

10 July 2014

The Research Director
Agriculture, Resources and Environment Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: AREC@parliament.qld.gov.au

Dear Research Director

Mineral and Energy Resources (Common Provisions) Bill 2014 – Overlapping Tenure Framework

Thank you for providing the opportunity for the Queensland Law Society (**Society**) to provide comments on the *Mineral and Energy Resources (Common Provisions) Bill 2014 (MERCPC Bill)*.

The MERCPC Bill has been considered by the Society's Mining and Resources Law Committee, who have prepared this submission.

The stated objectives of the Society's Committee have informed the review of the MERCPC Bill:

The Mining and Resources Committee aims to monitor and, where appropriate, comment on laws and policies relating to mineral resources, petroleum and gas exploration, production, related infrastructure and safety regulation (as well as the scope of the mining jurisdiction of the Land Court, but not its practice or procedure), with a view to advocating that these laws and policies:

- *reflect fundamental legislative principles*
- *comply with legislative standards on transparency, accountability and consistency*
- *achieve their stated aims without giving rise to unintended consequences in implementation.*

The Committee does not see its role as a representative of any particular interest group, but rather for the promotion of good law in Queensland.

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Given the time available to the Society and its committee members, this submission does not represent an exhaustive review of the Bill. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not commented upon. Omission of comment on any particular matter should not be interpreted as endorsement of that aspect of the Bill.

The Modernising Queensland Resource Acts (MQRA) Consultations

The Society has been a keen contributor to the MQRA consultation process undertaken by the Department of Natural Resources and Mines.

The Society commends the consultation process undertaken by the Department of Natural Resources and Mines (DNRM) and is grateful for the opportunity to provide comment as the review has progressed.


In its original submissions to DNRM, the Society provided comment on the following issues:

- The limited time allowed for consultation on the MQRA.
- The draft provisions' alignment with the principles outlined in the Queensland Resources Council report Maximising Utilisation of Coal and Coal Seam Gas Resources in Queensland - A New Approach to Overlapping Tenure In Queensland (the **White Paper**).
- Overlapping resource authorities other than coal overlapping coal seam gas and use of incidental coal seam gas.
- Ministerial powers conferred by the MQRA.
- Land access – public and private provisions.
- Entry to public land, access to cross land to reach a resource permit, and notifiable road use.
- Restricted land standardisation across all resources types.
- Mining lease notification and objections.
- Native title considerations.

The Society's review of aspects of the MERC Bill is informed by consideration of those issues previously and is included in the Schedule to this letter.

If you wish to discuss this submission or seek further views from the Committee, please contact our Principal Policy Solicitor, Mr Matt Dunn, on [REDACTED] or via email on [REDACTED]

Yours faithfully



Ian Brown
President

Schedule – Committee Submissions on MERCP Bill

Scope of submissions

The Committee recognises that the MERCP Bill is currently the subject of review by proponents of the coal and coal seam gas industries, by Government and by other members of the Society itself. We understand that representatives of these industries will be making separate submissions on the MERCP Bill, and also refer to the submissions of the Society's ADR Committee on the MERCP Bill's dispute resolution framework under Chapter 4 in respect of overlapping coal and petroleum tenure. As such, the Committee has limited the scope of its further submissions to the following matters:

- Chapter 2 – Dealings, caveats and associated agreements
- Chapter 3 – Land access
- Chapter 4 – Overlapping coal and petroleum resource authorities
- Chapter 5 – Applications and other documents.
- Chapter 7 – Transitional provisions

Dealings, caveats and associated agreements (Chapter 2)

The Committee supports the harmonisation of the resources regulatory framework governing dealings, caveats and associated agreements which will result from the implementation of the MERCP Bill. The consolidation of the administrative processes from existing resources legislation is a sensible outcome, consistent with the Government's red tape reduction commitment and supplements the improvements delivered through the *Mines Legislation (Streamlining) Amendment Act 2012 (Qld)*.

As the provisions largely maintain the regulatory status quo and the Committee is generally supportive of the substantive changes (whilst noting that much of the prescriptive detail has been left to the regulations), the Committee makes the following observations in respect to the issues the MERCP Bill does not address and to which further consideration might be given:

- Harmonisation of provisions relating to the transfer of applications for resource authorities (including to provide for the transfer of applications for mining authorities other than mining leases) as highlighted in the Industry Consultation Paper on Modernising Queensland's Resources Act Program - Dealings, Caveats and Associated Agreements dated July 2013
- The lapsing of indicative Ministerial approvals for reasons beyond the resource authority holder's control (e.g. delays in other regulatory approval processes or applicable assessments for transfer duty).

Land access (Chapter 3)

The Committee has identified a number of issues with these provisions as presently drafted. We refer you to the attached table for a detailed outline of these issues. These comments are primarily of a nature to ensure the relevant provisions of the MERCP Bill achieve the Government's evident intent and provide some limited suggestions on ways to amending the issues identified.

Overlapping coal and petroleum resource authorities (Chapter 4)*Limited time available for consultation and an incomplete regime*

In its original submissions on the draft legislation addressing coal and coal seam gas overlapping tenure regime, the Committee expressed its concerns regarding the limited time available to comment on the proposed legislation. The Committee remains concerned that the timing allowed for consultation and implementation of the coal and coal seam gas overlapping tenure regime within the MERC Bill is insufficient to allow for the necessary assessment of the framework and structure of the proposed legislation as a whole. This concern is heightened given the significant legal and commercial consequences for the rights of the coal and coal seam gas industry participants, and given that the White Paper (and subsequent Technical Working Group papers), on which the legislation is notionally based, was the result of several years of negotiations and concerted work by all parties.

Further, as identified by the Queensland Resources Council (QRC) in its original submissions on the draft legislative framework, the MERC Bill provisions do not reflect the entire proposed regime. The Committee understands that the Government's intention is to resolve the gaps and outstanding structural matters that form part of the White Paper solution, including those relating to the Code of Practice and to health and safety requirements, but also some of the 'unresolved' White Paper issues concerning transitional arrangements in regulations and in future legislation and legislative amendments.

While the Committee encourages the process of clarifying uncertain provisions and ensuring that the legislation regime is complete, we are concerned that such significant matters are not settled and included in the MERC Bill. It is clearly undesirable for legislation to be introduced with flagged further structural provisions and amendments required to reflect a complete regime. While acknowledging the Government's stated intent that the new regime will not commence until the further provisions are in place and regulations settled, such a position creates uncertainty for those persons affected. The Committee expects that this outcome is the result of the short timeframes under which this legislation was developed.

We submit that it will be vital that satisfactory consultation occurs on the introduction of the further legislative provisions and regulations.

Ministerial powers are too broad in scope and may be exercised at any time (Chapter 4, Part 4, Division 2)

In its original submissions on the Draft Legislative Framework, the Committee expressed its concerns regarding the broad powers conferred by the draft legislation to allow the Minister to:

- impose conditions on resource authorities to "optimise the development and use of the State's coal and petroleum resources to maximise the benefit for all Queenslanders" and ensure safe and efficient mining in the overlapping area
- require resource authority holders to amend their joint development plan at any time, and
- take compliance action against non-compliant resource authority holders, including unilaterally making material changes to resource authorities.

The Committee considered that these provisions as drafted gave rise to potential significant sovereign risk concerns. The powers conferred were broad, discretionary and not clearly related to the purposes of the legislation. Further, these powers effectively allowed the Minister to undermine commercial rights and arrangements (without compensation) and to override existing legislative provision by way of an administrative decision. The framework as drafted allowed the Minister to do this at any time, without any requirement to give reasons and without a clear process of administrative review.

In its original submissions, the Committee requested that the Ministerial powers provisions be amended to reduce this sovereign risk by limiting these powers and providing more clearly defined circumstances and time frames under which they could be exercised.

The Committee notes that the Ministerial powers provisions contained in the MERCPC Bill no longer include the power to amend resource authorities. Further, these provisions now include a set of criteria which the Minister must consider prior to requiring a resource authority holder to amend an agreed joint development plan. The Committee welcomes this response from Government.

While the changes made are encouraging, the provisions still raise concerns for the Committee and do not appropriately address all concerns raised by the Committee in its original submissions. The power of the Minister to require amendment of agreed joint development plans continues to remain a potentially significant issue of sovereign risk, and the criteria which were drafted with the intention of limiting that power provide little certainty regarding its exercise. This power has the potential to undermine and modify established and negotiated commercial arrangements and to do so with no compensation to the parties affected. Further, this power is still not time-bound in the sense that the Minister may exercise it at any time after rights have been granted and joint development plans settled, and parties have entered into commercial and operating arrangements in reliance on those rights and joint development plans.

The Committee submits again that these powers should be more limited and made subject to time limitation for their exercise (e.g. within a certain period of a joint development plan being settled). Further, the legislation must provide some clear means for affected parties to appeal the Minister's decisions.

Transitional Provisions for overlapping tenure are incomplete and relegation to future legislation is uncertain (Chapter 4, Part 4; Chapter 7)

The transitional provisions for overlapping tenure suffer from the same issues of incompleteness and relegation to subsequent legislation outlined in our submissions above. In their present state the transitional provisions create a number of serious inconsistencies between the positions of coal and coal seam gas resource authority holders. There is still no provision for overlapping concurrent production applications. Further, the provisions as drafted are insufficient to ensure that the existing rights and commercial arrangements of parties are not unreasonably interfered with. DNRM has indicated that it is investigating these concerns and will amend these provisions as required.

We submit that the development of the transitional provisions of the MERCPC Bill is vital to the successful and equitable operation of the overlapping provisions, and stress that the positions outlined in the White Paper were the result of significant time and expense by stakeholders to

negotiate a legislative scheme appropriate for Queensland's coal and coal seam gas industries.

Applications and other documents

The Committee supports the simplification of mining lease application, notification and objection processes which will result from the implementation of the MERC Bill. In our previous submission on these issues dated 5 April 2014 the Committee supported the proposed model to provide notification of ML applications only to affected persons provided that there was sufficient clarity as to who should receive that notice. We note that the affected persons will now be landholders, land occupiers and local government bodies with certain infrastructure in the mining lease area.

The Committee continues to note the limitation of objections to mining leases. This is supported on the basis that the continuing right to appeal to Land Court if a person has made a submission on a site specific EA either through the notification process for that EA or an associated EIS process is maintained.

In relation to the role of the Land Court the Committee notes that the proposal in the discussion paper for the Land Court will be given a final decision making power has not been carried through and the Minister will still make the final decision based on the land court recommendations. This is supported.

The Committee notes the reduced factors that are now to be considered by the Land Court and considering any objections and has no further comments on that point.

Queensland Law Society submission for Chapter 3 (Land Access) of the *Mineral and Energy Resources (Common Provisions) Bill 2014 (MERC Bill)*

Section	Subject	Comment
n/a	Determination of compensation for mining leases	<p><i>Mineral Resources Act 1989</i>, chapter 6, mining leases provides for the determination of compensation in respect of the grant of a mining lease:</p> <ul style="list-style-type: none"> • The entitlement to compensation is set out in section 281(3). • Only the owner of the land is entitled to compensation. • In the absence of agreement, compensation is determined by the Land Court on application by the owner or the ML applicant. <p>In July 2013, DNRM released a stakeholder discussion paper entitled “Reducing Red Tape for Small Scale Alluvial Mining”. One of the stated initiatives was to introduce “greater certainty” in the notification and objection process for mining leases. A proposed action was to “consider modernising the MRA to a post-grant appeals process where submissions may be made on the application, appeal to Land Court post-decision, and avenue for Land Court to amend the decision.”</p> <p>The Society subsequently made a submission in response dated 9 August 2013. The Society raised a number of issues with the proposed post-grant appeals process including the potential for inconsistency with EP Act processes which could result in multiple Land Court hearings being conducted for the same proposal. The Society recommended that further and broader consultation be conducted given the significant impact this proposal will have on stakeholders.</p> <p>Then, in March 2014, in a paper entitled “Proposed mining lease notification and objection initiatives”, DNRM proposed that compensation for a ML be “finalised at any time, but no later than three months after grant of the ML. If it is not finalised at this time, the matter will go to the Land Court for a determination. Only preliminary activities are authorised on the ML until a compensation agreement is finalised.”</p> <p>This proposal was repeated in the mining lease notification and objection initiative discussion paper released by DNRM.</p> <p>The Society has consistently argued that for good process and economic reasons, compensation for mining leases should be determined in accordance with a method and process that is consistent with the existing process in chapter 6 of the <i>Mineral Resources Act 1989</i>. Consequently, the MERC Bill should provide for compensation processes for mining leases that are equivalent to those in chapter 6 of the <i>Mineral Resources Act 1989</i>.</p> <p>Unless that exception is made for mining leases, rights and entitlements existing under the <i>Mineral Resources Act 1989</i> in respect of compensation for and rights of entry under mining leases will not be preserved by the MERC Bill</p>

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		<p>Bill.</p> <p>Another consequence is that effectively no entry is permitted for advanced activities in respect of prospecting permits or mining claims unless the negotiation and agreement of Land court determination process has been followed in full. The Society expects this is unintended.</p> <p>Should it have been intended that chapter 3 of the MERCPC Bill apply to mining lease compensation, the Society also notes that it is a consequence of the drafting that there is no real link between compensation and the value of the land, and for the owner, there is no provision for an additional amount as presently provided under <i>Mineral Resources Act 1989</i>, section 281(4)(e) to reflect the compulsory nature of the activity.</p> <p>Note also that it appears intended from drafting later in chapter 3 that the operation of the compensation provisions of the <i>Mineral Resources Act 1989</i> for mining leases were in fact intended to continue - see section 71(2)(a) of the MERCPC Bill and the reference there to section 279 of the <i>Mineral Resources Act 1989</i>, which can have no application if division 5 of part 7 (Land Court jurisdiction for compensation and conduct) were intended to apply to mining leases also.</p>
36	Making of Land Access Codes	The expression “one or more codes for <i>all Resources Acts</i> ” (emphasis added) has the effect that it is not possible to make different land access codes for <i>different Resources Acts</i> . The Society suggests the expression should be “one or more codes for all or any Resources Acts”.
38	Entry for authorised activities requires entry notice	Entry notices are now to be required to cross access land (section 38). This Society queries whether this is practical given that access land generally consists of formed tracks.
40	Entry notices	<p>In respect of section 40(1)(a) to (f), the Society has previously commented that the use of the word “or” after each sub-paragraph has the effect that an entry notice <i>is</i> required if <i>two or more</i> of 40(1)(a) to (f) apply. The Society suggests that in the third line of section 40(1), the word “if” be deleted and the words “if any one or more or all of the following apply.”</p> <p>The reference in section 40(1)(c) to the Land Court “considering” an application under section 94 should be replaced with the equivalent words in section 43(1)(d): “each owner and occupier of the land is an applicant or respondent to an application relating to the land”. Section 94 does not make it clear when the Land Court is “considering” an application. It should be sufficient that an application is made and served on the respondent.</p> <p>For section 40(3), the reference to “enforceable” suggests that “rights” can exist that are not enforceable, thus casting doubt on the meaning of the entire paragraph. The Society suggests that the words be changed to “enter land, means a right to enter the land under any law, including under a common law or equitable right, but does not include a right to enter the land under this Act or a Resources Act.”</p>

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43	Entry for advanced activities requires agreement	<p>For section 43(1), a similar comment is made as for section 40(1): the section results in a ban on entry of private land where, for example, the resource authority holder has a conduct and compensation agreement with the owner under section 43(1)(a) and a deferral agreement with the occupier under section 43(1)(b). The word “unless” should be deleted and the words “unless one or more of the following applies” should be inserted.</p> <p>A similar comment is made, and changes recommended, in respect of the definition of “independent legal right” in section 43(3) as for section 40(3).</p>
Division 4 subdivision 2	Access rights and access agreements	<p>As the Society recommended previously, access agreements should be only in writing, not oral – refer to examples at page 8 of the Society’s submission dated 1 August 2012 and pages 3-5 and 7-14 of the Society’s submission dated 23 April 2014. The Society made the following points:</p> <ul style="list-style-type: none"> • it is unclear how the compensation provisions apply if an access agreement is made orally; • oral access agreements will be binding on successors in title despite the fact that no evidence of the terms of the agreement exists, which is contrary to the longstanding requirements of the <i>Property Law Act 1974</i>, sections 11 and 59 which require arrangements in relation to the creation or disposition of interests in land to be in writing; and • an oral access agreement would be inconsistent with the requirements for a conduct and compensation agreement which must be in writing. <p>As such, it is recommended that section 47(1)(a) be amended to exclude the reference to oral agreements.</p>
49	Criteria for deciding whether access is reasonable	<p>Subsection (2) does not work in context. Subsection (4) defines “formed road” as meaning “any existing road or track on private land or public land”</p> <p>If that subsection is intended to set up an order of precedence – formed roads, even if not public roads, must be used first – then it fails, as the matters in subsection (3) can never be considered, and therefore it appears from the drafting, the Land Court’s powers under subdivision (3) cannot be invoked, unless it is “not possible or reasonable” to use a formed road, <i>even if that formed road is itself access land</i>.</p> <p>If the intent is to create an order of precedence that requires that formed tracks be used before a new road is created, then subsection (2) should read: “the resource authority holder must first show whether or not it is possible or reasonable to exercise access rights by using a formed road”.</p> <p>It is then possible to achieve the objective of section 49(3).</p>

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Section	Subject	Comment
52	Power of Land Court to decide access agreement	<p>The words “if a dispute arises” in section 52(1) are unclear. For example: if there is a failure to agree, has a “dispute arisen”? If the owner or occupier claims that the matters in sections 49(2) and (3) have not been considered, does the Land Court have jurisdiction?</p> <p>As drafted, neither of these matters are dealt with.</p> <p>The Society submits that it would be reasonable for section 52(1) to say, in effect, that either party may apply to the Land Court to decide the terms of an access agreement if the parties fail to agree the terms of an access agreement, the owner or occupier has refused to make the agreement, or it is taken under section 48(3) to have so refused.</p>
55	Right of access for rehabilitation and environmental management	The section does not deal with rehabilitation post expiry of the resource authority.
57, 58	Periodic entry notices for entry to public land	<p>In section 57(1), “periodic entry notice” is defined as “the first notice about an entry, or series of entries, to public land”.</p> <p>Consequently, after the initial entry or series of entries it is not possible to give a further entry notice (as the “first” notice will have been given). Consequently none of the following sections in part 3, division 1 can apply, and in effect there is then no process for entry to public land.</p> <p>The Society recommends that section 57(1) be amended by changing “first” to “first and any subsequent”.</p>
58(2)	Comply with section 58(1) despite being an applicant for the resource authority	The drafting is well intended but does not work. It is clear from section 58, and section 57 on which its operation relies that a notice can be given only in respect of a “resource authority” and by a “resource authority holder”. The Society considers that section 58(2) does not adequately overcome the absence at the point at which the notice would be given of a resource authority, and therefore of a resource authority holder.
61	Notifiable road use	This division should be stated not to apply to a declared project under the <i>State Development and Public Works Organisation Act</i> (see <i>Mineral Resources Act 1989</i> section 318EM).
68	“Restricted land” is to be defined by reference to buildings and areas used “at the date the resource	<p>The equivalent provisions in the <i>Mineral Resources Act 1989</i> generally refer to restricted land when the tenement is applied for (for MDLs section 181(8), for MLs section 238(1)).</p> <p>The Society points out that this will leave the resources authority applicant in considerable doubt about what areas within the tenement it can use on grant, as buildings can be constructed, and areas can be used, for purposes described in section 68(1) at some time after the application is made. The Society is concerned that this does not give the resource authority applicant a level playing field. On the one hand, the resource authority applicant must</p>

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	authority was granted”	<p>settle at a specific point in time (the date of its application) on the resource development it proposes. However, it must do so not knowing whether the land owner or occupier may start different uses, or construct buildings, in the considerable period that passes between application and grant.</p> <p>The Society strongly recommends that the reference to “granted” in section 68(1) be replaced by “applied for”, or else at least that mining leases be excluded from this part.</p>
69	Who is the relevant owner or occupier	<p>In the <i>Mineral Resources Act</i> 1989 as it stands, the concept of “restricted land” is limited to that of land owned or buildings used by an “owner”. The extension to “occupier” is not reasonable given that in effect the “owner” and “occupier” of restricted land have an absolute veto over resource activities in restricted areas, as now to be defined.</p> <p>There is no point to including restricted land in the area of a mining lease (as the Minister has undertaken to do, as part of the review and consultation process) if the ability to use that land is then subject to that absolute veto (without, the Society notes, recourse to any form of dispute resolution, such as the Land Court).</p> <p>Finally, the Society notes that on page 7 of the Department of Natural Resources and Mines’ document “Resource legislation reform initiatives”, “notifications and objections and restricted land”, the department proposed in line with references to restricted land being amended up to time of grant and “land owner consent required to enter,” the “extinguishment of restricted land for mining leases with surface rights”. The Society notes that this has not occurred, unless that is the intent of section 71(2) - in which case it should be made clear, in order to achieve the department’s objective, that part 7 (compensation and negotiated access) does not apply to mining leases.</p>
78(3)	Resource authority holder to notify new owner or occupier	<p>The inclusion of notice to the “owner” is problematic here for the resource authority holder as it cannot be reasonably be expected to maintain what will effectively to be day to day enquiries about the status of registration of transfers of land in the area of its tenement, in case a transfer or other dealing is registered that triggers this section. Note that, for example for an exploration permit, the area and number of properties concerned, and consequently the costs, administrative and in terms of search fees, can be extensive.</p> <p>The requirements of the section are significantly greater where “occupiers” are concerned. As defined, an “occupier” can be, for example, a bare licensee (see the Society’s comments below regarding the definition of “occupier”, particularly paragraph (b) of that definition).</p> <p>The Society recommends that the time period for the obligation to notify should commence only when the previous owner or occupier has given the resource authority holder written notice that there is a new owner or occupier, in order to make it practically possible for the resource authority holder to comply.</p>

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77	Agreements, notices and waivers not affected by dealing	The Society commented in its submission dated 23 April 2014 that it is unclear whether this provision also applies to conduct and compensation agreements, deferral agreements and opt-out agreements. This ambiguity has not yet been addressed. It is recommended that the section specify whether this is the case.
79	Access agreement binds successors and assigns	The Society repeats its comment in respect of section 47(1)(a): to declare that an “oral” access agreement binds personal representatives, successors in title and assigns is likely to be conducive to dispute and uncertainty. The Society recommends that all access agreements be required to be in writing.
Part 7	Compensation and negotiated access	The Society notes generally that “occupiers” should not be entitled to claim compensation in respect of the grant of mining leases, which should continue to be governed by the regime in chapter 6, <i>Mineral Resources Act 1989</i> as it stands. All of the following comments are made in that context and subject to that comment.
82(1)	Notice of intent to negotiate	<p>The Society notes that under section 80(1) a “compensation liability” arises only when an eligible claimant “suffers” a compensatable effect. It is only then that a “negotiation notice” may be given under section 82(1).</p> <p>It follows from the drafting that a negotiation notice can only be given about that compensation liability, and no other. It is not possible under part 7 as presently drafted to negotiate for compensation in respect of <i>future activities</i>. Consequently, the drafting is circular (as entry to the land is prohibited, amongst other things, unless there is a conduct and compensation agreement – see section 43(1)(a)).</p> <p>Consider for example this scenario:</p> <ul style="list-style-type: none"> • An EPC holder wishes to enter in order to carry out “advanced activities” for the purpose of exploration. • In the absence of some other form of agreement or the commencement of Land Court proceedings (not possible at that point), section 43(1) prohibits the entry. • The eligible claimant does not “suffer” any compensatable effect because authorised activities have not been carried out. There is consequently not “compensation liability”. • Consequently, no negotiation notice can be given under section 82(1). <p>The Society suggests that the simplest way of addressing this is in section 80(1) where “suffers” should be expanded to “or would suffer” or similar.</p> <p>The fact that the wording in the draft Bill is similar to that in existing access laws does not address this fundamental error.</p>
83	Negotiations	The Society recommends that the “without prejudice” provisions in section 87(6) be reflected in section 83 also.
86	Parties may seek conference or ADR	Section 86(2)(b) leaves the process in a state of uncertainty because it is not clear what happens if the other party does not agree. If the “call” upon the other party is pro forma then it might as a matter of construction follow that a

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		<p>conference can be held under section 87, or ADR can be conducted under section 88. However, if (as the word suggests) the other party's agreement is required, then none of the following steps can be taken in the absence of agreement.</p> <p>It appears to the Society that the intent is that the second interpretation applies. Given that the parties have already not agreed on compensation in the 20 business days' negotiation period, this has the potential simply to simply cause delay.</p> <p>The Society notes that in respect of section 88 the parties are obliged to use reasonable endeavours to finish "it" (presumably the ADR) "within 20 business days after the notice is given". No allowance is made here for the possibility (in the context, likelihood) that the other party does not agree to ADR. The drafting as it stands is likely to lead to confusion and dispute. The Society recommends that a party to an unsuccessful negotiation be entitled under section 86(2)(b) to specify the proposed ADR, in respect of which section 88 then applies.</p>
90	Particular agreements to be recorded on titles	<p>As indicated in its previous submissions, the Society does not oppose this.</p> <p>The Society notes its previous comments in its submissions dated 23 April 2014 that this requirement (then in draft provision 351) does not extend to access agreements and deferral agreements. It is important for prospective purchasers to be aware of the existence of an agreement which will apply to them following a purchase of the property, if this in fact the intention for access and deferral agreements. Some of the Society's other comments in relation to this issue have also not yet been addressed by the MERC Bill.</p> <p>The Society repeats its earlier comment, in respect of section 90(3), that the termination of an agreement for alleged non-compliance or breach (which is one of the ways in which an agreement can end) is likely to be the subject of considerable dispute. The resource authority holder will then be in an extremely difficult position. If it gives notice to the registrar that the agreement has ended, it has prejudiced its position in the dispute. If it does not, and the Land Court finds against it, then it has breached the Act and the conditions of the tenement. It is not reasonable that any party should be put in that position. As a matter of good law, section 90(3) should say that if a party claims that the agreement ends, the resource authority holder must give notice that the agreement ends within 28 days or if there is a dispute between the parties as to the agreement ending, then within 28 days after that dispute is settled by the parties or determined by the court.</p>
94	Land Court may decide if negotiation process is unsuccessful	<p>In section 94(2)(c) the "eligible party" could be either the land holder or the resource authority holder (see section 94(5)). Therefore the reference to "eligible party's land" makes no sense, unless "land" is intended to refer also to a resource authority. It would be more appropriate to refer to the "eligible claimant's" land.</p> <p>The Society understands that the addition of the new section 94(2)(c) is to clearly enable the Land Court to determine not only compensation but also conduct conditions. However, this is not what the section says – it goes much further by referring to "obligations or limitations". Consequently, it is open to the Land Court to in effect</p>

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		<p>change conditions on which the resource authority was first granted.</p> <p>The Society suggests that rather than referring to “obligations and limitations”, it would be clearer and more helpful to the parties if reference were made to the matters in section 81(1)(a) and (b), they being the proper subjects of conduct and compensation agreement on which the Land Court is effectively to rule.</p>
Schedule 1	Definition of “owner”	The Society has no comments on the changes made to the definition of “owner”.
Schedule 2	Definition of “occupier”	<p>Largely transitioned from the existing Resources Acts, this definition remains problematic.</p> <p>Paragraph (a) of the definition is straight forward. It is paragraph (b) that creates uncertainty. The Society acknowledges that paragraph (b) resulted from recent amendments to the equivalent provisions in the Resources Acts. The problem with paragraph (b) is that the term “right to occupy” is extremely broad and has the potential to include persons who were not intended to be encompassed by the concept of “occupier”. If a broad view were taken of its application, in practical terms it would not be possible for the resource authority holder to comply with a number of the obligations relating to occupiers – not least because “occupiers” on a broad view of paragraph (b) might include a range of potential persons who are not located on any public record and who might have a very remote, incidental or temporary association with the land.</p> <p>The Society strongly recommends that the committee consider an amendment to paragraph (b) of the definition of “occupier”.</p>