

Challenges to mining tax inevitable

Katie Walsh

The federal government's mining tax returns to parliament next week but lawyers warned it was certain to face court challenges once it became law.

The tax is budgeted to raise more than \$11 billion in its first three years but court battles could bog down the Australian Taxation Office for years and jeopardise revenues earmarked to fund superannuation payments, small business concessions and a corporate tax cut.

Corrs Chamber Westgarth partner Jonathon Leek said disputes were inevitable in laws open to interpretation like the mining tax.

One of the key areas of the mining tax that would likely give rise to disputes was the valuation of mining

revenue. It requires a process akin to that used in transfer pricing, the subject of a recent dramatic court win by drug company SNF over the Tax Office.

Under the mining tax, companies must determine mining revenue based on the value of the resources on the run of mill stockpile, after extraction.

"That's not usually the point where you sell it — particularly resources companies with integrated upstream and downstream processes," Mr Leek said. "They're not just digging it out of the ground they're adding value to it."

It is similar to the process required under the petroleum resources rent tax, which has faced a two-decade long assault from the

major miners over the point along the production chain that the impost is charged.

The Tax Office has won to date, but BHP and Esso have elevated the stoush to the full Federal Court.

The debacle has led the government to plug a potential \$600 million-plus revenue leakage if the resources giants win by introducing legislation a fortnight ago to confirm the tax is levied at the point of sale rather than at the well head.

The bill's changes will reach back 21 years, a prospect that triggered vehement objections from business groups including the Law Council of Australia, Corporate Tax Association, Institute of Chartered Accountants, Tax Institute and Business Council of Australia. Despite the

objections, a House of Representatives economics committee gave the bill its tick of approval.

Coalition members dissented in line with the lobby groups, stating the bill violated a "long-standing principle in tax law . . . that tax laws should, with few exceptions, be prospective rather than retrospective" and the ongoing court dispute "should be allowed to run its course".

The government argues the change will simply clarify how the law was always intended to apply.

Minter Ellison partner Craig Bowie said as the mining tax developed, taxpayers would be able to determine whether or not to resolve a dispute by litigation or negotiation.

"When you've got large sums of money, litigation obviously becomes

more likely because of the money at stake," he said. "You're probably more likely to see challenges under the mining resource rent tax simply because it's worth doing if you can't get an agreed outcome."

It would take some years for challenges to flow through to the courts, he said, akin to the delay before GST cases were heard following its introduction.

Mr Leek agreed. "As a general proposition, you don't really see the audit activity start until four years down the track. Court [takes] another two or three years.

"You end up looking at six or seven years before you start to see disputes publicly."

Debate on the mining tax bill continues in the lower house this week.