

# Operational policy

## Disqualification criteria and assessment

MIN/2020/5440

03 March 2021

Version 1.01

### 1. Purpose

This policy clarifies the matters that may be considered when deciding whether to disqualify an applicant from the grant or transfer of a prescribed resource authority under Chapter 7 of the *Mineral and Energy Resources (Common Provisions) Act 2014* (the MERCP Act). These legislative provisions do not apply for applications to renew a prescribed resource authority.

The information in this policy reflects current departmental practices and does not override legislative requirements or limit the exercise of discretion. These practices may change from time to time with changes to be published through a revised version of this policy.

The Department of Resources is committed to respecting, protecting and promoting human rights. Under the *Human Rights Act 2019*, the department has an obligation to act and make decisions in a way that is compatible with human rights and, when making a decision, to give proper consideration to human rights. To the extent an act or decision under this document may engage human rights under the *Human Rights Act 2019*, regard will be had to that Act in undertaking the act or making the decision.

### 2. Definitions

For the purpose of interpreting this guideline, the words *applicant*, *associate*, *prescribed resource authority* and *prescribed matter* have the meanings given in section 196A of the MERCP Act.

An *applicant* is an entity that applies for:

- the grant of a *prescribed resource authority*:
  - a mining claim; an exploration permit; a mineral development licence; a mining lease under the *Mineral Resources Act 1989*; or
  - an authority to prospect; a petroleum lease; a pipeline licence; a petroleum facility licence under the *Petroleum and Gas (Production and Safety) Act 2004*; or
  - a lease under the *Petroleum Act 1923*; or
  - a geothermal exploration permit or a geothermal production lease under the *Geothermal Energy Act 2010*; or
  - a GHG exploration permit or a GHG injection and storage lease under the *Greenhouse Gas Storage Act 2009*.
- a tender for a prescribed resource authority; or
- an application for approval of a prescribed dealing that is a transfer of a prescribed resource authority or a share in a prescribed resource authority.

*Prescribed matter* has the meaning given in section 196B of the MERCP Act –

- an application for the grant of a prescribed resource authority;
- a tender for a prescribed resource authority;
- an application for approval of a prescribed dealing that is a transfer of a prescribed resource authority or a share in a prescribed resource authority.

The definition of *associate* in section 196A includes directors and parent companies, as well as individuals or entities who are able to control or substantially influence the operations and decisions about the management of the resource authority. This may extend to family members, related bodies corporate, ultimate holding companies, and other entities.

An *associate* of an applicant for a prescribed matter means either:

- an entity the Minister or delegate (decision-maker) considers is in a position to control or substantially influence the applicant's affairs in connection with the prescribed resource authority the subject of the prescribed matter; or
- if the applicant is a body corporate –
  - a director of the applicant; or
  - if the applicant is a subsidiary of another body corporate (the parent company)
    - the parent company; or
    - a director of the parent company.

If the definition of *associate* applies, the decision-maker will consider whether a person is in a position to control or substantially influence the applicant's affairs in connection with the prescribed resource authority the subject of the prescribed matter. For example, the department will consider whether a parent company could substantially influence the management of a mining lease or its funding if granted. The decision-maker does not need to be satisfied that the person in question has actually exercised control or has actually substantially influenced these affairs.

Whether this definition applies will be a question of degree and fact and there is no prescriptive approach to the interpretation and application of the definition of *associate*. Each instance is considered on a case-by-case basis, taking into account all the relevant factors under section 196C(2) and any further information or documents that the decision-maker requires from the applicant to make a decision under section 196D.

### 3. Policy intent

The disqualification criteria are intended to allow the state to better assess the risk of applicants not being able to adequately manage their resource authority and remain compliant with resource authority obligations. This will mitigate the potential risk that the site may be disclaimed or left with other outstanding debts through an upfront assessment of the applicant's suitability to hold a resource authority. The disqualification criteria are in addition to the consideration of the financial and technical resources of an applicant and the application requirements which apply under the relevant Resource Act.

#### 3.1 Disqualification of an applicant

##### **Statutory matters that the decision-maker may consider regarding disqualification**

Section 196C(1) of the MERC Act allows the Minister to disqualify an applicant from being granted, or transferred, a prescribed resource authority. Section 196C(2) of the MERC Act lists a number of matters that the decision-maker *may* consider when making a disqualification decision.

The matters listed at section 196C(2) may be viewed as the 'trigger' circumstances for when the power to disqualify will be enlivened. Only one matter needs to be satisfied for disqualification. If an applicant triggers and is assessed as disqualified under one limb, the other limbs do not need to be considered.

The section 196C(2) matters are:

- whether the applicant, or an associate, has contravened the MERCCP Act or another Resource Act (other than Chapter 9 *Safety of the Petroleum and Gas (Production and Safety) Act 2004*;
- whether the applicant, or an associate, has been convicted of an offence against the MERCCP Act, a Resource Act, the *Coal Mining Safety and Health Act 1999*, the *Environmental Protection Act 1994*, the *Mining and Quarrying Safety and Health Act 1999*, or the *Water Act 2000*;
- whether the applicant, or an associate, has been convicted of an offence against a law of the Commonwealth or another state that is substantially the same as a Resource Act, the *Coal Mining Safety and Health Act 1999*, the *Environmental Protection Act 1994*, the *Mining and Quarrying Safety and Health Act 1999*, or the *Water Act 2000*;
- whether the applicant, or an associate, has been convicted of an offence involving fraud or dishonesty within the 10 years before the application or tender was made,
- whether the applicant, or an associate of the applicant, is an insolvent under administration;
- whether the applicant, or an associate, is or was, within 10 years before the application or tender was made, a director of a body corporate that is or was the subject of a winding-up order or for which a controller or administrator is or was appointed;
- whether the applicant or an associate is disqualified from managing corporations because of the *Corporations Act 2001* (Cth), part 2D.6;
- submissions, if any, made under section 196G;
- any other matter the decision-maker considers relevant to making the decision.

**Note** - *The prescribed matters under section 196C(2) of the MERCCP Act are not exhaustive but include any other matters considered to be relevant to making the decision, pursuant to section 196C(2)(i) of the MERCCP Act. Such 'other matters' are discussed in further detail below.*

### **Other matters relevant to the resource authority the decision-maker may consider regarding disqualification**

The Minister *may*, when deciding whether to disqualify an applicant, take into account any other matters considered to be relevant to making the decision, pursuant to section 196C(2)(i) of the MERCCP Act.

This means it is open to the decision-maker to consider any matter that relates, or is connected in some way, to a matter stated in subsections 196C(2)(a) to (h).

It is not intended that section 196C(2)(a) will be applied for trivial non-compliances of resources legislation, for example, submitting a late report, if this is something that does not occur on a regular basis.

When considering matters relating to insolvency, winding up orders and disqualification from managing corporations,<sup>1</sup> the decision-maker will have regard to the seriousness of the matter.

The following is a list of examples of matters that *may* be taken into consideration in making a disqualification decision:

- whether there is a history of repeated noncompliance or contravention of the Acts listed in section 196C(2) of the MERCCP Act;
- the amount of time that has passed since an applicant or its associate was insolvent under administration;
- the amount of time that has passed since an applicant or their associate was a director of a body corporate that was subject to a winding up order or had a controller or administrator appointed;
- any evidence of improved financial management practices; for example, if the applicant or their associate has a recent record of sound financial management;

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<sup>1</sup> See matters listed in subsections 196C(2)(e)-(g) MERCCP Act.

- any factors that lead to a body corporate that the applicant or associate was a director of becoming subject to a winding-up order or having a controller or administrator appointed. Factors relating to the event that may be considered relevant include, but are not limited to:
  - force of nature impacts or economic factors beyond the control of the applicant or associate;
  - the amount of time that has passed since the relevant body corporate was subject to a winding up order or had a controller or administrator appointed;
- any factors that lead to an insolvency process that the applicant or associate was involved in. Factors relating to the event that may be considered relevant, include, but are not limited to:
  - force of nature or economic factors beyond the control of the applicant or associate that led to insolvency; and
  - the amount of time that has passed since the applicant or their associate was an insolvent under administration;
- any evidence of a pattern of high risk commercial behaviour that shows substantial non-compliance or maladministration of a body corporate; and
- whether a court decision evidences that an applicant or associate deliberately or negligently caused a company that was otherwise solvent to be insolvent.

The list is not intended to be exhaustive and not every listed matter will necessarily be of relevance to every decision.

### **Matters that may be considered when disregarding a past contravention or conviction – section 196C**

Section 196C(3) of the MERC Act provides that, the decision-maker may disregard a contravention or conviction for an offence mentioned in section 196C(2) having regard to the following:

- the degree of seriousness of the contravention or offence (section 196C(3)(a));
- the degree of harm caused by the contravention or offence (section 196C(3)(b));
- the length of time that has elapsed from the commission of the contravention or offence (section 196C(3)(c));
- the extent to which the applicant or associate was involved in the commission of the contravention or offence (section 196C(3)(d)); and
- any other matter the decision-maker considers relevant (section 196C(3)(e)).

To clarify, section 196C(3)(e) provides that other factors not listed in section 196C(3) may still be considered by the decision-maker when deciding whether to disregard a past contravention or conviction.

By way of example, the decision-maker *may*, at their discretion, consider any of the following additional factors in deciding whether to disregard an applicant's or associate's previous contravention or conviction:

- whether a court decision evidences that the applicant or associate knowingly committed the contravention or conviction;
- the age, physical or mental health or special infirmity of the applicant or associate when the contravention or conviction occurred;
- the existence of any mitigating circumstances in relation to the contravention or conviction; or
- whether the applicant or associate has reformed or taken steps to improve their conduct, such as:
  - deliberate action to redress a circumstance;
  - recent compliance with any of the above mentioned Acts;
  - remedial training;
  - rehabilitation courses; or
  - community service;
- whether a court decision evidences that an applicant or associate deliberately or negligently caused a company that was otherwise solvent to be insolvent.

## **Transitional**

The power to disqualify under section 196C applies only if the application or tender constituting the prescribed matter was made after 7 September 2020. Existing undecided applications as at 6 September 2020 are not subject to the disqualification provisions.

## Document information

**Availability:** External

**Location:** Business Industry Portal

**Owner and approver:** Deputy Director-General, Georesources Division

**Review date:** September 2022

**Related documents:**

**Contacts:** For help and information about this policy, please contact the Mineral Assessment Hub on (07) 4447 9230 or email [mineralhub@resources.qld.gov.au](mailto:mineralhub@resources.qld.gov.au) or the Coal Assessment Hub on (07) 4936 0169 or email [coalhub@resources.qld.gov.au](mailto:coalhub@resources.qld.gov.au) or the Petroleum Assessment Hub on (07) 3199 8118 or email [PetroleumHub@resources.qld.gov.au](mailto:PetroleumHub@resources.qld.gov.au).

### Disclaimer

The purpose of this policy is to provide a framework for consistent application and interpretation of the legislation administered by the department. Policies may be applied flexibly where individual circumstances require an alternative application of policy. Where this policy, or part of this policy, is inconsistent with relevant legislation, the legislation will prevail to the extent of the inconsistency. While this document has been prepared with care it contains general information and does not profess to offer legal, professional or commercial advice. The Queensland Government accepts no liability for any external decisions or actions taken on the basis of this document. Persons external to the Queensland Government should satisfy themselves independently and by consulting their own professional advisors before embarking on any proposed course of action.

### Keywords

MIN/2020/5440; Resources; MERCPC; resource authority; applications; prescribed matter