

In September 2001, the Attorney-General had announced in a press release that Mrs Osland's petition for mercy had been denied, the Attorney-General citing independent legal advice as the basis of the decision. In that press release, the Attorney-General stated that 'a panel of three senior counsel' had been appointed to consider the petition, and that their 'joint advice recommend[ed] on every ground that the petition should be denied'.

Mrs Osland requested access to all advice provided to the Attorney-General, but the Department of Justice claimed the documents were exempt from disclosure under s 32(1) of the Act, on the grounds that the advice attracted legal professional privilege. Osland appealed to the Victorian Civil and Administrative Tribunal (VCAT), unsuccessfully arguing that the Attorney-General had waived privilege by referring to legal advice in a public press release.

VCAT nonetheless ordered that the advice should be released under section 50(4) of the Act, which allows release of documents otherwise exempted from disclosure where the 'tribunal is of the opinion that the public interest requires … access to the document'. However, VCAT's application of section 50(4) — the "over-ride" provision — was overturned by decision of the Victorian Court of Appeal, a decision which was itself overturned by the High Court. The High Court held that significant differences of substance between the advice relied upon and advice obtained previously could have been a sufficient public interest basis to require disclosure. This being so, the Court of Appeal ought to have inspected the documents — something they had failed to do. On remitter, the Court of Appeal again found that the over-ride provision should not apply because, even considering the differences between advices provided, it was outside the scope of this provision for the court to decide, as a matter of *generality*, whether there should be public scrutiny of legal advices received by a Minister in connection with the making of an executive decision.

The case was again appealed to the High Court, on the grounds that the Court of Appeal did not perform the task required of it in accordance with the High Court's remittal. The High Court again set aside the Court of Appeal's decision because the 'generality of the Court's reasoning' suggested they had in fact found that differences between legal advices provided to ministers would generally not be sufficient to require disclosure — answering, in the words of the High Court, a 'question of law precluded by the terms of the remitter.'

The High Court held that the Court of Appeal had not considered that the different conclusions reached by counsel were based not on 'arcane disagreements … about the interpretation of the relevant law' but rather 'normative judgments about the desirability of exercising the prerogative of mercy'. The former was likely to be misunderstood, while the latter was readily comprehensible by members of the public. According to the High Court, the different conclusions raised by the earlier advices raised issues of the 'fairness and authority of the criminal justice system' and 'asserted inadequacies in the law in relation to domestic violence', both issues of sufficient public interest to 'put to one side' the privilege attaching to the advices.

Given the failure by the Court of Appeal in the previous remitter, and in the interests of providing finality for Osland, the High Court reinstated the original decision of the Tribunal rather than remit the matter to the Court of Appeal once again, ending a near-decade long dispute and finally giving Osland access to legal advice relied upon in denying her petition for mercy.

Update: Building Energy Efficiency Disclosure

The disclosure obligations to be introduced under the new Building Energy Efficiency Disclosure Legislation were discussed in the June edition of e-Bulletin. Property and Projects Lawyer, Brooke Thomas, provides an update and examines what this could mean for your business.

The *Building Energy Efficiency Disclosure Act 2010 (Cth)* (Act) received royal assent by Federal Parliament on 28 June 2010. This is Stage One of the National Framework for Energy Efficiency.

Disclosure affected buildings:

Owners and tenants of "disclosure affected buildings" will be required to comply with the Act. The *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2010* (Determination) was made on 16 July 2010 to specify the kinds of buildings that are "disclosure affected".

Section 4 of the Determination states that a building (or area of a building) is "disclosure affected" if:

a. it has a net lettable area of at least 2,000 square meters

b. the net lettable area is for administrative, clerical, professional or similar information-based activities, including any support facilities for those activities that are located in that area.

However, a building (or area of a building) will not be "disclosure affected" if:

- the building or area of the building is newly constructed or has undergone major refurbishments and a Certificate of Occupancy (Certificate of Classification in Queensland) has been issued which is less than 2 years old, or
- the building (or area of a building) is held under a strata title (body corporate) system.

After debate in Parliament, provisions have been included in the Act so that the scheme will not apply to leases/subleases of 12 months or less (including any options to extend).

Building Energy Efficiency Certificates

The Building Energy Efficiency Certificate (BEEC) will have three primary components:

1. an energy efficiency rating for the office building
2. information about the energy efficiency of the office lighting (either for the whole building, if it is the subject of the sale or lease, or the area of the building that is to be leased), and
3. general guidance on how the energy efficiency of the building may be improved. Further clarification regarding this guidance can be found in the *Building Energy Efficiency Disclosure Determination 2010* dated 8 July 2010 (BEED Determination).

Part 2 of the *Building Energy Efficiency Disclosure Regulations 2010* lists the information that must be included in a BEEC.

The owner or tenant will be required to register a BEEC with the Building Energy Efficiency Register before it offers to sell or lease the building. Both current and prior BEEC's will be available to potential buyers and tenants to inspect via the online registry.

Disclosure of the BEEC must be made:

- in all advertising material
- to all potential buyers, tenants and sub-tenants when requested.

The National Australian Built Environment Rating System (NABERS) Energy star rating will need to be disclosed in any advertisement about the sale, lease or sublease of the building or area of building. The requirements for how star ratings must be disclosed in advertisements are specified in the BEED Determination.

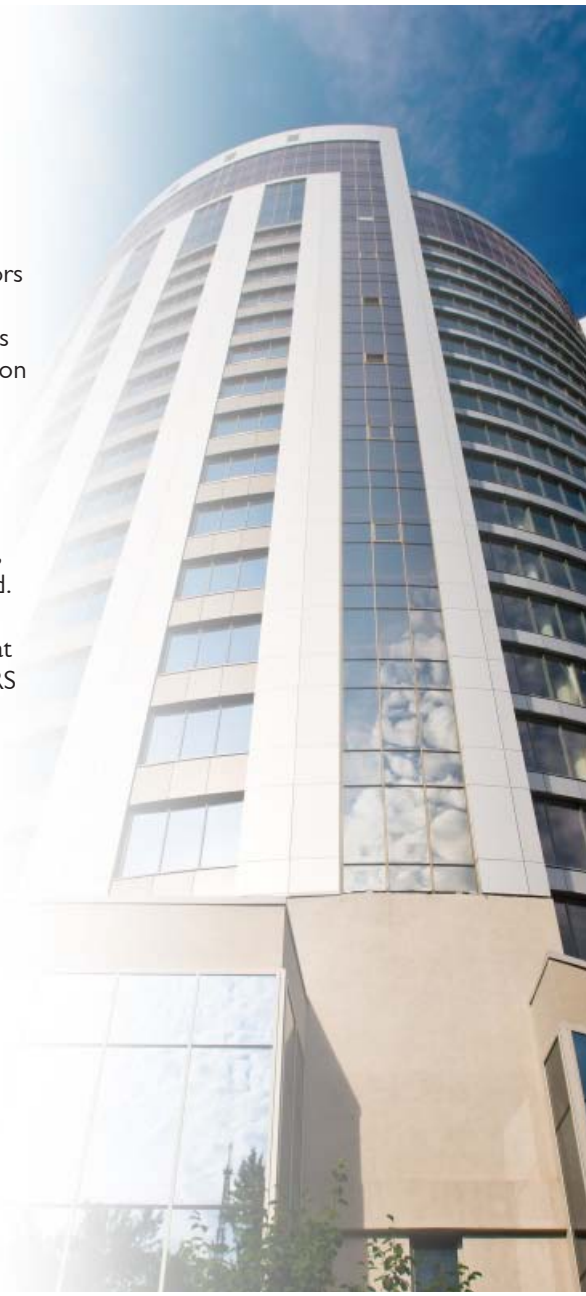
Penalty provisions

There is a maximum penalty of $110,000 for failing to register a BEEC or failing to provide an energy efficiency rating in an advertisement. The penalty provisions drafted in the *Building and Energy Efficiency Bill 2010* were revised so that the Act limits the penalty payable for particular contraventions where the infringement continues for more than one day. This means that each new day of the contravention after the initial breach will generally be calculated at a maximum amount of $11,000 per day rather than the initial maximum penalty of $110,000 per day.

Transitional provisions

Certain provisions of the Act commenced on 1 July 2010 to provide persons who will be subject to disclosure obligations with a period of time in which to prepare to meet those obligations. It will also enable the Government to ensure that adequate numbers of assessors and auditors are trained and accredited before the implementation day. Disclosure obligations will then commence on the "implementation day" which was fixed by proclamation on 8 July 2010 as 1 November 2010.

There will be a transitional period from 1 November 2010 to 31 October 2011 during which a valid NABERS Energy base, or whole building rating, must be disclosed. After the transition period, a full BEEC is required to be disclosed. It is advisable that owners of office buildings obtain a NABERS Energy Rating before the implementation day to obtain the benefit of the transition period.



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