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Exempt - section 22

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**From:** Rueckert, Michelle  
**Sent:** Tuesday, 19 October 2010 12:31 PM  
**To:** McDonald, Hamish; QTB  
**Cc:** RG BTD Resource Tax Unit; McCullough, Paul; Parker, David  
**Subject:** RE: QTB - article in the Australian on AGS legal advice regarding the capping of state royalties  
[SEC=UNCLASSIFIED]

Hamish

We had to make one minor additional change to the version I sent you a few minutes ago.

Please find attached the updated QTB.

Regards  
Michelle

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**From:** Rueckert, Michelle  
**Sent:** Tuesday, 19 October 2010 12:18 PM  
**To:** McDonald, Hamish; QTB  
**Cc:** RG BTD Resource Tax Unit; McCullough, Paul; Parker, David  
**Subject:** QTB - article in the Australian on AGS legal advice regarding the capping of state royalties  
[SEC=UNCLASSIFIED]

Hamish

Please find attached a QTB for the article that appeared in the Australian today on AGS legal advice regarding the capping of state royalties.

The link below is to the article itself -

<http://www.theaustralian.com.au/national-affairs/rudd-was-warned-of-legal-problems-with-mining-tax/story-fn59niix-1225940422802>

Regards

**Michelle Rueckert**  
Policy Analyst

Treasury Division  
The Treasury, Langton Crescent, Parkes ACT 2600  
phone: (02) 6263 2983

~~IN CONFIDENCE~~

*Treasury QTB*

## Category – Liaison to enter

### **CONSTITUTIONALITY OF THE MRRT – AGS LEGAL ADVICE**

#### **THE GOVERNMENT WILL IMPLEMENT THE MRRT IN ACCORDANCE WITH THE AUSTRALIAN CONSTITUTION**

- This is why we sought legal advice from the Australian Government Solicitor on the constitutional issues relating to the resource tax design.
- The legal advice indicated that capping RSPT refunds of state royalties might, depending on its design, discriminate between states in contravention of the Australian Constitution.
- The legal risk will depend on the final design of the legislation.
- The legal advice suggested mechanisms for ensuring the risk of the resource tax being found unconstitutional is low.

#### **ADDITIONAL ADVICE SOUGHT**

- S-42 exemption
  - Under the MRRT, there will be no refunding of royalties, so this constitutional issue does not arise.
  - Treasury was questioned at Senate Estimates on whether it had sought legal advice on the ability of a current government to bind a future government.
    - This issue arose in the context of the proposal to provide refunds to companies under the RSPT.
  - No legal advice was sought on this point as a current Parliament cannot bind a future Parliament.

#### **FURTHER TALKING POINTS**

- Following the announcement of the RSPT, the Government was criticised for not seeking legal advice on the constitutionality of the tax.
  - The release of this legal advice sets the record straight.

## **BACKGROUND FACTS**

*The Australian article – Rudd was warned of legal problems with mining tax – 19 October 2010*

- On 19 October 2010, *The Australian* reported that AGS Chief Executive Officer, Ian Govey, was questioned at Senate estimates about advice it had provided to Treasury on the likelihood of a High Court challenge to the mining tax.
- Mr Govey was handed extracts of the AGS legal advice that warned the RSPT might be unconstitutional on the grounds that the tax would have the potential to discriminate between the states.
- Mr Govey is reported as saying that AGS had suggested changes to the RSPT.

*AGS legal advice extracts released under the Western Australian FOI request*

- The AGS legal advice extract that was released focused on the constitutionality of capping the refund to companies of state royalties paid.
- AGS advised that a cap on refunds of royalties based on the rates applicable at the time of announcing the RSPT would risk being unconstitutional on the grounds that the RSPT would have the potential to discriminate between, or give preference to, States and parts of a State. [REDACTED]
- It did not consider that there would be a risk that the law would be invalid if it did not include a cap on the refund/credit. [REDACTED]