

8 September 2016

Your ref

Our ref: JKC/Min&Res/Opt-out CCAs

Resources and Policy Team
Department of Natural Resources and MinesBy email: ResourcesPolicy@dnrm.qld.gov.au

Dear Sir/Madam

Landholder opt-outs of conduct and compensation agreements or deferral agreements

Thank you for the opportunity to provide comment on the above. Queensland Law Society appreciates being consulted on this important area.

This response has been compiled with the assistance of the Mining and Resources Committee who have substantial expertise in this area.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We lead a profession of more than 9,500 members throughout Queensland. The QLS is comprised of several specialist committees who provide policy advice to the QLS Council on law reform and areas of concern to the profession.

This submission will make comments on both the opt-out agreement information sheet and the opt-out agreement itself.

1. INFORMATION SHEET OPT-OUT AGREEMENT**1.1 *Status of information sheet***

The Opt Out Agreements Information Sheet is an important document because of the way the process is effectively prescribed by the form. We have set out a number of comments below.

1.2 *Drawing attention to certain crucial clauses*

The Department may wish to consider making more prominent the following clauses:

- The need to obtain legal advice before signing.
- The interaction between an opt out agreement and a conduct and compensation agreement (CCA).
- The fact that the material merely states the procedures, but does not endorse the process as being appropriate for every situation.

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1.3 **Conceptual/definitional amendments (using the current head up in the information sheet)**

(a) Section 2 “*What is an opt-out agreement*”

This section of the information sheet describes an opt-out agreement as a “contractual arrangement”. This would be better described as a legally binding agreement.

There is also a statement that “*The landholder releases the resource authority holder from the obligations of having to negotiate a CCA or a deferral agreement*”. This is an incorrect statement and is not consistent with ss 43(1)(c) or 45 of the Act.

In the following paragraph, the word “may” [be invalid] is inaccurate (see Regulation s 22(2)(a)) and the opt-out agreement “will” be invalid.

(b) Section 3 “*What is the effect of entering an opt-out agreement*”

The words “a landholder is agreeing to forego particular rights afforded to those negotiating the CCA”, are inaccurate – see s 43, which is far broader. The Society suggests instead the following wording: “a landholder may agree to forego particular rights that it would otherwise have under the Act, for example negotiating a CCA or a deferral agreement”.

(c) Section 4 “*When may an opt-out agreement be suitable?*”

Though the opening sentence contains the word “may”, the context suggests that these paragraphs are intended to give the landholder guidance about when an opt-out agreement will or will not be appropriate. This may give the impression that the State is mandating the circumstances where the agreement is appropriate, rather than being for the landholder to determine. It is not difficult to envisage a range of other circumstances where opt-out agreements may be suitable.

The Society submits that if the Department considers it appropriate to address this matter at all, words should be included that make it clear that it is up to the landholder to decide whether or not the landholder, in the particular circumstances, wishes to opt-out, and that any examples are not comprehensive.

(d) Section 5 “*Differences between an opt-out agreement and the CCA*”,

The word “of” should be inserted after “number” and the word “choses” should be “chooses”.

2. **OPT-OUT AGREEMENT**

2.1 **Statutory Context**

It is important to understand the statutory context of an opt-out agreement. S 45(2) of the MRCP Act says that the “election to opt-out is an *opt-out agreement* and is invalid if it does not comply with the prescribed requirements for the agreement”. This means, in the approved form.

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2.2 *Election of Agreement*

Because an opt-out agreement is said to be both an election and an agreement, the Society submits that thought could be given to amend s 45(2) to provide that an agreement entered into by an owner and/or occupier and a resource authority holder, that amongst other things records the owner's and/or occupier's election to opt-out, is an opt-out agreement.

2.3 *General Comments*

The Society also notes the following general comments to the nature of this document:

- (a) The prominence of certain aspects, in particular the 10 day cooling off period of the opportunity to provide legal advice, may be better placed early in the document.
- (b) To ensure the acknowledgement in Item 6's reference to the land holder having received documents is correct, would it be appropriate to annex those documents to the prescribed form.

2.4 *Specific Changes Recommended*

The Society suggests the following specific changes:

- (a) In items 2 and 3, it would be useful to insert an option to notify details of a representative for each of the landholder and the resource authority holder.
- (b) In item 5, the resource authority type and number should both be stated.
- (c) In item 6:
 - (i) At the end of paragraph 1, the word "that" should be inserted, and "that" should be deleted at the beginning of paragraphs (iii), (iv) and (vi).
 - (ii) The statement in paragraph 1(iv) is potentially vague. It would be better stated as "that the landholder is aware that if the landholder negotiates a conduct and compensation agreement or a deferral agreement, the landholder may be entitled to, or may be able to negotiate, for additional conditions that are not contained in this opt-out agreement".
 - (iii) Paragraph 1(vi) is also unclear. It could refer to the resource authority holder having provided the landholder with a description of the proposed authorised activities to be carried out in accordance with a specified attachment to the agreement or identifying that document by another means. "Clear", "concise" and "complete" are value laden terms that will simply cause confusion and dispute.
 - (iv) In clause 2(i), the words "in Queensland" should be deleted and "of" should be "from".

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- (d) In item 7, it is inappropriate to refer to the opt-out information sheet for guidance. That suggests that the information sheet has a role to play in the interpretation of the opt-out agreement and that it has some force under the Act and Regulation (which it should not). That sentence should be deleted.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Julia Connelly, on (07) 3842 5884 or J.Connelly@qls.com.au.

Yours faithfully

A handwritten signature in black ink, appearing to read 'B. Potts', with a long horizontal stroke extending to the right.

Bill Potts
President