

Sent: Monday, 7 November 2011 12:10 PM
To:
Cc:
Subject: RE: Dot points on constitutional issues

Below is the final dot points on constitutionality (subject to any amendment by you).

has cleared all the MRRT dot points and has provided the text for the PRRT dot points.

If you are happy with this, will include it in the briefing packs.

Constitutional advice

ONLY IF ASKED: Have you received constitutional advice?

- Yes. We have sought and received a number of pieces of advice on the question of constitutional validity of the MRRT. [Note – because of the risk of waiving privilege we should not outline the detail of this advice or state that the advice supports the Government's view of the MRRT's validity].

MRRT - Tax on State property

- We have carefully considered whether the MRRT can be characterised as a tax on State property and therefore contravene section 114 of the Constitution and we are of the view that it cannot be so characterised.
- The MRRT is a tax on profits, in much the same way as company tax is a tax on the profits of a company.
- As the MRRT objects clause at section 1-10 of the Bill states, the object of the Act is to tax 'above normal profits made by miners (also known as economic rents) that are reasonably attributable to the resources in the form and place they were in when extracted.'
- The MRRT taxes profits made by miners that are reasonably attributed to the resource. The MRRT does not tax the resource itself. Nor does the MRRT impose tax on a State where the State, or an instrumentality of the State, is itself the miner who makes an above normal profit from the resource (this is made clear by clause 5 of each of the Imposition Bills).

MRRT Royalties – discrimination between States or parts of States, or give preference to one State (or part thereof) over another State (or part thereof)

- We have carefully considered whether the MRRT contravenes paragraph 51(ii) or section 99 of the Constitution by discriminating between State or giving preference to one State over another and we are of the view that it cannot be so characterised.
- The MRRT provides miners with a full credit for State royalties paid in relation to the resources.
- The rate at which royalties are charged from one State to another is different. Similarly, the manner in which royalties are calculated differ from one State to the next. In other words, the MRRT Bill does not

differentiate between or discriminate between the States. Any unequal outcomes arises from the varying royalty regimes that exist from State to State. The MRRT Bill takes the State regimes as it finds them.

MRRT Imposition Bills

- The MRRT is imposed by three different imposition Bills. One imposes MRRT to the extent that it is a duty of customs; one imposes MRRT to the extent that it is a duty of excise; and one imposes MRRT to the extent that it is neither a duty of customs nor one of excise.
- This reflects the constitutional requirements, in section 55 of the Constitution, that laws imposing duties of customs shall deal only with duties of customs and that laws imposing duties of excise shall deal only with duties of excise.
- The approach of enacting a single assessment Bill with multiple imposition Bills when a tax law could be argued to be a duty of customs, a duty of excise, as well as some other type of tax is not unusual. The same approach was followed for the enactment of the goods and services tax legislation.

PRRT Imposition Bills

- The PRRT amendments repeal the original imposition Bill and replace it with three imposition Bills. One imposes PRRT to the extent that it is a duty of customs; one imposes PRRT to the extent that it is a duty of excise; and one imposes PRRT to the extent that it is neither a duty of customs nor one of excise.
- The imposition Bills will apply retrospectively from 1 July 1986, consistent with the commencement of the original imposition Act. Replacing the original imposition Act does not alter the operation of the PRRT.
- The constitutional validity of the PRRT as a tax on profits has never been questioned. However, out of an abundance of caution the Government has decided to put the matter beyond any doubt through the introduction of three imposition Bills, consistent with the approach being taken for the introduction of the MRRT.
 1. This reflects the constitutional requirements, in section 55 of the Constitution, that laws imposing duties of customs shall deal only with duties of customs and that laws imposing duties of excise shall deal only with duties of excise.

Constitutional references

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: -

(ii.) Taxation; but so as not to discriminate between States or parts of States.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

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