Submissions

Mineral and Energy Resources (Financial Provisioning) Bill 2018

Submitter: The Trustee for the Wilson Family Discretionary Trust
Mailing address: [redacted]
Daytime phone number: [redacted]
05-Mar-18

To: Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane Qld 4000

egc@parliament.qld.gov.au

1. Executive Summary

1.1. The focus of our submissions pertains to the impact that regulation has on the burden to industry.

1.2. Our belief is that prescriptive legislation causes there to be no innovation.

1.3. Queensland Treasury have done amazing work to start looking at ways to reduce the burden on industry, and we are fully supportive of the direction for the State of Queensland.

1.4. In the current legislation, flexibility is given to decision and policy makers, to allow for flexible and adaptable solutions without the need for legislative amendment.

1.5. This draft legislation takes away the capabilities of the decision makers to develop policies or assess applications on the merits, unless that application falls within 1 of 3 boxes, being a bank guarantee, an insurance bond or cash.

1.6. The legislation should be amended to broaden the power of the decision makers to be able to (in certain circumstances) consider the merits of alternative forms of surety, as a means to encourage innovation and competition in the sector. This will allow informed debate, to later inform policy work within Queensland Treasury, rather than sending the message to industry that "you are in, or you are out" which shuts down productive policy conversations.

1.7. Without legitimate competition, we are likely to end up with similar burdens.

1.8. Without the flexibility of the decision and policy makers, the regulations will make industry try to fit into those boxes, rather than looking at the economic outcome, and development alternative and less burdensome ways to achieve the outcomes sought by the State.

1.9. Current government policy dictates that innovation is to be enabled through government

2. The problem

2.1. We understand the problem sought to be resolved by the legislation, was outlined in the Review of Queensland's Financial Assurance Framework Final Report prepared by Queensland Treasury Corporation.

2.2. A key objective is to limit the exposure of the State, to proactive management of remaining risks arising from failure to rehabilitate.

2.3. The key recommendation from this report were:

"*The TS option offers the Government some significant benefits:*

...

- *A benefit to the majority of industry (but not for a significant minority) through a reduction in the cost of business. "*

3. Where did the risk come from

3.1. Broadly speaking, there have been a few issues with this existing framework, being:

3.1.1. A framework that was almost entirely monopolised by banking institutions / Authorised Deposit Taking Institutions, resulting in:

3.1.1.1. Stagnation of innovation

3.1.1.2. unchecked costs and obligations being imposed (as there was no legitimate alternative)

3.1.2. A failure to properly assess the extent of costs and liabilities for meeting the statutory obligations under licence conditions.

3.2. We understand Queensland Treasury has indentified the enormous problem and now seeks through new direction and policy setting, to implement a framework where the liability is underwritten, so there are no residual financial responsibilities for the State of Queensland.

4. Relevant recommendations

4.1. The key recommendations for the report by Queensland Treasury were:

"Developing a custom product for each segment, the Tailored Solution has been designed to:

- *take a risk-based approach to managing the portfolio*
- *develop an improved environmental outcome by providing government with greater funds to complete rehabilitation where the operator is unable to do so*
- *reduce the financial impact of FA for Industry, and*
- *provide a source of funding to develop a best practice FA regime and associated projects such as an expanded abandoned mines program.*

5. What we know

5.1. Queensland Treasury have identified that there is a clear need for government to lead the reduction of the financial impact for Financial Assurances on industry.

5.2. Our understanding is that a key part of this is a focus on the cost to business.

5.3. We know that under current regulations, the "free market" (being the banking sector) has developed and held an unchecked monopoly given the State has accepted only bank guarantees.

5.4. Banking institutions have responded and feedback from industry appears to confirm that charges and general burdens, it is incredibly difficult to obtain and secure these kinds of sureties.

5.5. In fact, we know there is at least $250,000,000 in Cash Bonds. This is a symptom of a larger problem, that such huge volumes of cash are being held, rather than being productively managed within the economy. This demonstrates that the barriers to securing the bank guarantees discourages economic investment, and discourages participation in those banking products. There must be a problem if $250,000,000 is better left in government bank accounts, rather than in financial institution bank accounts.

6. What the legislation does

6.1. The proposed section 56 of the Bill provides:

"56 Form of surety

(1) The scheme manager may only approve a surety in 1 or more of the following forms—

(a) a bank guarantee—

(i) in the approved form; or

(ii) on terms and conditions approved by the scheme manager;

(b) an insurance bond issued by a prescribed insurer—

(i) in the approved form; or

(ii) on terms and conditions approved by the scheme manager;

(c) a payment of a cash amount—

(i) on the condition that the giver of the surety is not entitled to interest on the amount of the surety; and

(ii) subject to subparagraph (i), on the terms and conditions approved by the scheme manager."

6.2. Bank guarantees and undertakings

6.2.1. This form moves away from the current wording, which requires the provision of an undertaking from a financial institution in the approved form, and replaces it with the words 'bank guarantee'.

6.2.2. The approved form presently published by the Queensland Government, which Queensland Treasury advises will continue to be the approved form moving forward, also mirrors that it will continue to be an undertaking from a financial institution.

6.2.3. The concept of a bank guarantee is brand new by this legislation and policy and is not one that is adopted in Queensland in the implementation of this framework either by Queensland Treasury or implemented through the Environmental Protection Act.

6.2.4. The concept of a 'bank guarantee' is the colloquial name for an undertaking by a financial institution.

6.2.5. We recommend the term be changed to be consistent with how the State does business now so there is a consistent connection and terminology used between the legislation, the obligation and the approved form, to avoid confusion.

6.3. Burden on industry

6.3.1. Despite the clear direction of Queensland Treasury moving for a more flexible and less burdensome environment for industry, it has still created a very prescriptive form of surety. That is, the surety can ONLY be in 1 of 3 forms.

6.3.2. The present legislation (Environmental Protection Act) gives a very broad power to the Chief Executive to approve the form and amount of the surety. It is not prescriptive and allows the decision maker to consider all forms of surety. It is the policy and implementation of policy that which has resulted in only bank guarantees and cash being accepted.

6.3.3. This prescription, as mentioned above has created a false monopoly in favour of banking institutions, which the consequence, has been no innovation and incredibly high burden on industry.

6.3.4. If we are looking to achieve alternative ways to reduce the risk to government, and to avoid creating monopolies through mandatory prescription, a better model, would be allow the experts in Queensland Treasury, evaluate any form of surety to see whether it achieves government purposes.

6.3.5. If we define these as the only forms of surety that are acceptable, industry will respond by building products which fall into those defined categories. That is, they will tick the mandatory boxes, and then look at how to increase profits. This is likely what has occurred in banking institutions and being prescriptive in this space, will simply lead to burden on business again.

6.3.6. The desire to reduce the burden on industry, is to open up the regulations, to see what other opportunities might exist across the market place. This will allow the market to identify other forms of surety (in name or function), which may be much less costly or burdensome to industry. That is, encourage the market to be innovative, and reduce the burden to industry.

6.3.7. Without this flexibility to assess all proposals on the merits, the State is continuing to tie themselves to a very narrow part of the market, again, potentially limiting innovation through their regulations. We will simply be in the same position as before, that is, industry trying to figure out how to fall into a category.

6.3.8. It would be very unfortunate outcome, if there were innovations in Queensland, that were not contemplated as being within one of those 3 forms, that achieves better than present outcome for all parties. In that situation, legislative reform is necessary, which will drive innovation into other markets which do not have the same legislative barriers.

6.3.9. This submission confirms that the market does have such instruments available, which meet the current framework under the EP Act, which are over 50% less burdensome to industry on a cost basis, and remove substantial barriers for industry accessing them. These instruments also offer creditor protection for the benefit of the State of Queensland.

7. Royal Commission into Misconduct in Banking and other sectors

7.1. On 14 December 2017, the Governor-General of the Commonwealth of Australia, His Excellency General the Honourable Sir Peter Cosgrove AK MC (Retd), appointed former High Court Judge, the Honourable Kenneth Madison Hayne AC QC, to inquire into and report on misconduct in the banking, superannuation and financial services industry.

7.2. The establishment of the Royal Commission comes after many scandals and a lessening of Community trust in the Financial Services industry over recent times.

7.3. Amongst the Terms of Reference were the following:

(b) whether any conduct, practices, behaviour or business activities by financial services entities fall below community standards and expectations;

(c) whether the use by financial services entities of superannuation members' retirement savings, for any purpose, does not meet community standards and expectations or is otherwise not in the best interests of those members;

(d) whether any findings in respect of the matters mentioned in paragraphs (a), (b) and (c):

(i) are attributable to the particular culture and governance practices of a financial services entity or broader cultural or governance practices in the relevant industry or relevant subsector; or

(ii) result from other practices, including risk management, recruitment and remuneration practices, of a financial services entity, or in the relevant industry or relevant subsector;

7.4. The prescription of specific financial services instruments contained in the draft Legislation could appear to be supportive of such institutions at a time where a Royal Commission is probing the culture, practices and conduct in dealing with consumers.

7.5. The Royal Commission has received a submission from the Reserve Bank of Australia, where it points out that it is new competitors entering the market which tend to drive innovation within the sector[1].

7.6. The legislation in its present form has the real potential to be a re-badge of the existing way of thinking including leaving a door open for conduct subject to adverse findings in the Royal Commission, to continue into the underwriting of financial liability to rehabilitate in Queensland.

7.7. The legislation also has the real potential to lock out new entrants to the market, reducing the likelihood of innovation.

7.8. This will potentially challenge the very integrity of what the State is seeking to achieve, by endorsing only those products, provided by only those industries as the only businesses who can do this type of business in Queensland.

7.9. Ultimately, it is the role of the Australian Prudential Regulatory Authority to decide who is and is not licensed to provide these kinds of services in Australia. This legislation cuts across the jurisdiction of APRA, by confirming that many licensed providers, have no place in Queensland, despite being licensed by APRA to carry on that business.

7.10. By limiting the jurisdiction to be able to accept and assess applications to cash, bank guarantees and insurance bonds, this stops all innovation offered through alternatives, even where APRA confirms those products are compliant.

[1] See further Reserve Bank of Australia, Competition in the Financial System: Submission to the Productivity Commission Inquiry (September 2017), 38 .

7.11. It is exactly in the times when government interventions through things like Royal Commissions occur, where new ideas, fresh thinking and true innovation arises. To limit Queensland now, will be to lose opportunity and potential economic opportunities and efficiencies which arise.

8. Current government policy

8.1. The Queensland Government is a Labor Government. In section 2.16 of the State Platform 2017 policy statement it provides with our emphasis:

"Labor believes there is a role for government in helping to enable individuals and industry to pursue innovation that delivers new products and services for both Queenslanders and international markets. Labor supports the establishment of industries around new innovation and the services economy that will deliver the jobs of the future and diversify Queensland's economic base."

8.2. It is the current policy, and a priority of the current government to enable industry to pursue innovation to develop new products and services.

8.3. The prescription of 3 mandatory forms of surety simply forces the free market to fit inside one of those 3 forms, being:

8.3.1. A bank guarantee – i.e. the existing framework which created market barriers

8.3.2. Cash – which is an unproductive use of capital pending rehabilitation, slowing down our economy or

8.3.3. Insurance Bonds – which are limited in their application.

8.4. The framework is not consistent with current government policy. Current government policy, interpreted conservatively, would give the discretion to the experts in Queensland Treasury the power to set the policy around managing financial liabilities, however current accounting and financial practices are.

8.5. There must be a discretion and procedure at minimum, to approve alternative forms, if those are acceptable to the experts in Queensland Treasury.

8.6. Without that capability, there is a real prospect that these kinds of innovations will go elsewhere, again, hindering the economic prosperity of Queensland.

9. Recommendation

9.1. We recommend that the Scheme Manager be given broad authority to assess the merits of any form of surety. If it proposes to include a new form of surety not contemplated in section 56 of the Bill, then a subsection 56(d) would be included, along the following lines:

56 Form of surety

(1) The scheme manager may only approve a surety in 1 or more of the following forms—

(a) an undertaking from a financial institution ~~bank guarantee~~—

(i) in the approved form; or

(ii) on terms and conditions approved by the scheme manager;

(b) an insurance bond issued by a prescribed insurer—

(i) in the approved form; or

(ii) on terms and conditions approved by the scheme manager;

(c) a payment of a cash amount—

(i) on the condition that the giver of the surety is not entitled to interest on the amount of the surety; and

(ii) subject to subparagraph (i), on the terms and conditions approved by the scheme manager.

(d) another form, which:

(i) provides to the satisfaction of (either the Minister or Scheme Manager) either:

(A) the same or better security for payment than the approved forms contemplated above; or

(B) terms satisfactory to the (Scheme Manager or Minister) in all the circumstances;

(ii) is approved by the (either the Scheme Manager or Minister).

9.2. The broadening of this provision, allows the relevant decision and policy maker the power to:

9.2.1. consider innovative solutions on its merits, rather than making the solution fit onto 1 of the 3 defined boxes

9.2.2. provides the market the opportunity to look at ways to reduce cost, burden and impact on industry, in order to provide these products

9.2.3. the opportunity for increased market participation and competition (i.e. reduced monopolies)

9.2.4. the real opportunity for innovations to be established in Queensland, consistent with current government policy

9.2.5. Lead, through policy setting and enabling industry, innovation in the financial services and resources sectors.