

# Mineral and Energy Resources (Financial Provisioning) Act 2018

## Risk Category Allocation Information Sheet

Prepared for the Queensland Government Interdepartmental Committee on Financial Assurance for the Resource Sector

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## 1.0 Introduction

The *Mineral and Energy Resources (Financial Provisioning) Act 2018* (the Act) replaces the financial assurance requirements for resource activities under the *Environmental Protection Act 1994* (the EP Act). The Act establishes a financial provisioning scheme (scheme) to manage the financial risk to the State if the holder of an environmental authority for a resource activity or a small scale mining tenure does not comply with their environmental management and rehabilitation obligations. The scheme is managed by a scheme manager.

The scheme applies to:

- an environmental authority for resource activities (**authority**); and
- a small scale mining tenure (**SSMT**).

For an authority with an estimated rehabilitation cost (ERC) amount equal to or more than the prescribed ERC amount (currently \$100,000), the scheme manager must allocate the authority to one of four risk categories and then determine whether the holder is required to pay a contribution to the scheme fund or give a surety to the scheme manager (**risk category allocation framework**).

Surety is required to be given to the scheme manager by a holder of an authority with an ERC less than \$100,000 in an amount equal to the ERC or by a holder of a SSMT in the amount prescribed under the EP Act.

## 2.0 Purpose of this information sheet

This information sheet provides information to assist mining, petroleum, and gas companies to understand the risk category allocation framework under Part 3 of the Act.

This information sheet:

- Deals with an authority with an ERC equal to or more than \$100,000.
- Does not deal with an authority with an ERC less than \$100,000 or a SSMT.

This information sheet should be read together with the scheme manager guidelines.

**Note:** The ERC for an authority is a decision made by the administering authority under the EP Act and notice of the ERC decision is provided by the administering authority to the scheme manager.

## 3.0 Overview of the allocation decision

In making an allocation decision, the scheme manager must decide the following:

- **Risk Category:** allocating the authority to one of the following risk categories: very low, low, moderate or high.
- **Relevant Holder:** if there is more than one holder, assigning the authority to a relevant holder. (Assigning the authority to the relevant holder assists the scheme manager in deciding whether surety is required, see section 4.3).

The scheme manager may seek advice to assist in making the allocation decision.

### Three types of allocation decisions

There are three types of allocation decisions for an authority:

1. Initial allocation decision (section 27 of the Act).

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- This is the first allocation decision for an authority and occurs after the administering authority notifies the scheme manager of the first ERC decision for the authority under section 300 of the EP Act.
- This gives the authority its initial risk category allocation.

**Notes:**

1. For an existing authority on commencement of the Act, the initial allocation decision will occur during a three-year transitional time frame. The order in which authorities are transitioned will be determined by the scheme manager.
2. Aside from the transitional arrangements, the first ERC decision by the administering authority is the entry point into the risk category allocation process. Later ERC decisions made by the administering authority are relevant for other allocation decisions.
3. The administering authority under the EP Act gives notice of the ERC decision to the scheme manager.

#### 2. Changed holder review decision (section 32 of the Act).

- This applies to an authority that already has a current risk category allocation.
- This decision may be made when there is a transfer of the resource tenure for the authority resulting in a change of holder of the authority or when there is a change in corporate control of the holder of the authority.

**Note:** The use of the term 'change in corporate control' is being used in this information sheet to provide a general meaning. See section 32(1)(c)(ii) and s33(1)(c)(ii) of the Act for what is captured by this term.

**Note:** The scheme manager has a discretion to review the risk category allocation of an authority in these circumstances, it is not a mandatory requirement. In addition, it is open to an authority holder, or the incoming holder, to ask the scheme manager for an indicative review of the risk category allocation before an application for transfer or change of control occurs.

#### 3. Annual review decision (section 38 of the Act).

- This applies to an authority that already has a current risk category allocation.
- This decision is made annually from the date of the initial allocation decision, or if there has been a changed holder review decision for authority, annually from the date of the changed holder review decision.

## 4.0 Making the allocation decision

To allocate the authority to one of the four risk categories – very low, low, moderate or high, the scheme manager must consider:

1. the scheme manager's opinion of the probability of the State incurring costs and expenses because the holder of the authority has not prevented or minimised environmental harm, or rehabilitated or restored the environment, in relation to a resource activity carried out under, or to ensure compliance with, the authority; (***scheme manager's opinion of the financial risk to the State***);
2. relevant scheme manager guidelines; and

**Note:** The Scheme Manager Guideline '*Forming the Scheme Manager's Opinion*' is relevant here.

3. submissions if any, made by the holder about the indicative risk category allocation; and
4. any other matter the scheme manager considers relevant.

## 4.1 Forming an opinion of the financial risk to the State

In forming an opinion of the financial risk to the State the scheme manager:

(a) **must** consider:

- the financial soundness of the holder; and
- relevant guidelines.

(b) **may** consider:

- the resource characteristics of the resource project to which the authority relates; and
- any other matter the scheme manager considers relevant.

Financial soundness as a mandatory consideration reflects the importance of financial soundness to the scheme manager forming his or her opinion.

## 4.1.1 Considering financial soundness of the holder

Assessing financial soundness of the holder seeks to manage the risk to the State of making a financial outlay due to the financial capacity of the holder, including the risk of the holder becoming insolvent resulting in non-compliance with their legal obligations under their authority.

The Scheme Manager Guideline 'Forming the Scheme Manager's Opinion' provides guidance to the scheme manager in exercising his/her discretion on which holder to consider, whether to consider the financial soundness of a parent of the holder and other financial soundness considerations.

**Note:** It is important to note that the scheme manager is required to have regard to this guideline but retains a discretion as to the extent to which it guides the scheme manager's decision. The guideline provides guidance to the scheme manager in exercising his/her discretion on which holder to consider, considering the financial soundness of a parent of the holder and financial soundness considerations.

It is mandatory for the scheme manager to consider the financial soundness of the holder. If there is more than one holder, the scheme manager may consider the financial soundness of any or all the holders.

### Which holder to consider – single or multiple holders

If there is a single holder of an authority:

- the scheme manager must consider the financial soundness of the holder.

Where there are multiple holders of an authority:

- The scheme manager need only consider the financial soundness of one of the holders.
- As a basic rule, the scheme manager could base their assessment on the operator of the resource tenure, provided the holder holds greater than a 20% shareholding in the tenure or tenures relating to the authority.
- Otherwise the scheme manager could select a holder that holds a share of not less than 20% in the tenure or tenures relating to the authority.
- If there is no such holder, the scheme manager would select a holder having regard to the ownership structure for the authority and the roles of the authority.

It is also open to the scheme manager to consider a nomination from the authority holders for a different holder to be the assessed.

Having selected the holder to be assessed, the next step is for the scheme manager to undertake the assessment of financial soundness.

### How is the parent corporation of the holder relevant?

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All holders of an authority and any parent corporation of a holder are jointly and severally liable under the EP Act. This not only gives the scheme manager flexibility in which holder or holders to consider, but once identified, whether to take account of the financial soundness of a parent corporation of the holder or any of the holders.

In considering the parent corporation of a holder, the scheme manager could consider the financial soundness of a parent corporation that is an Australian company in priority to a parent corporation that is a foreign company. This reflects the difficulties that may arise in enforcing environmental obligations in a foreign jurisdiction. However, the scheme manager still retains a discretion to consider a foreign parent corporation.

If the scheme manager chooses to consider the financial soundness of the parent corporation of the holder, that assessment is taken to be the assessment of the holder.

#### **Where the holder or the parent corporation has a credit rating**

As a basic rule, where the holder or the holder's parent corporation has a credit rating the scheme manager would assess the financial soundness of this entity based on this rating, if:

- the rating is from a credit rating agency approved by Queensland Treasury, and
- the rating is a long-term public credit rating or a private credit rating not more than 12 months old.

Where multiple acceptable credit ratings exist, the scheme manager should use the weakest rating.

#### **Where the holder or the parent corporation does not have a credit rating**

As a basic rule, where the holder or holder's parent corporation does not have a credit rating, the scheme manager would consider its financial soundness having regard to 3 years of audited financial statements and other factors that would ordinarily be considered by a credit rating agency such as the relevant industry sector and the domicile of the holder or the parent corporation.

Financial metrics that would typically be assessed include, but not limited to, debt serviceability, balance sheet position, gearing / leverage, profitability, and other relevant factors. Other factors may also be considered by the scheme manager where relevant to ensure appropriate understanding of the risk for each authority (e.g. a holder or the holder's parent corporation with a track record of not fully supporting unsuccessful resource projects).

**Note:** The financial soundness assessed by the scheme manager is limited to the purpose of allocating an authority to a risk category for the scheme under the Act and is not intended to be as detailed as an assessment normally undertaken by a credit rating agency, nor is it meant to represent a formal credit rating assessment.

#### **Where the holder or the parent corporation does not have sufficient financial information**

If the holder or the holder's parent corporation does not hold three years of audited financial statements, the scheme manager may not be able to satisfactorily assess the financial soundness.

### **4.1.2 Considering the characteristics of the resource project**

The scheme manager has a discretion to consider the characteristics of the resource project.

The Scheme Manager Guideline 'Forming the Scheme Manager's Opinion' provides guidance to the scheme manager in exercising his/her discretion on whether to consider the characteristics of the resource project, and if so, what characteristics of the resource project to consider.

**Note:** It is important to note that the scheme manager is required to have regard to this guideline but retains a discretion as to the extent to which it guides the scheme manager's decision. The guideline provides guidance to the scheme manager in exercising his/her discretion on whether to consider resource characteristics, and if so, the minimum characteristics for consideration.

### **When will the scheme manager consider resource projects characteristics?**

The scheme manager will not ordinarily consider any resource project characteristics for a project that is not in production. For example, this would include resource projects in the exploration, care and maintenance, or decommission phases.

Overall, the financial risk to the State is unlikely to be affected by a consideration of the resource project characteristics of these types of projects. Therefore, it is reasonable for the scheme manager to form an opinion primarily based on the financial soundness of the holder.

In all other circumstances, the scheme manager will consider resource characteristics of the project that the scheme manager considers may affect the likelihood of sale of the resource project in the event of failure of the holder.

### **Resource project characteristics for consideration**

The types of resource characteristics that may be considered include, but are not limited to, those listed below.

#### ***Resource Project Strength***

##### *Remaining Economic Life*

An assessment of the remaining economic life of the project will be based on the size, certainty, and economic viability of the reserves of the resource project. Both probable and proven reserves, the rate of extraction, and other relevant factors may be considered in determining the strength of the project. The existence of reserves will be based on relevant JORC reports or equivalent (for minerals and coal projects), and reports in accordance with SPE-PRMS guidelines or equivalent (for petroleum and gas projects).

##### *Off-Take Agreements*

Ordinarily the scheme manager will only consider off-take agreements where the scheme managers considers there is an incremental benefit to managing the financial risk to the State because of the improved saleability of the resource project.

This would generally include off-take agreements having regard to the following matters:

- unrelated and financially sound counterparties;
- the duration of the term of the agreement;
- the profitability of the resource project.

The provision of information about off-take agreements is sufficient detail to allow the scheme manager to assess the matters above is entirely voluntary at the holder's election.

The scheme manager will not draw an adverse inference about the saleability of the project if there is no relevant off-take agreement information provided.

##### *Rehabilitation*

Rehabilitation that has already been undertaken improves the saleability of the resource project, including demonstration of the ability of the site to be rehabilitated consistent with conditions of the authority for the resource project.

The scheme manager may consider the extent of certified rehabilitation completed under the authority.

The scheme manager may also consider closure planning for the project and measured progress towards the post closure land use. Closure planning requires the establishment of a performance framework for closure that facilitates a consistent approach and enables success in closure to be measured.

### Compliance Record

The scheme manager may consider relevant compliance issues relating to the authority and the resource tenure to which it relates but it is not anticipated the scheme manager will be considering instances of all compliance issues.

The types of compliance issues will depend on the circumstance in each case however the scheme manager is not required to consider the full compliance history. For example, it may be relevant to the issue of saleability that there is statutory enforcement or prosecution activity relevant to the site or notice given of a breach of the resource tenure.

## **4.2 Other considerations of the scheme manager**

In making a risk category allocation decision, the scheme manager may consider any other matter it considers relevant to forming an opinion on the authority.

## **4.3 Assigning an authority to a relevant holder**

The scheme is predicated on the basis that the scheme fund will not be overexposed to risk from one particular entity or corporate group. For this reason, there is a prescribed fund threshold (currently \$450 million) which represents the level of acceptable risk. The threshold has initially been calculated as \$450 million, representing approximately 5% of the total ERC in Queensland

The ERC for an authority is recorded against the holder for purpose of calculating that holder's potential exposure to the scheme fund. However, where there is more than one holder, the ERC will only be assigned to one of the holders to avoid double counting of the ERC.

Therefore, where there is more than one holder, the scheme manager must, at the same time as making an allocation decision, assign the authority to one of the holders – the relevant holder. The ERC for the authority then forms part of the relevant holder's total ERC.

**Note:** The Scheme Manager Guideline 'Assigning an Authority to a Relevant Holder' gives guidance to the scheme manager on assigning the authority to the relevant holder.

The basic rule for selecting the relevant holder is that it can be any holder, including a holder nominated by the authority holders, provided that the scheme manager has assessed the financial soundness of that holder and the financial soundness assessment has been taken into account by the scheme manager in the allocation decision for the authority.

Where the total ERC for the relevant holder (as well as the total ERC for any holder in the relevant holder's corporate group) is likely to exceed the fund threshold (currently \$450 million), the scheme manager may require the holder to give a surety to preserve the financial viability of the scheme fund. (This is explained further in section 5 below).

**Note:** The assigning of a relevant holder does not affect the joint and several obligations of each holder to pay a contribution to the scheme fund or give a surety to the scheme manager.

## 4.4 Allocating the authority to a risk category and if more than one holder, assign the authority to a relevant holder

The scheme manager having considered his or her opinion of the financial risk to the State, any applicable guidelines and any other matters the scheme manager considers relevant, the scheme manager will allocate the authority to one of the following risk categories:

- very low,
- low,
- moderate or
- high.

If there are multiple holders, the scheme manager will also assign the authority to a relevant holder.

## 4.5 Holder input into the allocation decision

### Providing information to the scheme manager

The scheme manager may, before making an allocation decision, require the holder to give the scheme manager further information or a document the scheme manager reasonably requires to make the decision.

For an initial risk category allocation, the scheme manager may require the holder to give information or a document at any time after the holder has applied for an ERC decision to the administering authority under the EP Act in relation to its authority.

The scheme manager will have access to, and use for undertaking the risk category allocation assessment but not limited to:

- relevant information that the authority holder has provided to the scheme manager, as well as any relevant information provided under its regulatory obligations to DNRME and DES; and
- relevant publicly available information, for example, financial information.

### Making submissions on indicative allocation decision

There is a two-step process for making an allocation decision. The scheme manager must, before deciding the risk category allocation, give the holder a notice of indicative decision which states the following:

- the risk category the scheme manager intends to allocate the authority;
- reasons for the indicative risk category allocation
- the relevant holder if there are multiple holders
- requirement for a contribution to the scheme fund or giving of a surety

The holder may make submissions to the scheme manager about the above matters or give notice accepting the indicative risk category allocation.

This first step gives the holder an opportunity to make submissions to the scheme manager before a final decision is made or accept the indicative decision as the allocation decision.

## 5.0 Liability for contribution or surety

An allocation decision by the scheme manager allocates the authority to one of the four risk categories – very low, low, moderate or high and which determines whether the holder of the authority will be required to pay a contribution to the scheme fund or give a surety to the scheme manager.

Subject to limited exceptions outlined below:

- The holder of an authority allocated to the very low, low or moderate risk category will be required to pay a contribution to the scheme fund in an amount calculated by multiplying the ERC for the authority and the prescribed percentage for the risk category.
- The holder of an authority allocated to the high risk category will be required to give a surety to the scheme manager in an amount equal to the ERC for the authority.

### **When a holder of an authority that is allocated to very low, low and moderate risk category is required to give surety**

#### Exception 1: To preserve the financial viability of the scheme fund

- Under section 53(c)(ii) of the Act, the scheme manager has a discretion to require a surety for an authority allocated to the very low, low or moderate risk category to preserve the financial viability of the scheme fund. This is necessary to protect the scheme fund from overexposure to one particular entity or corporate group.
  - *For example, the scheme manager may require a surety for an authority where the holder or relevant holder (and its corporate group) already hold authorities for which a contribution to the scheme fund is payable, and where the total ERC for these authorities is likely to be more than the fund threshold of \$450 million.*
- A key concept for this exception is the ‘total ERC’. The total ERC for a holder, or if there is more than one, the relevant holder, is the total ERC for each authority held by the holder or assigned to the relevant holder for which a contribution to the scheme fund is payable.
- If the scheme manager exercises this discretion, the scheme manager may aggregate the total ERC of the entities in relation to the holder or relevant holder as set out in section 54.
- The entities mentioned in section 54(2) are:
  - The holder of the authority, or if there is more than one, the relevant holder
  - Any parent corporation of the holder or the relevant holder of the authority (parent corporation)
  - Any subsidiary corporation of a parent corporation
  - A corporation controlled by a parent corporation
- The approach the scheme manager could take in exercising a discretion is as follows:
  - A surety should be required if the sum of the total ERC of the entities exceeds the fund threshold
  - A surety should be required if the scheme manager considers that the sum of the total ERC of the entities is likely to exceed the fund threshold before the next annual review of the authority. The scheme manager could take account of factors like – any likely change to the authorities held by a group entity; any likely change to the ERC for any authority held by a group entity and any likely change to a group entity.

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- **Note:** Section 54 does not limit the scheme manager’s discretion to require surety. There may be other circumstances where the scheme manager considers it necessary to require surety to maintain the financial viability of the scheme fund.

**Note:** The Scheme Manager Guideline ‘Requiring Surety to Preserve the Financial Viability of the Scheme Fund’ is relevant for this component of the scheme manager’s allocation decision.

### Exception 2: For a single authority with an ERC more than the scheme fund threshold

- The holder of a single authority with an ERC more than the fund threshold will be required to pay both a contribution to the scheme fund (calculated based on the ERC equivalent to the fund threshold) and give a surety to the scheme manager for the amount of ERC that exceeds the fund threshold.

### **When a holder of an authority that is allocated to high risk category is required to pay contribution**

#### Exception 1: Authority previously allocated to very low, low or moderate risk category

- The scheme manager has a discretion to require contribution for an authority allocated to the high risk category if:
  - (a) prior to an authority being allocated to high risk category, the authority was previously allocated to very low, low or medium risk category for each of the 4 years immediately preceding the decision; and
  - (b) before making the allocation, the scheme manager is reasonably satisfied that the holder is not able to obtain a surety within the necessary timeframe.
- In these circumstances, the holder will be required to pay a contribution as if the authority is allocated to the risk category of moderate for working out the amount of contribution payable.
- This exception allows for a holder of an authority allocated to the high risk category to continue to pay contribution, for that year.

## 6.0 Amount of Contribution or Surety

### **Amount of contribution payable to the scheme fund**

The amount of contribution payable to the scheme fund is calculated by reference to the prescribed percentage and the ERC for the authority.

The prescribed percentage is set out in the regulation under the Act and refers to a specific percentage for an authority allocated to the very low, low or moderate risk category.

The prescribed percentages are as follows:

<b>Risk Category</b>	<b>Prescribed Percentage</b>
An authority allocated to risk category of very low	0.5%
An authority allocated to risk category of low	1.0%
An authority allocated to risk category of moderate	2.75%

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For example, if an EA has an ERC of \$10 million and the relevant holder is allocated to the low category the prescribed percentage would be 1.0% and the contribution amount would be 1.0% x \$10 million = \$100,000.

In addition to the contribution amount, the holder will also pay an assessment fee noted below.

The assessment fee is as follows based on the ERC for the authority being assessed:

Type of allocation decision	ERC for the Authority	Assessment Fee
Initial allocation decision Changed holder review decision Annual review decision	\$100,000 - \$999,999	\$250
Initial allocation decision Changed holder review decision Annual review decision	\$1,000,000 - \$9,999,999	\$1,250
Initial allocation decision Changed holder review decision Annual review decision	\$10,000,000 - \$49,999,999	\$5,000
Initial allocation decision Changed holder review decision Annual review decision	\$50,000,000 - \$99,999,999	\$22,500
Initial allocation decision Changed holder review decision Annual review decision	\$100,000,000 and greater	\$45,000

**Amount of surety required to be given to the scheme manager**

The amount of surety required to be given to the scheme manager is an amount equal to the ERC for the authority.

In addition to the surety amount, the holder will also need to pay an assessment fee in the amount noted above.

## 7.0 Providing Surety

Surety must be given in the one or more of the approved forms under section 56 of the Act – a bank guarantee, an insurance bond or a payment of a cash amount.

The holder may decide which form of surety will be provided. A combination of any of the approved forms of surety can be provided to achieve the total surety amount.

However, the scheme manager determines the approved form or terms and conditions for bank guarantees and insurance bonds. The scheme manager also determines the terms and conditions for cash surety, known as the cash surety deed. The scheme manager will only accept the surety once it is satisfied that the surety is as per the applicable approved form and/or the terms and conditions. Appendix 1 of the Scheme Manager Guideline ‘Forms of Surety’ provides the approved form of undertaking, for a bank guarantee or insurance bond, and Appendix 2 of the Scheme Manager Guideline ‘Forms of Surety’ provides the approved terms and conditions for a cash surety deed.

For cash surety less than \$100,000 the scheme manager does not require the payment to meet the terms and conditions of the cash surety deed. However, when the total of the cash sureties given by that holder exceeds \$100,000, the scheme manager may require the individual cash sureties to satisfy the terms and conditions of the cash surety deed.

<b>Note:</b> The Scheme Manager Guideline ' <i>Forms of Surety</i> ' is relevant for this decision of the scheme manager.
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## **8.0 Consequences of Not Paying a Contribution to the Scheme Fund or Not Giving a Surety to the Scheme Manager**

There are two consequences if there is non-payment of contribution to the scheme fund or failure to give a surety to scheme manager.

Under the Act: A contribution payable under the Act may be recovered as a debt payable to the State.

Under the EP Act: Holders of authorities cannot lawfully carry out resource activities if payment of a contribution to the scheme fund has not been made or a surety has not been given as required under the Act. This requirement is a condition of an authority.