QUEENSLAND
LAW REFORM
COMMISSION

Reimagining decision-making processes for Queensland Mining

Review of mining lease objections processes

Consultation paper – July 2024

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Publications in this reference:

QLRC, Introducing our review, Background paper 1, August 2023.

QLRC, Scanning the horizon: Queensland mining in the future, Background paper 2, October 2023.

QLRC, Other Jurisdictions, Background paper 3, February 2024.

QLRC, Valuing the Perspectives of Aboriginal peoples and Torres Strait Islander peoples, Consultation paper 2, July 2024.

Legislation:

All legislation referred to applies to Queensland, unless otherwise indicated. Commonwealth legislation has (Cth) at the end of its title.

Contents

Introduction

We are reviewing the current processes for deciding applications for mining leases and associated environmental authorities in Queensland.

This consultation paper:

- considers the strengths and problems with the current processes
- discusses and asks for feedback on:
  - 6 proposals for reform of the current processes
  - 26 questions, including on key aspects of how those reforms could be implemented.

We invite you to share your views on the consultation proposals and questions and any other issues you believe are important for our review.

We have released another consultation paper which focusses on the interests of Aboriginal peoples and Torres Strait Islander peoples. It includes the same proposals and questions but gives more context about relevant laws that affect their interests. We are committed to hearing the perspectives of Aboriginal peoples and Torres Strait Islander peoples and their communities in developing recommendations for reform.

You can share your views with us in any way, including in written submissions, drawings or audio or video recordings. You can send them to us by email or mail or upload them to our website. Submissions close on **13 September 2024**.

There will also be opportunities to attend meetings and forums to share your views in August and September 2024. Details about these meetings will be shared on our website and through our newsletters and LinkedIn page.

Our review

1. We have been asked to review and make recommendations about the processes to decide contested applications for mining leases under the Mineral Resources Act 1989 and associated environmental authorities under the Environmental Protection Act 1994, including review of decisions (the 'current processes'). The current processes also apply to major amendments for environmental authorities associated with a mining lease.

2. We have also been asked to consider:
   - how any recommended process would interact with decisions made under other Queensland and Australian laws, including:
     - Aboriginal Cultural Heritage Act 2003 and Torres Strait Islander Cultural Heritage Act 2003 (the 'cultural heritage Acts')
     - State Development and Public Works Organisation Act 1971
     - Water Act 2000
     - Planning Act 2016
     - Local Government Act 2009
     - Environment Protection and Biodiversity Conservation Act 1999 (Cth)
     - Native Title Act 1993 (Cth)
   - the implications of other laws, including:

- Human Rights Act 2019
- Judicial Review Act 1991

- whether any changes we recommend should apply to applications for resource production tenures under the Greenhouse Gas Storage Act 2009, the Geothermal Energy Act 2010 and the Petroleum and Gas (Production and Safety) Act 2004.

3. Appendix A contains an extract of the terms of reference. The full terms of reference are available on our website.[1]

Making a submission

4. You are invited to give us your views on the consultation proposals and questions, as well as any other issues relevant to our review. Your submissions are important and will help us to develop our recommendations. The closing date for submissions is **13 September 2024**.

5. You do not have to follow a specific format in making your submission. Submissions can be made in writing, as an audio or visual recording or in other formats such as artwork. You can upload them to our website or send them to us by email or post.

6. We prefer to receive public submissions as they provide important evidence in our review. Our submissions policy explains how we may use and publish submissions we receive.[2] We treat all submissions as public unless you clearly indicate it is confidential.

You can send us your written submissions through our website.

Please tell us clearly on your submission if you do not want us to refer to it in our report.

View our submissions policy and our right to information policy on our website

Terminology

In this paper:

- 'Indigenous peoples' and 'Indigenous communities' are used broadly in the context of international recognition of the rights and interests of Indigenous peoples.
- 'Aboriginal peoples' and 'Torres Strait Islander peoples' are used locally, in reference to the Traditional Owners of Australia.
- 'Community' is used in 2 separate ways:
  - to broadly refer to a group of people with shared interests
  - to refer more specifically to groups with shared culture.

We recognise the diversity of cultures, languages and communities throughout Queensland and Australia. We also recognise and respect the distinct cultural identities of Aboriginal peoples and Torres Strait Islander peoples.

We recognise that different language preferences exist. We use these terms with the utmost respect.

Background to our review

7. In the Queensland Resources Industry Development Plan ('QRIDP'), the Queensland Government committed to ensuring that the regulatory framework for the State's resources industry is 'risk-based, efficient, effective and transparent', with the aim of:[3]

- Queensland's resources being explored and developed in the public interest
- the community being confident that the resources industry is well regulated.

8. Our review is one of the actions specified in QRIDP to improve regulatory efficiency.[4]

9. Previous Government reviews have identified the need to improve the efficiency of the current processes. They recognised issues with the complexity, duplication, uncertainty, timeliness and cost of the current processes and the unusual role of the Land Court.[5]

Our preliminary research and consultations

10. We have engaged in preliminary consultations in approximately 94 meetings, forums and roundtables. This includes meeting with representatives of Government agencies and authorities, Aboriginal and Torres Strait Islander organisations and communities, industry bodies, landholder organisations, environmental organisations, legal professional bodies and the Land Court of Queensland. We have also analysed the reports of, and submissions to, previous reviews.[6]

11. The purpose of this work was to raise awareness and engagement in our review and to identify the strengths and problems of the current processes and options and opportunities for reform.

12. We have published 3 background papers that give context for our review and inform the consultation papers:[7]

- Background paper 1: Introducing our review – gives an overview of the scope and focus of our review, the current regulatory framework and the current processes.
- Background paper 2: Scanning the horizon: Queensland mining in the future – explores key drivers shaping the future of mining in Queensland and the potential implications of these trends for our review.
- Background paper 3: Other jurisdictions – gives an overview of relevant processes in Western Australia, New South Wales, the Northern Territory, British Columbia (Canada) and South Africa to give context to our analysis of the current processes and reform options.

13. We have released another consultation paper which focusses on the interests of Aboriginal peoples and Torres Strait Islander peoples. It includes the same proposals and questions but contains more context about relevant laws that affect their interests. We have also developed a set of 4 summary papers with expert advice from cross-cultural linguist Dr Diana Eades. We have designed these papers for Aboriginal peoples and Torres Strait Islander peoples who speak English as an additional language. They give summary information and invite views on our reform proposals.[8]

View and download the papers on our website

Our next steps

14. In August and September 2024, we will undertake extensive consultation throughout Queensland.

15. In November 2024, we will publish a submissions paper, summarising the submissions received on our consultation papers. We will also publish a consultation paper about whether any changes we recommend should apply to resource production tenures under the

Greenhouse Gas Storage Act 2009, the Geothermal Energy Act 2010 and the Petroleum and Gas (Production and Safety) Act 2004.

16. We will continue to engage in further consultation throughout the review.

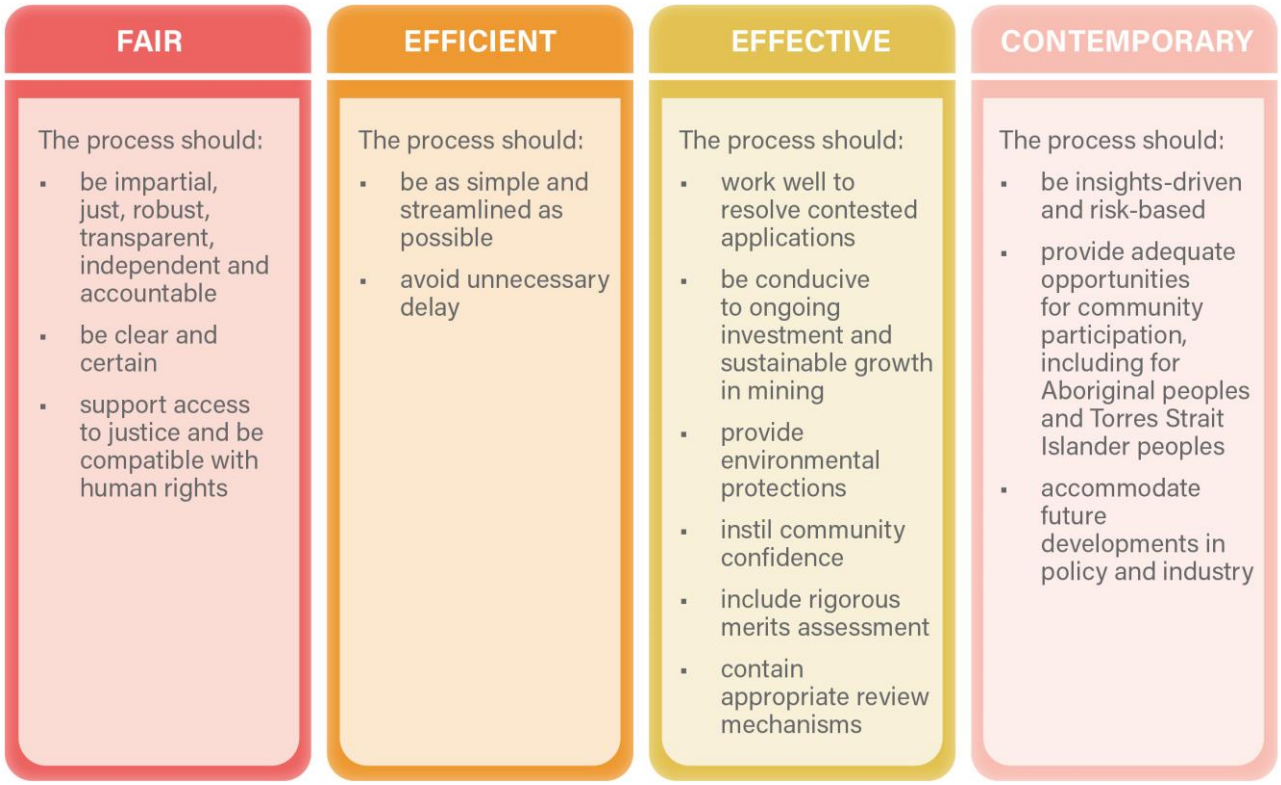
17. By 30 June 2025, we will make our recommendations in a final report to the Attorney-General.

Figure 1: The timeline for our review

Our guiding principles

18. We have developed principles to guide our review. We aim to develop recommendations to ensure the processes are 'fair, efficient, effective and contemporary'.

Figure 2: Our guiding principles



19. Our principles are informed by the terms of reference for our review and are consistent with current commitments by the Queensland Government, including:

- strong and genuine partnerships with Aboriginal peoples and Torres Strait Islander peoples, self-determination and free, prior and informed consent ('FPIC') in treaty negotiations and treaty-making[9]
- ensuring that the regulatory framework for the State's resources industry is 'risk-based, efficient, effective and transparent'[10]
- strengthening environmental, social and governance ('ESG') credentials.[11]

Question

Q1 Are the guiding principles of 'fair, efficient, effective and contemporary' appropriate for reform of the current processes?

The current processes

20. To machine-mine in Queensland, a miner must have a mining lease, granted by the Minister for Resources under the Mineral Resources Act 1989. The Minister cannot grant a mining lease unless the miner has an associated environmental authority, granted by the chief executive of the Department of Environment, Science and Innovation under the Environmental Protection Act 1994.[12]

21. The environmental authority application for all large mines must include a progressive rehabilitation and closure plan ('PRCP') schedule.[13] Resource activities authorised by a mining lease do not require a development approval under the Planning Act 2016.

22. Any person can participate in the current processes by:
    - making an objection to a mining lease application
    - making a submission on:
        - an associated environmental authority application, which could include a new or major amendment application or
        - any environmental impact statement ('EIS'): see box 1[14]
    - making an objection to the draft environmental authority, the draft PRCP schedule or both (if they have made a submission).

Box 1: Environmental impact statements ('EIS')

An EIS is the most rigorous form of environmental assessment in Queensland. It provides the decision-maker with detailed information about the potential environmental, social and economic impacts of the project and ways to avoid, minimise, mitigate or offset them.

An EIS may be prepared under either of 2 Acts. It may be:

- prepared voluntarily
- required for an environmental authority application under the Environmental Protection Act 1994
- required for a project declared a 'coordinated project' under the State Development and Public Works Organisation Act 1971.

Both Acts require public notification and comment on the EIS.

If there is a complete and current EIS for an environmental authority, the miner will not be required to publicly notify the application. Submissions on the EIS will be taken to be submissions on the environmental authority application and the submitter will have the right to object to the application.

23. The Government must refer to the Land Court any applications that have been objected to, along with the objections. The Land Court must conduct an objections hearing and make a recommendation to the relevant decision-maker.

24. The Land Court's recommendation is an administrative decision, not a binding judicial decision. However, the decision-maker must take it into account in deciding the application. The Mineral Resources Act 1989 and the Environmental Protection Act 1994 each set out the matters that the Land Court and the decision-maker must consider for the relevant application (the 'statutory criteria'), including the public interest.

25. A public entity must consider and act compatibly with the Human Rights Act 2019.[15] Both the Land Court when making its recommendation and the decision-makers for each application are public entities bound by that Act.[16]

26. Under the Judicial Review Act 1991, a person can apply to the Supreme Court for judicial review of both the Land Court's recommendation and the decision on the application. There is no merits review available for either the recommendation or the decision.

Integration of the processes

27. Although applications for mining leases and associated environmental authorities ('mining proposals') are regulated by separate Acts and administered by different agencies, they are connected at key points:

- only an applicant for a mining lease can apply for an associated environmental authority, although the applications do not need to be made at the same time
- the miner must give public notice of the applications together, unless there is a complete and current EIS at the time of application (see box 1)
- if there are objections to both applications, the Land Court must hold a combined objections hearing, if practicable
- the Land Court's recommendation is made to the relevant decision-maker on each application before the final decision is made
- a mining lease cannot be granted unless an environmental authority has been granted.

Strengths and problems

28. We have identified key strengths and problems with the current processes to help us develop consultation proposals and questions.

Summary of strengths

29. The opportunity for public participation in the Government's decision-making processes is fundamental to instilling community confidence in the regulation of the mining industry. The availability of independent merits assessment of all mining lease and associated environmental authority applications is a key strength of the current processes.

30. The Land Court objections hearing provides an independent public forum to assess the merits of an application. Strengths of the Land Court process include its rigour, impartiality, credibility, transparency and use of independent expert evidence to inform recommendations.

31. The Land Court has specialist expertise in land, mining, environmental and cultural heritage disputes. Through its jurisdiction under the cultural heritage Acts, it has developed specialist expertise about the cultural heritage of Aboriginal peoples and Torres Strait Islander peoples.[17]

In fulfilling its obligations under the Human Rights Act 2019, the Land Court has made directions adopting a 'First Nations Protocol' for taking on-Country evidence 'in the presence of the people who have the collective authority to speak about matters of place and culture', based on the cultural rights in the Human Rights Act 2019.[18]

32. If there are objections to both applications, a combined objections hearing considers issues for both the mining lease and environmental authority. This reduces duplication and provides a holistic approach to dispute-resolution.

33. Statutory criteria apply to Government assessments, Land Court recommendations and final Government decisions. They provide clarity and support consistent decision-making.[19]

34. The broader framework governing decisions about mining projects also have features that promote a fair, efficient and effective process. There are Government systems that promote transparency and accountability and mitigate against corruption, including public information and access to application and authority documents (though the conditions of mining leases are not publicly available).[20]

Summary of problems

35. The primary way to participate in the current processes is by objecting to an application. This automatically triggers an adversarial – and sometimes lengthy and expensive – objections hearing.

36. Only applications that are objected to are subject to merits assessment by a court unless the Government or miner separately decides to refer the application to the Land Court. There is a lack of safeguards to ensure rigorous, independent merits assessment of all mining activities that may pose elevated risk or community concern.

37. Substantial time may pass between public notification and comment on the EIS and the objections hearing and final decision. This delay can mean the information supporting the application is outdated. Further, it may exclude objection rights for interested people and communities.

38. Notification and information-sharing requirements can be dispersed across multiple Government departments and websites and span significant timeframes. The requirements do not meet contemporary expectations and create further barriers to effective participation.

39. The current processes lack procedural fairness in some respects, for example:

- there is a lack of transparency and accountability at key points and public access to sufficient current and impartial information can be limited. This includes:
  - not all documentation in support of the mining lease application is publicly available
  - additional information provided during the assessment process may not be publicly available
  - while the miner can provide additional information and revise their mining proposal during the objection hearing, objectors are confined to their grounds of objection
  - additional information can be provided to the decision-makers after the Land Court has made its recommendation
  - reasons for decision, other than for the Land Court recommendation, are not publicly available

- decisions by the Coordinator-General can bind other decision makers, including a Minister, with no right of review.

40. The lack of transparency and access to current information fails to address the negative mining legacy for communities that have experienced fraught relationships with industry, concerns with the treatment of cultural heritage or community interests or the impact of abandoned mines.

41. The current processes do not meet the Government's commitments to effective consultation, strong ESG performance and respect for the rights and interests of Aboriginal peoples and Torres Strait Islander peoples.

42. The Land Court's administrative function of making a recommendation to a Government decision-maker is unusual and contrasts with the ordinary judicial function of a court. It places the Land Court within the administrative process and blurs the formal separation of powers between the judiciary and executive. It also gives an opportunity for judicial review, before the final decision is made, resulting in delay and uncertainty in Government decision-making.

43. The complexity, duplication and costs of the current processes may be exacerbated by interactions with other approval processes, such as those for water, regional planning and federal native title and environmental approvals.

44. The current processes are not responsive to the key drivers for future mining in Queensland. The Government anticipates increasing diversity in the mining industry and growth in the number of mining lease applications driven by decarbonisation and the demand for critical minerals. To accommodate industry developments and meet the Government's commitment to efficiency and to expedite critical minerals developments, the current processes must be insights-driven and risk-based.

45. Community concerns with the current processes include:

- limited access to information
- lack of opportunity to meaningfully participate other than through the objections hearing
- lack of transparency about how decisions are made and the information on which they are based.

46. Community concerns also relate to the ability for industry to 'game the system', for example by tailoring applications to sit just below the threshold for an EIS. This leads to limited confidence in the outcomes of decisions for landholders, communities and the environment.

47. Industry concerns with the current processes include:

- complexity and procedural redundancies in the current processes
- protracted assessment and approval timeframes
- the ability for the objections hearing to be used as 'lawfare' to delay projects and increase industry expense
- delay and lack of certainty deter investment in Queensland mining.

48. Key stakeholder groups experience barriers to participating in the current processes, including a lack of knowledge of the current processes and insufficient information and resources to effectively participate.

Question

Q2 Do you agree these are the strengths and problems of the current processes? Are there others not mentioned here which are appropriate to be considered for reform of the current processes?

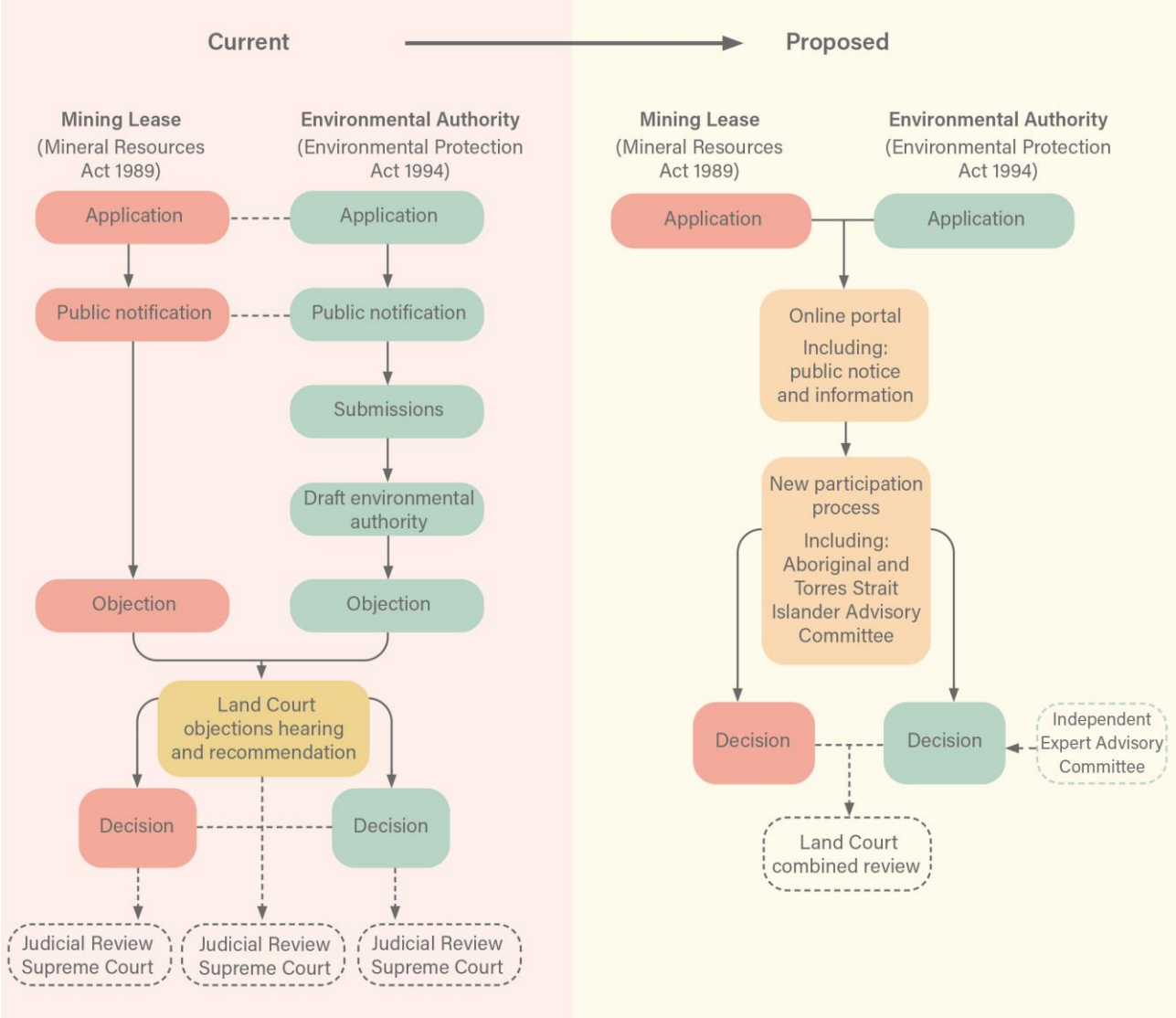
Our consultation proposals

49. We have 6 proposals for reform of the current processes. The proposals are preliminary ideas we have developed for public discussion and input. We invite your feedback and will genuinely consider all views regarding the proposals, as well as any other reform options you may identify.

50. Your feedback will help us to develop final recommendations that are workable and implementable.

51. Figure 3 shows the key changes we are proposing to the sequence of the processes.

Figure 3: Current and proposed processes



How the proposals work together

52. The proposals are intended to work together to preserve the strengths of the current processes while addressing the identified problems, through the lens of our guiding principles.

53. The fundamental change is to move from pre-decision merits assessment by the Land Court to post-decision review (merits and judicial). We propose to:

- remove the Land Court objections hearing pre-decision (P1)
- introduce review by the Land Court (merits and judicial) (P6).

54. Because the Land Court objections hearing provides the forum for participation in the current processes, we have re-imagined the participation process.

55. **We are proposing to introduce an integrated, non-adversarial participation process (P1)**. This would support early identification and resolution of key concerns and interests and gather relevant information to inform decision-making. When a proposed project may impact the rights and interests of Aboriginal peoples and Torres Strait Islander peoples, an Aboriginal and Torres Strait Islander Advisory Committee would be established, to consult with community to identify relevant interests and gather and share community input with decision-makers.

56. **We are proposing a new online portal (P2).** The portal would give up-to-date information and notice about mining proposals. It would increase efficiency, support informed participation and good decision-making and increase transparency and accountability.

57. **We are proposing a new Independent Expert Advisory Panel (P3).** The panel would be comprised of experts that would form a project-specific committee ('Independent Expert Advisory Committee') for environmental authority applications that meet specified criteria. The Independent Expert Advisory Committee's advice would enhance the evidence base for decisions as well as the quality, consistency and transparency of the decision-making process.

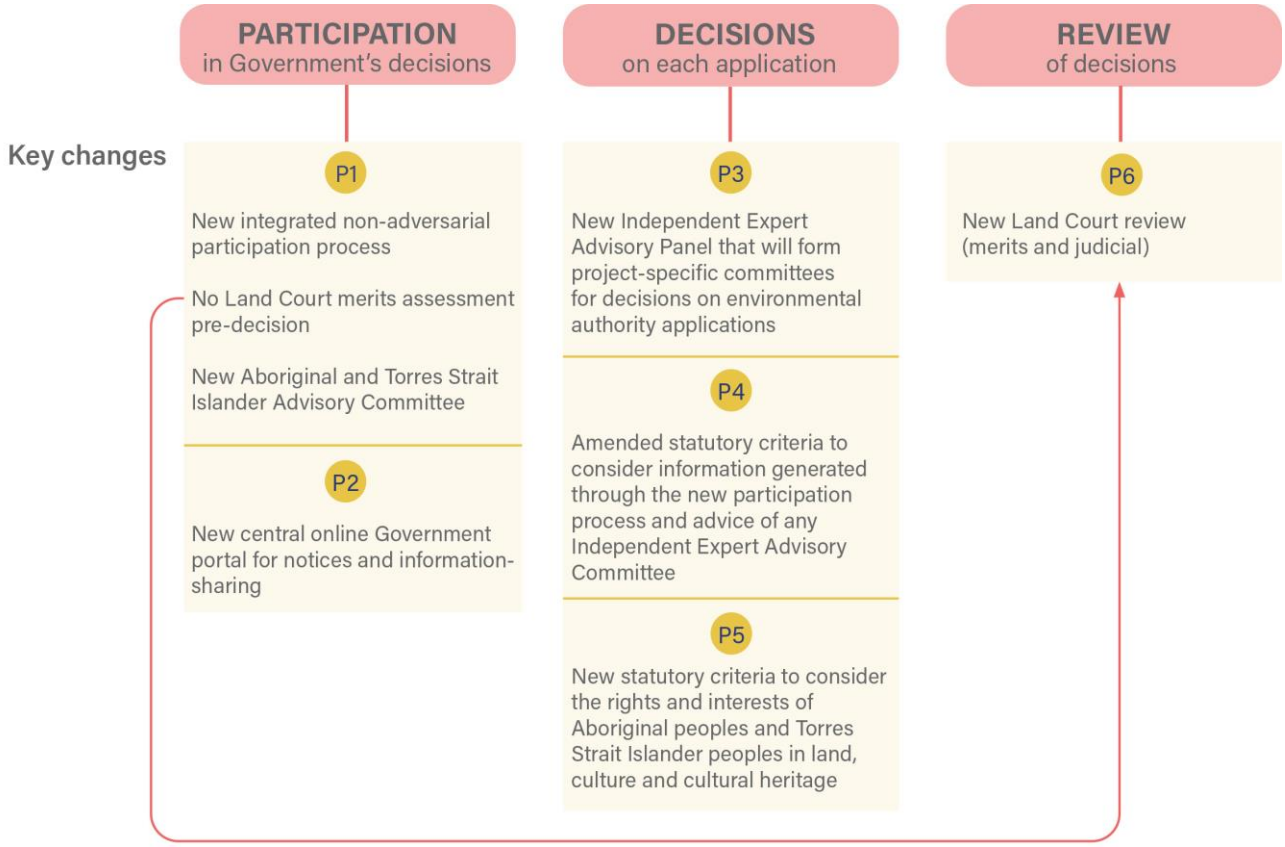
58. **We are proposing consequential amendments to the statutory criteria to require decision-makers to consider public input and expert advice (P4).** Decision-makers for both authorities would be required to consider information generated through the new participation process, to ensure it directly informs decision-making. This could include advice from the Aboriginal and Torres Strait Islander Advisory Committee and from local government and other relevant entities. The decision-maker for environmental authority applications would also be required to consider any advice of the Independent Expert Advisory Committee, to ensure that this expert advice directly informs decisions. The amended criteria would ensure that these reforms have a substantive, as well as procedural, impact on decision-making.

59. **We are proposing a new statutory criterion to require decision-makers to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples (P5).** Decision-makers for both authorities would be required to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage. This consideration could be informed by the advice of the Aboriginal and Torres Strait Islander Advisory Committee, as part of the new participation process, and by advice on Aboriginal and Torres Strait Islander rights and interests by a member of the Independent Expert Advisory Committee with this expertise.

60. **We are proposing a new combined review process in the Land Court (P6).** Merits and judicial review by the Land Court after the decision on each application is made would ensure decisions are subject to appropriate review in an accessible, expert forum. It would align with the processes for other major projects in Queensland and with best practice administrative decision-making. Having the Land Court consider both the merits and legality of Government decisions in a combined review would streamline review processes and increase efficiency.

61. Figure 4 is an overview of our proposals for reform.

Figure 4: Overview of our consultation proposals



How the proposals are structured

62. The discussion of the proposals and questions is divided into the following sections that reflect 3 key elements of good administrative decision-making processes for matters that may impact the public interest:

- participating in the Government's decision-making processes (P1–P2)
- deciding each application (P3–P5)
- reviewing the Government's decisions (P6).

Participating in the Government's decisions

63. In this section, we consider how people could participate in the Government's decision-making processes: see box 2. We focus on participation before the decision on each application is made.

Box 2: What is 'participation'

Our focus is on the legislated mandatory processes for participation in the Government's decisions on mining lease and associated environmental authority applications, including any EIS process.

This is distinct from other forms of consultation and engagement, such as voluntary engagement by the miner with the community or other consultation required by the Government, for example consultation required in the development of the PRCP.

64. We explain proposals to:

- reframe participation by removing the Land Court objections hearing pre-decision and introduce a new integrated participation process with non-adversarial forms of participation (the 'new participation process')
- establish a central online portal to facilitate public access to up-to-date information and notice about mining proposals.

65. We ask questions about how the new participation process could operate, including about:

- what new forms of participation should be included, for example, information sessions, public meetings, written submissions, community advisory committees
- the effect of removing the Land Court objections hearing
- whether there should be different participation requirements depending on the nature of the project
- notice and information requirements
- how we can ensure processes are accessible and responsive to the diverse needs of communities.

Reframing the participation processes

Proposal

P1 Participation in the current processes should be reframed by:

(a) removing the Land Court objections hearing pre-decision

(b) including an integrated, non-adversarial participation process

(c) establishing an Aboriginal and Torres Strait Islander Advisory Committee for relevant mining proposals to facilitate Aboriginal and Torres Strait Islander input as part of the new participation process.

66. The opportunity to participate in the Government's decision-making processes is fundamental to instilling community confidence that the resources industry is well-regulated and that the State's resources are developed in the public interest. Effective participation is also fundamental to good decision-making. It helps to identify and explore relevant issues and collect and share information. Hearing from potentially affected people is recognised as a requirement of natural justice or procedural fairness.

67. This proposal is based on the principles that:

- people potentially affected by mining proposals have the right to meaningfully participate in the decision-making processes
- good decision-making processes about public interest matters include opportunities for public participation
- when appropriately balanced, early and ongoing participation prior to decision-making improves, rather than detracts from, efficiency.

68. This proposal responds to the identified problems that:

- The current processes frame participation as a contest and impose an adversarial court process before the decision on each application is made. Many people and communities wish to have input into mining proposals without formally challenging the application or becoming an active party to a court hearing. This can include people

who are likely to be directly affected by a mining proposal, such as landholders, and people and groups who may have questions or concerns about the project on environmental, social, economic or public interest grounds. This can place a high burden on participants if they become an active party to an objections hearing. It can position interests as opposing and foster an adversarial dynamic. It can also be costly in terms of time, legal fees and expert evidence.

- There is a lack of early, non-adversarial opportunities to participate in the development of mining proposals to support mutually beneficial outcomes for people with a range of interests. This limits a miner's ability to understand interests, concerns and opportunities and can lead to increased costs and tensions.
- The current processes do not include mechanisms for local governments and other relevant entities to participate, aside from the objections hearing and limited consultation requirements, for example when a social impact assessment ('SIA') is required as part of an EIS.
- Relying on an objection being made for independent merits assessment to occur is arbitrary and can lead to inconsistent outcomes.
- The current processes lack safeguards to ensure genuine engagement and assessment by the relevant or affected Aboriginal peoples and Torres Strait Islander peoples. This limits the decision-makers' ability to assess cultural heritage significance, as required in any EIS process.[21]
- Systemic issues can deter meaningful participation. This may be the result of the negative mining legacy when there are abandoned mines or a history of inadequate management or compliance. Or it may be due to a lack of:
  - information and knowledge
  - digital technology
  - access to timely and affordable support, legal advice and representation.

69. International standards provide a basis for identifying the following principles of contemporary participation processes:[22]

- informative: the public is entitled to comprehensive, relevant and accurate information
- open: processes should be inclusive, responsive and well-resourced
- just: processes should focus on the impacts on social systems and the environment and opportunities to improve.

70. Figure 5 is a summary of the principles of meaningful participation.

Figure 5: The principles of meaningful participation[23]

71. Meaningful participation has special significance for Aboriginal peoples and Torres Strait Islander peoples. They have a distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources which they are connected with under Aboriginal tradition and Ailan Kastom.[24] At international law, Indigenous peoples are recognised as having an enhanced status as rights holders.[25] The right to self-determination is particularly fundamental to meaningful participation in decision-making that may affect rights.[26]

72. Processes must also be certain and efficient. Previous Government reviews have identified this as important to support sustainable growth and investment in Queensland mining. The core tenets of the Government's commitments in QRIDP reflect the desire to balance meaningful participation with improved regulatory efficiency. This includes the intention to:[27]

- foster coexistence and sustainable communities
- ensure strong and genuine engagement with Aboriginal peoples and Torres Strait Islander peoples and their communities
- strengthen ESG credentials and environmental protection
- improve regulatory efficiency.

Aboriginal and Torres Strait Islander Advisory Committee

Aboriginal and Torres Strait Islander Advisory Committee

A working group of Aboriginal peoples and Torres Strait Islander peoples that consults with community to identify relevant interests and provides advice to decision-makers about a mining proposal that may affect Aboriginal and Torres Strait Islander rights or interests

73. An advisory committee would be established for a mining proposal that may affect the rights and interests of Aboriginal peoples and Torres Strait Islander peoples, to give the decision-makers input from Aboriginal peoples and Torres Strait Islander peoples and their communities. The committee would give advice on specific issues, such as cultural heritage, as well as other broader issues about the proposed mine.

74. In Australia, Aboriginal and Torres Strait Islander advisory panels and committees are a regular feature at the strategic and policy level. One example is the Indigenous Advisory Committee operating under the Environment Protection and Conservation Biodiversity Act 1999 (Cth).

75. Another example is South Australia's State Aboriginal Cultural Heritage Committee. This committee is established under their cultural heritage legislation and comprised of Aboriginal South Australians appointed by the Minister. [28] The Minister must endeavour to consult with the Committee, as well as any Traditional Owners or other Aboriginal peoples the Minister identifies as having a particular interest in the matter. The Committee's role is to 'represent the interests of Aboriginal people' throughout South Australia. [29]

76. This model can be adapted to the project level. For example, in British Columbia's environmental assessment process, Indigenous nations can be appointed to assess the potential effects of the project which then must be considered by the decision-maker.[30]

77. Advisory committees can help ensure the rights and interests of Aboriginal peoples and Torres Strait Islander peoples and their communities are respected and there is active involvement in decision-making processes for mining on traditional lands. A voluntary extension of the role is for community groups to co-manage or co-own the project, a model aligned with the right to self-determination.[31]

78. We must consider the following issues in designing the advisory committee:

- how to ensure the most appropriate people are appointed from the relevant community – those who hold the cultural authority and knowledge for the relevant area, can speak for Country and represent their families and community groups on relevant issues
- gender diversity, to allow for the culturally appropriate sharing of information related to men's and women's business
- appropriate remuneration and recognition for committee members
- the importance of maintaining data sovereignty in the collection, handling, storage and use of Aboriginal peoples' and Torres Strait Islander peoples' information.[32]

Public participation

79. Our proposal maintains opportunities for participation on both the mining lease and associated environmental authority applications. In some comparative jurisdictions, public participation in the mining lease application is limited and the main way for members of the public to participate in mining proposals is through the processes to decide the authority that manages environmental impacts.[33]

80. For example, in New South Wales, participation in mining lease applications is limited to people with private interests in the land. Public participation in mining proposals occurs through the development consent process, which regulates a mine's environmental impacts. In the Northern Territory, only a landowner can object to a mining lease application and participate in a Northern Territory Civil and Administrative Tribunal hearing. However, any person can make public submissions on the mining lease application and there are more extensive opportunities for public participation in the environmental assessment process.

81. There are tensions in limiting participation in mining leases to private interests. While it is the Minister's decision whether to grant, grant with conditions or refuse the mining lease, the grant of a mining lease allows the miner to exploit natural resources, which belong to Queenslanders. There are fundamental public interest considerations in decisions about the use of public resources, separate to the public interest in avoiding, managing and mitigating environmental impacts, which is the concern of the environmental assessment process.

82. Currently, any person can object to a mining lease application and make a submission and object to an associated environmental authority. A person who has made an objection can then become an active party in the Land Court objections hearing. This open basis of standing to object and become an active party in the objections hearing has been consistently raised as an issue by stakeholders.

83. Some people consider that open standing and unlimited grounds to object to either or both applications enable abuses of process. Others maintain this is important for decisions involving the public interest.

84. The issue has less relevance under the new participation process, as our proposal to remove the Land Court objections hearing means that there will be no court process at this stage of the decision-making process and no need to consider the basis for objecting. We address standing later in this paper, in the context of our proposal to introduce combined review of Government decisions by the Land Court.

85. Our proposed review model limits the evidence available to the Land Court on review to the same evidence that was before the original decision-makers, with discretion to admit new evidence in exceptional circumstances (P6). In the current processes, additional evidence is obtained and provided through the objections hearing, which can enhance the evidence base for decisions. A consequence of removing the objections hearing is that expert evidence that members of the public wish to be considered by the decision-makers could be provided through the new participation process. This is in addition to the evidence that will be obtained and considered by the Independent Expert Advisory Committee (P3).

Maintaining integration

86. Our review does not propose to change the current approach of integrating the participation process for mining lease and the environmental authority applications. Allowing people to choose whether to participate on either or both applications:

- enables effective participation by allowing interested parties to address all relevant issues in one forum rather than in fragmented processes
- provides consistency and clarity and contributes to the alignment of processes
- improves coordination and fosters communication between relevant decision-making agencies
- provides environmental protections by allowing for a holistic consideration of environmental impacts across the mining proposal
- enables interested people to share their views about a mining proposal, without needing to identify the authority to which their concerns relate.

87. We are not proposing to change the current decision-making framework, where the final decision on each application is made by the existing decision-maker.

Question

Q3 What are your views on proposal 1?

Introducing new forms of participation

Models of public participation

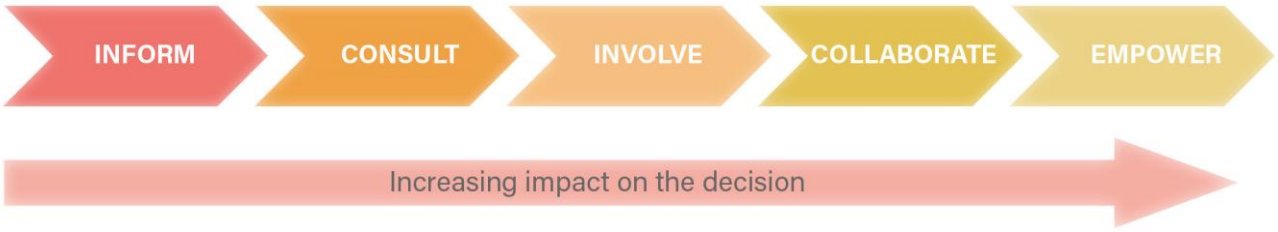
88. We are considering a range of different models for participation. They vary in the time and commitment required to participate, the level of active engagement and influence, and the control and autonomy they vest in the community.

89. Figure 6 shows the spectrum of participation options identified by the International Association for Public Participation,[34] which range from informing the public to a highly collaborative process:

- inform: to provide information to the public to assist them to understand the problem, alternatives, opportunities and solutions
- consult: to obtain public feedback on analysis, alternatives and decisions
- involve: to work directly with the public to ensure public concerns and aspirations are consistently understood and considered
- collaborate: to partner with the public in each aspect of the decision, including developing alternatives and identifying the preferred solution
- empower: to place the final decision in the hands of the public.

90. The full participation spectrum is in Appendix D.

Figure 6: The participation spectrum[35]



91. The following section explains the different models for participation we are considering for the new participation process.

Information session or open house

92. An information session or open house is a type of public meeting held to raise awareness and explain the mining proposal and decision-making process. People that may attend include community members and stakeholders. These meetings focus on providing information, such

as a brief description of the mining proposal and details on governance and engagement processes.[36] They are not intended as a forum for detailed discussion.

93. Information sessions can be hosted by the government or the miner. They can be held as a single session or run as multiple sessions at various stages of the process. Meetings may be held in person, at public venues such as town halls, online, or both. Information may also be provided in other ways, for example information booths may be held to raise community awareness of local planning and development proposals.

94. In British Columbia, open houses are commonly used in early engagement prior to the application. Multiple meetings are often held, hosted by either or both the Government and the miner.[37]

95. Effective information sessions can help to ensure transparency, foster ongoing community engagement, help to identify community concerns early and ultimately assist in building trust and acceptance in the process.[38]

Community advisory committee or reference group

Community advisory committee or reference group

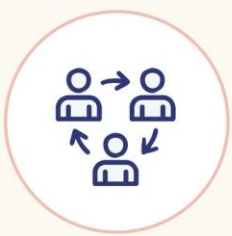
A working group that gathers community input and advises decision-makers about potential community impacts of a mining proposal

96. This is a working group of interested members of the public able to give local perspectives on mining proposals. The purpose of the group is to gather community input and to give decision-makers advice about potential community impacts of a mining proposal. This model could be a formal avenue for engagement by local governments and other relevant entities.

97. In British Columbia, a community advisory committee must be established as part of the environmental assessment process if there is sufficient community interest in a project.[39] The committee advises the Government on the potential effects of the proposed project on the community. These committees are a way for interested members of the public to stay updated on the progress of the project and be informed of opportunities to provide information about the effects of a project on the community.[40]

98. Committees in British Columbia generally include interested members of the public, local governments, members of Indigenous nations and interested organisations.[41] The Government may also establish a 'select committee', which is a small group of community representatives appointed through a selection and recruitment process.[42] Select committees operate under terms of reference and usually have more direct input into the assessment process, including drafting assessment reports and conditions of approval.[43]

Community leader council



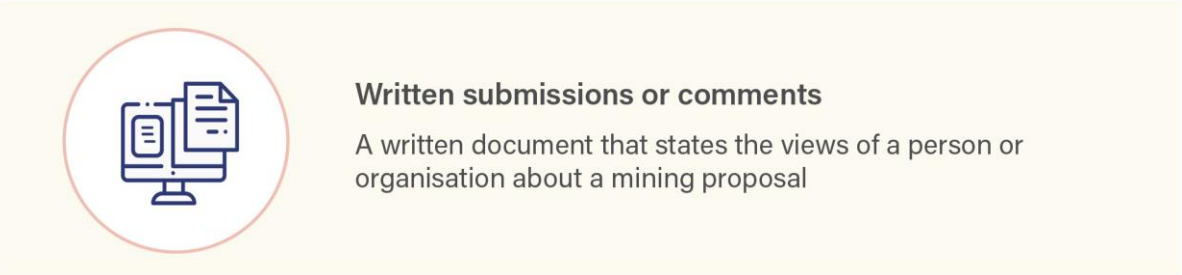
Community leader council

A working group of leaders from interested groups formed to help identify potential community impacts of a mining proposal and collaboratively develop possible solutions

99. This council would provide a forum to identify issues relating to mining proposals and enable solutions to be developed collaboratively. Community leader councils are like community advisory or reference groups, but members are the leaders of interested communities, representing a range of local experiences and perspectives.

100. Coexistence Queensland provides an example. The Coexistence Queensland Act 2013 establishes community leader councils to assist Coexistence Queensland to identify issues affecting the coexistence of landholders, regional communities, the resources industry and the renewable energy industry.[44] The councils consist of representatives of local government, regional communities, the agricultural industry, the resources industry and the renewable energy industry.[45]

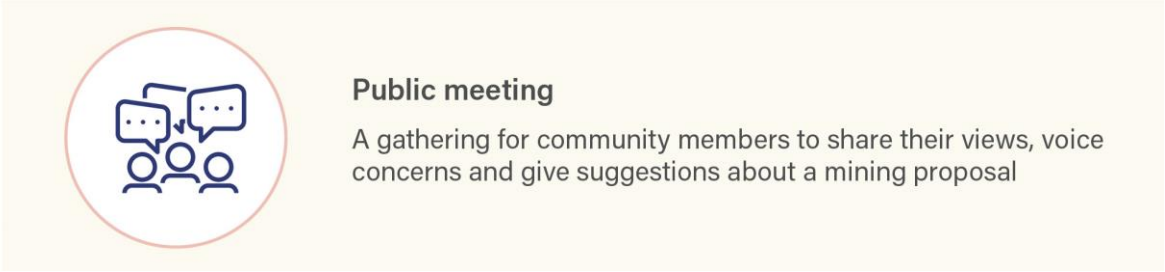
Written submissions or comments



101. Written submissions can help identify issues and public concerns about mining proposals and may enable the miner or Government decision-maker to address them prior to the decision. It is a common way to gather views on a mining proposal.

102. There may be strict requirements about how and when submissions must be given, for example, that submissions contain certain information or only address certain issues. It may be possible to make a submission on a mining proposal at more than one stage of the assessment process. Submissions may be published or kept confidential. The miner may be asked to explain how they have addressed the submissions. Their response may be made public or provided directly to the decision-maker.

Public meeting



103. A public meeting provides a non-adversarial platform for stakeholders, including local community members, to share their views, voice concerns and make suggestions about mining proposals. The focus of the meeting is for the miner and government decision-maker to listen and provide an opportunity for people to be heard. Depending on the model, public meetings may also allow for more detailed discussions around the issues and impacts of the mining proposal. Models vary in formality, procedural rules and powers to require people to attend or give evidence.

104. The New South Wales Independent Planning Commission ('IPC') regularly holds public meetings as part of its decision-making process for mining projects.[46] They also hold public hearings. The IPC's public meeting or hearing allows it to hear the community's view on the

project.[47] The IPC will notify people of an upcoming meeting or hearing and advise how people can apply to speak at the event.[48]

105. If the IPC holds a public hearing, it can require certain people to attend and give evidence.[49] In practice, this is the only substantial difference between a public meeting and a public hearing, other than its consequence. If the IPC holds a public meeting, there is a right of merits review of its decision in the NSW Land and Environment Court. If it holds a public hearing, there is not.[50]

106. Given a public hearing precludes merits review, the IPC may seek to address issues raised in submissions, by asking questions of the miner, Government representatives and members of the public.[51] No one may ask questions.[52] A public hearing is recorded and the transcript is published on the IPC website, as well as any presentations, submissions or other notes given to the IPC about the proposed mine.[53]

107. A public meeting can allow for an open discussion between a miner, Government and the public. Ideally, the feedback given in a public meeting could lead to revisions in the mining proposal to address community concerns, resulting in better outcomes.

Question

Q4 What forms of participation should be included in the new participation process?

Private and communal interests

108. As well as having environmental, social, economic and other public interest impacts, mines can significantly affect the rights of landholders and other miners (private interests) and native title holders (communal interests). The current processes do not differentiate between private and public interests, with anyone able to object to a mining proposal.

109. There can be overlap between private and public interest concerns, such as dust and water pollution concerns. More specific private interest matters can also arise, such as conflicts between the mining proposal and the pre-existing activities of affected landholders, through impacts on pastoral and agricultural businesses. Cultural heritage impacts of mining also raise private interest concerns.

110. Disputes can also arise between the miner and other resource tenure holders or applicants, including about overlapping rights, priority of claims and compliance with regulatory frameworks. These issues are not reflected in the recent objections hearings before the Land Court. This suggests they are adequately dealt by the requirements of the Mineral Resources Act 1989, including that the miner must obtain the consent or views of other tenure holders or earlier applicants and that the decision-maker must consider any disadvantage that may result from the mining proposal before the application is decided. [54]

111. While the current objections hearing may cover public and private disputes about mining proposals, landholders and other specific rights holders, such as native title rights holders, have additional and separate processes for engaging and negotiating with miners. The separate processes for landholder compensation and native title do not give participants in those processes direct input into the Government's decisions about mining lease and environmental authority applications. However, there is a direct intersection between them because a mining lease cannot be granted until those separate processes are finalised.

112. For example, while a landholder has no right to refuse mining access to their land, they have a right to compensation. A mining lease cannot be granted unless the miner and landholder agree on compensation or the Land Court determines what amount should be paid.[55] The

compensation must address matters such as the deprivation of land, diminution of land value and loss or expenses arising from the mining project.[56] Unlike the conduct and compensation agreements that must be made with landholders for a petroleum operation, mining agreements do not address the conduct of the miner, which is dealt with by conditions of either or both the mining lease and environmental authority.

113. The Land Court's recommendation on the applications may influence the compensation agreed or determined. Further, the Government decision-maker will be a party to, or aware of, agreements or determinations made under the native title processes. The 'future acts' regime under the Native Title Act 1993 (Cth) is currently under review by the Australian Law Reform Commission.[57]

114. Removing the Land Court objections hearing means the Land Court recommendation cannot influence the compensation or native title processes. We must consider whether replacing the objections hearing with alternative participation opportunities is sufficient to address these private interest concerns.

Question

Q5 How would removing the objections hearing affect private interests?

Tailoring participation opportunities

115. A key issue is whether there should be one form of participation or different participation opportunities depending on the project ('tailored participation processes'). If we recommend tailored participation processes, we must then consider what criteria should apply. While the new participation process will apply to major amendments for environmental authorities, we are not changing the amendment thresholds which determine whether an amendment application is major or minor.

116. The current processes include the opportunity for public participation and the new participation process should maintain some opportunity for all projects. This is consistent with our terms of reference, the Government commitments in QRIDP and with the guiding principles for our review. Even if a project is small and considered 'low impact' from a Government or industry perspective, it may have a high impact or significance for individuals or communities.

117. Criteria that could be used for categorising projects include:

- scale, risk and impact of the project
- application type (standard, variation, site-specific)
- EIS triggers
- level of community concern.

118. In New South Wales, the level of community concern, measured by the number of submissions made on an application, is a threshold for determining whether a project is referred to the IPC.

119. British Columbia adopts a similar approach, with the level of community interest determining whether there will be a community advisory group to provide community input to the assessment process.[58] However, unlike New South Wales, British Columbia does not have an objective measure for determining community interest, rather the discretion rests with the Government.

120. There are mixed views about tailored participation processes. One view is that a uniform approach to public participation lacks flexibility to respond to the highly variable nature of

mining projects and adds unnecessary cost and delay. One suggested response is to introduce an expedited process for certain application types that recognises early or alternative public participation.

121. Others see value in providing consistent public participation opportunities for all projects and that tailored participation processes create risks, including:

- reducing the ability to fairly quantify the potential impact of a project at an early stage
- increased complexity and uncertainty by having multiple pathways
- promoting 'gaming' by industry, when decisions about mine planning are driven by the desire to minimise regulatory requirements rather than focusing on optimal economic, social and environmental outcomes.

Question

Q6 Should there be tailored participation processes depending on the nature of the project? If so:

(a) what criteria should be used to determine different requirements for participation (for example, size, nature of risk, interest or other factors)?

(b) what should be the forms of participation?

Participation by Aboriginal peoples and Torres Strait Islander peoples

122. Aboriginal peoples and Torres Strait Islander peoples face systemic barriers to participation in the current processes. Their interests in land differ from other interested parties. There are additional laws that affect their interactions with miners. Those laws create siloed and onerous mechanisms for participation in multiple processes. This limits their resources to engage with a mining proposal or participate in objections hearings.

123. This is an issue of particular concern given the growth of critical minerals mining and the location of critical minerals on land in which Aboriginal peoples and Torres Strait Islander peoples hold interests. This may exacerbate engagement demands on already overburdened communities. The imbalance between miners and Aboriginal and Torres Strait Islander communities in power, knowledge and resources can compromise meaningful participation.[59]

124. The Native Title Act 1993 (Cth) recognises and protects native title, being the communal or individual rights and interests, possessed under traditional laws, of Aboriginal peoples or Torres Strait Islanders in land or water.[60] The Native Title Act 1993 (Cth) seeks to achieve this by establishing an application process for the formal recognition of native title, as well as establishing the 'future act regime' that sets out procedural requirements that must be complied with for certain land dealings.[61] Most commonly for mining, agreement is needed with the native title party through an 'Indigenous land use agreement' or another agreement through the 'right to negotiate' process.[62]

125. One of the fundamental difficulties with the native title processes is the significant threshold for recognition of native title. Native title applicants must show that their traditional laws and customs have been acknowledged and observed without substantial interruption since sovereignty.[63] Accordingly, there can be a hierarchy of rights under the current processes that are associated with native title status that do not accurately represent the breadth and extent of interests in land.

126. Aboriginal and Torres Strait Islander knowledge is ordinarily 'community property', held in common and in trust by the custodians, who have a shared responsibility for it.[64] It may be that

a larger community group does not 'speak for' their entire Country, rather, there may be smaller landholding or language groups that have the cultural authority to speak for particular areas, despite native title and cultural heritage laws recognising them as all one Traditional Owner group.[65]

127. Under the Native Title Act 1993 (Cth), native title parties can negotiate with mining companies about the impact of the proposed activities on their rights and interests.[66] However, this relies on effective and appropriate representation by an appointed negotiator.[67] Community members' interests are not always effectively represented as part of this process. This is compounded by the limited transparency of agreements between mining companies and native title parties, due to the confidentiality of the agreements.[68]

128. The cultural heritage of Aboriginal peoples and Torres Strait Islander peoples is protected by the cultural heritage Acts.[69] The cultural heritage Acts impose a 'cultural heritage duty of care' on all land users carrying out activities to 'take all reasonable and practicable measures' to ensure cultural heritage is not harmed.[70] There are several ways land users can meet this duty, including by acting in accordance with the 'duty of care guidelines' or entering into a 'cultural heritage management plan'.[71] The Acts define an 'Aboriginal party' or 'Torres Strait Islander party' for the relevant area primarily by reference to their native title status.[72] The role of an Aboriginal party or Torres Strait Islander party under the Acts includes surveying areas to assess possible cultural heritage and being party to cultural heritage management plans.[73] The Queensland Government commenced a review of the Acts in 2019.[74] One criticism of the Acts is that land users can rely on the duty of care guidelines to avoid involving Aboriginal peoples or Torres Strait Islander peoples in land use decisions.[75]

129. The Human Rights Act 2019 recognises that Aboriginal peoples and Torres Strait Islander peoples have a distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources under Aboriginal tradition and Ailan Kastom.[76] It recognises that the right to self-determination is particularly significant for Aboriginal peoples and Torres Strait Islander peoples.[77]

130. Section 28 recognises and protects the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples, which include the right to enjoy, maintain, control, protect and develop identity and culture with other members of their community.[78] Unlike the Native Title Act 1993 (Cth) and the cultural heritage Acts, the protection and enforcement of these rights is not dependent on status and recognition by criteria set out in law. Section 28 codifies rights recognised in 2 international treaties: the International Covenant on Civil and Political Rights and UNDRIP.[79]

131. A varied approach to the interpretation of section 28 is emerging from early case law. In several cases, courts have taken a narrow approach to interpreting section 28 when there is an existing plan, such as a cultural heritage management plan or another process in place to consider and protect the rights or interests of Aboriginal peoples or Torres Strait Islander peoples. In these cases, the courts have found the existing processes satisfy the requirement to consider and address cultural rights, and the existence of the commitment to meet the need to address cultural rights, with the result that there is found to be no, or no unjustifiable, infringement of section 28.[80]

132. In other cases, courts have taken a more expansive approach, giving effect to the purpose of protecting the survival and continual development of culture. In Waratah (No 6), the Land Court considered the unique and disproportionate impacts that would likely result from climate change resulting from greenhouse gas emissions of the proposed mining activity on the cultural rights of Aboriginal peoples and Torres Strait Islander peoples.[81] In balancing the right and its proposed limitation, the Court found the balance in favour of preserving the right,

having regard to the significance of the risk to the survival of Torres Strait Islander culture posed by rising sea levels associated with climate change.[82]

133. The Act has encouraged courts to adapt their practices and procedures to make them more culturally safe and appropriate. In Waratah (No 5), the Land Court made directions adopting a 'First Nations Protocol' for taking on-Country evidence 'in the presence of the people who have the collective authority to speak about matters of place and culture'.[83]

Question

Q7 How can we ensure the new participation process is accessible and responsive to the diverse needs of communities?

A central online portal

Proposal

P2 A central online Government portal should be established to facilitate public notice and give up-to-date information about mining proposals. The Mineral Resources Act 1989 and the Environmental Protection Act 1994 should be amended to require material to be published on the online portal, including:

(a) notice of applications

(b) notice of opportunities to participate

(c) outcomes of participation processes

(d) information requests

(e) decisions.

134. Our second proposal is to establish a central online portal that gives public access to up-to-date information about mining proposals and approved mines. The Government would maintain the online portal and it would require interdepartmental collaboration and resourcing.

135. The online portal would provide a more efficient, effective and contemporary way to give notice and share information in one centralised place. It would work in conjunction with the new participation process, which:

- disconnects notice from participation rights
- may include information sessions, to raise community awareness about mining proposals and increase understanding of participation rights
- provides multiple opportunities for participation.

136. Access to relevant, up-to-date information:

- supports effective participation
- increases transparency and efficiency, improves decision-making and instils greater community trust and confidence in decisions
- improves efficiencies and assists policy and industry development.

137. The proposal responds to the identified problems of the current processes that:

- the notification requirements, which require 'one-off' notice to be given in an approved newspaper circulating in the relevant area, are outdated, inefficient and ineffective
- there is a lack of up-to-date information about mining projects, especially when the project proposal changes over time
- the ability to participate is linked to notification and responding within a specified timeframe.

Key features

138. Although the existing notice provisions do not expressly require notice to be given online, the Department of Resources and the Department of Environment, Science and Innovation each publish notices and information on their websites: see box 3.[84]

Box 3: Existing Department websites

Department of Resources:

- Publishes notices of mining lease applications, application documents and area maps here.
- Publishes mining and resources maps and spatial data on GeoResGlobe and information about how to conduct public searches for mining lease applications or grants here.

Department of Environment, Science and Innovation:

- Publishes public notices and consultations, including for environmental authority applications here. They remain available on this website only while they are open for feedback. People can subscribe to receive email notifications of new notices and consultations.
- Maintains a public register of records related to the regulation of environmentally relevant activities here. This includes records of valid environmental authority applications that have been received by the department since August 2021, current and historical environmental authorities and PRCPs.
- Publishes information about EIS assessment processes here. This includes the ability to search by project or region.

139. Other jurisdictions have established portals that provide models for consideration, including:

- NSW Planning Portal[85]
- EPBC [Environment Protection and Biodiversity Conservation Act 1999] Act Public Portal (Cth)[86]
- EPIC (portal for environmental assessments in British Columbia).[87]

140. The online portal could:

- consolidate information about mining lease and associated environmental authority applications on a central website (including notices, information about outcomes, information requests and decisions)
- make information available and searchable by each region and project (this could include interactive maps)
- enable people to subscribe for project or region-specific updates
- allow people to easily track what stage each application is at and to access up-to-date documentation relevant to each stage

- include information in plain English language, for example, information about participation opportunities and plain language summaries of technical project information
- provide an ongoing record and archive of all current mining proposals and relevant documentation
- give information in a format that ensures that the right people are notified, including giving information to Aboriginal peoples and Torres Strait Islander peoples and their communities in art form.[88]

Are additional public notice requirements needed?

141. The online portal proposal is intended to address identified barriers to participation in the current processes, including:
    - the inadequacy of notice
    - lack of awareness of projects
    - difficulties finding relevant and current information
    - difficulties understanding the nature and extent of the project and participation rights.
142. For example, a lawyer who represents landholders would be able to sign up to receive email notice for projects in a particular region and easily monitor it and identify if their clients are affected.
143. Despite the benefits of an online portal, additional forms of notice may be needed.
144. Additional public notice options that could be included as part of the new participation process are:[89]
    - requiring the miner to give notice by advertising in a newspaper
    - making provision for additional or substituted forms of notice, depending on project and community-specific considerations. requiring notice in a relevant special interest publication directed mainly, or exclusively, to an audience of Aboriginal peoples or Torres Strait Islander peoples, such as the Koori Mail[90]
    - giving notice to the native title representative body for the area, to facilitate contact with Traditional Owners.[91]

Direct notice

145. Another consideration is who should be given direct notice of mining proposals.
146. Under the Mineral Resources Act 1989, the miner must give notice of mining lease applications directly to each 'affected person', which includes:[92]
    - owners of the land that will be used for the proposed mining lease
    - owners of private land that directly adjoins the land used for the proposed mining lease
    - the relevant local government
    - infrastructure providers.
147. The definition of 'affected person' does not include every person whose interests may be affected, such as nearby landholders who may be affected by dust or noise from the mine.
148. The definition also does not include all Aboriginal peoples and Torres Strait Islander peoples with an interest in the land. The definition of 'affected person' does not include registered

native title parties. However, the Government has recently issued a policy directive requiring the miner to give notice to a registered native title claimant or registered native title body corporate in accordance with the Racial Discrimination Act 1975.[93]

149. There are no specific direct notice requirements for environmental authority applications in the Environmental Protection Act 1994. However, a miner must give notice of an associated environmental authority application at the same time, or together with, and in the same way as the mining lease application (unless there is a complete and current EIS), which includes giving direct notice to affected persons.[94] Direct notice of an EIS is specifically required under the Environmental Protection Act 1994 and must be given to:[95]

- each 'affected person' for the project, which is defined broadly and includes landholders, registered native title claimants and registered native title bodies corporate and the relevant local government[96]
- each 'interested person', which is defined as any person the miner identifies for the project, such as an unincorporated community or environmental body connected to the local area[97]
- any other person decided by the chief executive.

Questions

Q8 What are your views on proposal 2?

Q9 What additional notice and information-sharing requirements should be included in legislation as part of the new participation process?

Q10 What direct notice requirements should be included for applications for:

(a) mining leases?

(b) associated environmental authorities?

Q11 What else is required to notify Aboriginal peoples and Torres Strait Islander peoples who may have an interest in the mining proposal?

Deciding each application

150. In this section, we focus on the processes for deciding applications. This includes consideration of:

- who the decision-makers are
- the interrelationship of decisions
- the information on which decisions are based
- the matters that must be considered by decision-makers.

151. We are not proposing comprehensive reforms to how decisions are made. Instead, we explain 2 proposals that are designed to strengthen the evidence base for decision-makers in the absence of a pre-decision Land Court objections hearing. The proposals would:

- increase transparency, community trust and confidence in decision-making processes
- provide greater clarity and specificity about the matters that must be considered.

152. We ask questions about how the fundamental elements of good decision-making processes can best be reflected and to explore key considerations relevant to how decisions are made.

Elements of good decision-making

153. Natural justice is fundamental to good decision-making processes that may affect the rights and interests of people.[98] It requires decision-makers to consider what is fair in the circumstances, with reference to 2 rules:[99]

- people who will be affected by a decision must be given an opportunity to express their views (hearing rule)
- the decision-maker must be, and must be seen to be, impartial (bias rule).

154. For multi-stage decision-making processes, such as the current processes, fairness can include opportunities to participate and the gathering and testing of evidence at various stages of the process. In the participation section, above, we propose a new participation process that would meet or exceed the requirements of the hearing rule.

155. The rise of ESG principles is also bringing increasing focus to the importance of independence, transparency and accountability in mining approval processes. The role of ESG is critical as regulatory issues associated with new methods of mining emerge. Further, international law and policy relating to ESG continues to develop in a way that may impact the regulation of mining in Queensland in the future.

156. The Human Rights Act 2019 adds to existing administrative law obligations and oversight mechanisms that hold the Government accountable, aiming to ensure public functions are exercised in a principled and proper way. It also aims to ensure human rights are properly considered in public sector decision-making and in the development of Queensland law and policy.[100]

157. In addition to cultural rights and procedural rights, other human rights recognised and protected by the Human Rights Act 2019 may have relevance to the current processes. These rights include:

- recognition and equality before the law (section 15)
- right to life (section 16)
- freedom of expression (section 21)
- taking part in public life (section 23)
- property rights (section 24)
- privacy and reputation (section 25)
- protection of families and children (section 26)
- fair hearing (section 31).

158. We will properly consider these rights in making recommendations in our final report that are compatible with the rights in the Human Rights Act 2019.

The decision-maker

159. In the current processes, the final decision about whether to grant, grant with conditions or refuse an application is made by:

- for mining lease applications – the Minister for Resources[101]
- for associated environmental authority applications – the chief executive of the Department of Environment, Science and Innovation.[102]

160. The distinct purposes and objectives of the Mineral Resources Act 1989 and the Environmental Protection Act 1994 support maintaining the separation of decision-making functions and powers under those Acts. The purpose and objectives of the Mineral Resources Act 1989 focus primarily on encouraging and facilitating mining, while acknowledging the importance of environmentally responsible mining.[103] The primary objective of the Environmental Protection Act 1994 is protection of the environment, while allowing for ecologically sustainable development.[104]

161. Our view is that separate decision-making for mining lease and environmental authority applications should be maintained. This allows for specialisation, which has led to the development of relevant expertise in separate Government Departments.

The interrelationship of decisions

162. The decisions on the mining lease and associated environmental authority are interrelated because the mining lease can only be granted if the associated environmental authority has been granted.[105] We consider it appropriate to maintain that requirement. This allows the Minister for Resources to be satisfied the mining will be conducted in an environmentally responsible manner if the mining lease is granted.

163. While the current processes link these decisions appropriately, there are inefficiencies, which can be addressed by reforms to decision-making criteria, discussed below.

164. While we acknowledge there are additional decisions about a mining project that will be made under other laws, including cultural heritage and native title laws, our proposals do not change this broader decision-making framework.

An Independent Expert Advisory Panel

Proposal

P3 An Independent Expert Advisory Panel should be established that is:

(a) comprised of people with recognised expertise in matters relevant to the assessment of environmental authority applications

(b) formed as project-specific committees to give independent expert advice to inform decisions on environmental authority applications that meet specified criteria.

165. This proposal is designed to enhance the evidentiary basis for decision-making by ensuring decision-makers have access to necessary scientific and technical advice. We acknowledge the depth of expertise within the Department of Environment, Science and Innovation and intend this proposal to assist the Department by adding to the existing expert technical evidence available to support good decision-making. Ensuring processes provide decisions-makers with relevant, quality, impartial evidence will enhance community trust and confidence in decision-making.[106]

166. Our proposal is to establish a model like the NSW Independent Expert Advisory Panel, with a broad range of experts available to be formed as a project-specific committee for environmental authority applications that meet the specified criteria.

167. The panel could include members with specialist scientific and technical expertise. The panel could also include members with expertise in cultural heritage and Aboriginal and Torres Strait Islander rights and interests. Information and advice from the Aboriginal and Torres Strait Islander Advisory Committee could inform the expert analysis. The committee would need to

consider processes for ensuring data sovereignty in the collection and use of information and advice by the committee. The independent review of the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) led by Professor Graeme Samuel AC (the 'Samuel review') recognised the importance of valuing Indigenous environmental, economic and social knowledge and of ensuring decision-makers have access to this information to inform decision-making.[107]

168. This proposal draws on the practice in other Australian and international jurisdictions that have established independent expert advisory panels.[108] It builds on existing practices in Queensland. For example, the Department of Environment, Science and Innovation can request expert advice from the Office of Groundwater Impact Assessment as part of the EIS process.[109] It can also request advice from the Commonwealth's Independent Expert Scientific Committee on Unconventional Gas Development and Large Coal Mining Development ('IESC') and from CSIRO.[110]

169. The IESC is a statutory committee comprised of 5 to 8 experts in geology, hydrology, hydrogeology and ecology.[111] It independently advises Government regulators on the potential impacts on Australia's water resources of unconventional gas and large coal mining developments. The IESC may also advise state Governments if asked.[112] The Samuel review noted that the IESC has improved Commonwealth Government decision-making, leading to increased transparency and community confidence that the cumulative impacts of proposals are assessed.[113]

170. In New South Wales, the Independent Expert Advisory Panel for Mining has been established to provide the Government and the Independent Planning Commission access to scientific advice when assessing mining projects.[114] This is a permanent advisory panel that, when requested, provides technical advice on development applications, post-approval matters and policy relating to the assessment and management of environmental impacts associated with mining.[115] The panel comprises an independent chair and experts in the fields of mining engineering and subsidence, surface water, groundwater and swamp hydrology, ecology, biodiversity and geochemistry.[116]

171. Proposal 3 acknowledges that removing the objections hearing pre-decision may reduce the independent expert evidence base for decision-makers. It also addresses the problems that, in the current processes:

- an objections hearing is only held if an objection is made, and the evidence obtained and provided depends on the grounds raised in the written objections and the ability of active objectors to engage expert witnesses
- the miner has discretion about how, when and from whom information is sourced
- technical and financial information can be dated by the time the matter is before the final decision-makers[117]
- there can be a change in the evidence before the Land Court and the decision-makers without a corresponding opportunity for other parties to respond to the evidence[118]
- there can be a lack of transparency about the evidence on which final decisions are based.

172. There is a wide variety in environmental authority applications in terms of size, risk and complexity of the mining proposal. We propose an Independent Expert Advisory Committee must be formed for environmental authority applications that meet specified criteria. The use of specified criteria, not Government discretion, will provide clarity and certainty. Potential criteria include:

- the scale, risk and impact of the project

- application type (standard, variation, site-specific)
- EIS triggers
- level of community concern.

Questions

Q12 What are your views on proposal 3?

Q13 What should be the criteria to form an Independent Expert Advisory Committee for an environmental authority application?

Amended statutory criteria for decisions

Proposals

P4 The statutory criteria in the Mineral Resources Act 1989 and the Environmental Protection Act 1994 should be amended to require the relevant decision-maker to consider:

(a) for decisions about mining lease and associated environmental authority applications – information generated through the new participation process

(b) for decisions about environmental authority applications – any advice of the Independent Expert Advisory Committee.

P5 The statutory criteria in the Mineral Resources Act 1989 and the Environmental Protection Act 1994 for decisions about mining lease and associated environmental authority applications should be amended to require each decision-maker to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage.

173. Our fourth and fifth proposals are to expand the statutory criteria which the relevant decision-maker must consider when deciding a mining lease or associated environmental authority. The statutory criteria are a critical component of our review because they frame how applications are assessed and decisions are made. The statutory criteria are set out in Appendix C.

Consideration of information and expert advice

174. Proposal 4(a) is to make consequential amendments to the statutory criteria for decisions about mining leases and associated environmental authorities to reflect the new participation process. This would amend the current requirement for decision-makers to consider submissions, objections and the Land Court's recommendation.[119] It would require decision-makers to consider the information generated through the new participation process, including information from local governments and other relevant entities and information from the Aboriginal and Torres Strait Islander Advisory Committee. This will ensure it has a substantive, as well as procedural, impact on decision-making.

175. There are different ways to ensure a decision-maker considers information generated through the new participation process, including:

- Consultation reports under the Planning Act 2016, which outline, as a minimum, consultation undertaken with the public, any issues raised in properly made submissions and the outcomes reached.[120]
- Consultation reports on draft EISs required by the Coordinator-General for projects assessed under the State Development and Public Works Organisations Act, which may

include details of stakeholders, key issues, consultation strategies and communication protocols.[121]

- Summary reports of community engagement and consultation, including reasons for the timing, opportunities for engagement, methods of engagement, how people were informed about the engagement process, key themes and issues raised and feedback on the proposal.[122]

176. Proposal 4(b) requires the decision-maker for environmental authority applications to consider the evidence-based advice of the Independent Expert Advisory Committee. This would replace the requirement to consider any recommendation of the Land Court following an objections hearing and is designed to ensure expert information and advice is considered by decision-makers.

177. Proposal 4 is outcomes-based and designed to ensure that the information generated through earlier reform proposals directly inform decisions. This is consistent with the findings of the Samuel review that:[123]

- effective, outcomes-based decision-making is informed by community participation and concerns, as well as by scientific facts
- the primary way to improve community trust and confidence in decisions about matters that affect the environment is by engaging people in the decision-making processes in a way that directly contributes to the outcomes of decisions.

Consideration of Aboriginal and Torres Strait Islander rights and interests

178. We are proposing to include an additional statutory criterion in the Mineral Resources Act 1989 and the Environmental Protection Act 1994 requiring decision-makers to consider Aboriginal and Torres Strait Islander rights and interests. Currently, the Government is not specifically required to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples and their communities when deciding mining lease and environmental authority applications. Native title and cultural heritage requirements are considered through separate processes. While certain native title and cultural heritage requirements must be met before a mining lease and associated environmental authority are approved, there is no requirement for the Government to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples as part of the current processes.[124]

179. The separation of the processes can prevent proper consideration of Aboriginal or Torres Strait Islander interests. Although it is encouraged by the cultural heritage Acts, the miner is only required to have an approved cultural heritage management plan before an environmental authority that requires an EIS is granted. Further, the Land Court can 'approve' a cultural heritage management plan without agreement of the Aboriginal or Torres Strait Islander party when an irresolvable dispute arises between the miner and that party.[125] The approved plan may not reflect the Aboriginal or Torres Strait Islander party's intentions or concerns.

180. In several cases under the current processes, the Land Court has held that these separate native title and cultural heritage processes 'provide a level of protection of rights and interests' of Aboriginal peoples and Torres Strait Islander peoples. As a consequence, no further consideration of their rights and interests was required.[126] The effect is that these rights and interests are not properly considered in the current processes.

181. Careful consideration must be given to how the statutory criteria are drafted to ensure relevant rights and interests are considered. Our initial view is that this requires identification and description of two key features:

- the rights and interests in the relevant area
- who has authority and responsibility for the land, culture and cultural heritage.

182. The cultural heritage Acts protect 'significant' Aboriginal and Torres Strait Islander areas, objects and evidence, of archaeological or historical significance, of Aboriginal or Torres Strait Islander occupation of an area of Queensland.[127] What is missing is certainty about what is meant by 'significance'. The South Australian cultural heritage legislation requires that, when determining the significance of cultural heritage, the Minister must accept the views of the relevant Traditional Owners for the area.[128]

183. The current approach to defining cultural heritage does not capture intangible, or living, cultural heritage. Intangible cultural heritage is knowledge or expression of Aboriginal and Torres Strait Islander traditions, customs and beliefs. It recognises that places where a community's ancestors and creators once lived continue to be living and should be protected.[129]

184. Concepts of classifying and protecting intangible cultural heritage have been legislated in other jurisdictions,[130] and have been the topic of reform for both Queensland and the Commonwealth.[131] However, reservations about including intangible heritage in cultural heritage protection legislation have been expressed, based on the possible breadth of the description of intangible cultural heritage. One suggestion by industry is to provide a clear framework for identifying large areas and for deciding whether they may be quarantined from development areas.[132]

185. In addition, linking cultural heritage rights to native title status can be problematic and may perpetuate the difficulties and divisions associated with native title status.

186. In this review, we cannot recommend changes to the Native Title Act 1993 (Cth), but we can consider ways to ensure the rights and interests of Aboriginal peoples and Torres Strait Islander peoples and their communities are appropriately recognised and protected in decision-making about mining lease and environmental authority applications.

Overlapping statutory criteria

187. We are exploring options for increasing efficiency and effectiveness in how the statutory criteria are considered by each decision-maker. The inclusion of statutory criteria for decision-making is a strength of the current processes. However, there are differing views about how appropriate certain criteria are.

188. One view is that there is duplication or 'procedural redundancy' in the criteria for decision-making on the mining lease and associated environmental authority. For example, both decision-makers must consider the public interest, although the requirement is differently framed. Similarly, while the primary purpose of the environmental authority is to assess the environmental impacts of a mining proposal, the statutory criteria for the mining lease also requires the Minister for Resources to consider potential adverse environmental impacts.

189. Another view is that areas of perceived duplication are necessary to ensure key matters are appropriately considered through the lens of the distinct statutory objectives in the Mineral Resources Act 1989 and the Environmental Protection Act 1994.

190. One option is for decision-makers to address overlapping criteria by considering:

- the assessment of those criteria by another Department, under another Act
- any additional material relevant to decide the overlapping criteria.

191. This could apply to the following criteria under the Mineral Resources Act 1989:[133]

- whether there will be any adverse environmental impact

- whether the public right and interest will be prejudiced.

192. In exploring potential reforms in this regard, we focus on the public interest criterion.

The public interest

193. Our initial view is that the requirement for decision-making processes for both environmental authority and mining lease applications to consider the public interest should be maintained, and that any problems with overlap should be addressed by reforms to process rather than to the statutory criteria.

194. The concept of public interest must be assessed in the context of the Act under which it must be considered.

195. The Land Court has taken a broad approach in interpreting the meaning of 'public interest' to encompass factors such as potential social and economic benefits, impacts on particular environmental values, as well as public health, property and human rights consequences arising from associated climate change impacts.[134]

196. Since the enactment of the Human Rights Act 2019, the Land Court's role in giving proper consideration to human rights includes weighing the public interest in each application before it and making a decision compatible with human rights. For example, in Waratah (No 6), the Land Court considered the distinct cultural rights recognised and protected by the Human Rights Act 2019. It recognised that Aboriginal peoples and Torres Strait Islander peoples and their communities will be disproportionately affected by climate change impacts.[135]

197. Some stakeholders suggest that Aboriginal or Torres Strait Islander communities directly impacted by a mine are often not benefiting from the mine's associated social and economic impacts. For example, a mine may contribute certain social benefits to the community, however, we understand these contributions are not necessarily suitable for addressing the impacts on the local Aboriginal or Torres Strait Islander community. Further, we understand that local Aboriginal or Torres Strait Islander corporations may not be engaged to undertake work associated with the mine, which could assist with the economic development of the community. This supports the importance of ensuring there is meaningful engagement with potentially affected communities to understand and consider community interests and needs as part of the decision-making process.

198. While the Land Court has interpreted the concept of public interest in many cases under the current processes, there is a lack of guidance about how the decision-makers assess this criterion.

199. One option is to adopt a referral agency approach, like that used for a coordinated project under the State Development and Public Works Organisation Act 1971 or for developments or projects under the Planning Act 2016. This would require the Department of Resources to ascertain the views of relevant State and local government departments in assessing the public interest.

200. Another option is to publish departmental guidelines on the public interest, clarifying its meaning under each Act. For example, the Office of the Information Commissioner Queensland has published guidelines on balancing the public interest under its governing Acts.[136] In the mining context, the guidelines could give objective examples of what is a public interest (such as sound natural resource management and appropriate use of public resources) and what is not a public interest (such as a private monetary benefit). The guidelines could also explain the process the decision-maker will use to assess public interest.

Questions

Q14 What are your views on proposal 4?

Q15 What are your views on proposal 5?

Q16 Should the decision-maker for the mining lease application be required to consider the decision (and reasons for decision) of the decision-maker for the environmental authority application in reaching their decision on the statutory criteria for:

(a) public interest?

(b) adverse environmental impact?

(c) the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage (see proposal 5)?

(d) any other criteria?

Q17 Are there additional reforms to the statutory criteria under the Mineral Resources Act 1989 and the Environmental Protection Act 1994 you would like us to consider?

Reviewing the Government's decisions

201. This section considers how Government decisions about mining lease and associated environmental authority applications should be reviewed. This includes consideration of:

- who is entitled to bring a review
- the court's powers
- costs.

202. We explain a proposal to introduce merits review by the Land Court after decisions on both authorities are made, to extend the court's declaratory function to enable it to conduct combined reviews and to introduce appeals from the Land Court directly to the Court of Appeal.

203. We discuss the 2 types of administrative review:

- merits review
- judicial review (including declaratory proceedings).

204. We ask questions to assist us to consider how the fundamental elements of a good review process can best be reflected in our proposed process.

Box 4: Merits review

Merits review is a comprehensive review of a Government decision.

An individual or body, other than the original decision-maker, reconsiders the facts, law and policy of the original decision and determines the 'correct and preferable' decision.

The reviewer can:

- affirm the decision
- vary the decision
- set aside the decision and substitute a different decision or
- set aside the decision and return the matter to the original decision-maker with recommendations or directions to remake the decision.

Many aspects of merits review vary depending on the relevant laws, including the parties, the burden of proof and costs.

Box 5: Judicial review

Judicial review (or 'declaratory proceeding') considers whether Government decisions are made according to law. It does not consider the merits of decisions.

Judicial review is conducted by the Supreme Court of Queensland. Other courts may be given statutory power to conduct declaratory proceedings, a form of judicial review. For example, the Land Court has declaratory powers for some matters within its jurisdiction.

To apply for judicial review:

- a person must be 'aggrieved' by the decision because they have a special interest that has been adversely affected or they are more affected than the general public and
- the decision must be appropriate for review.

The 'grounds of review' include that the decision-maker:

- failed to observe mandatory procedures in laws
- took into account irrelevant considerations
- failed to take into account relevant considerations or
- made a decision not supported by evidence.

If the applicant is successful, the court can:

- declare the Government decision was invalid or
- return the matter to the original decision-maker to be remade according to law.

There is no power for the court to remake the decision.

The unsuccessful party is generally required to pay the successful party's costs.

Introducing combined review

Proposal

P6 Review by the Land Court should be available after the Government has decided the mining lease and environmental authority applications. Decisions of the Land Court should be appealable to the Court of Appeal on the grounds of errors of law or jurisdictional error. The Land Court should:

(a) conduct proceedings after decisions on both applications are made

(b) conduct combined (merits and judicial) review

(c) conduct the review on the evidence before the primary decision-makers, unless exceptional circumstances are established

(d) apply existing practices and procedures.

205. Our sixth proposal has 3 parts. It:

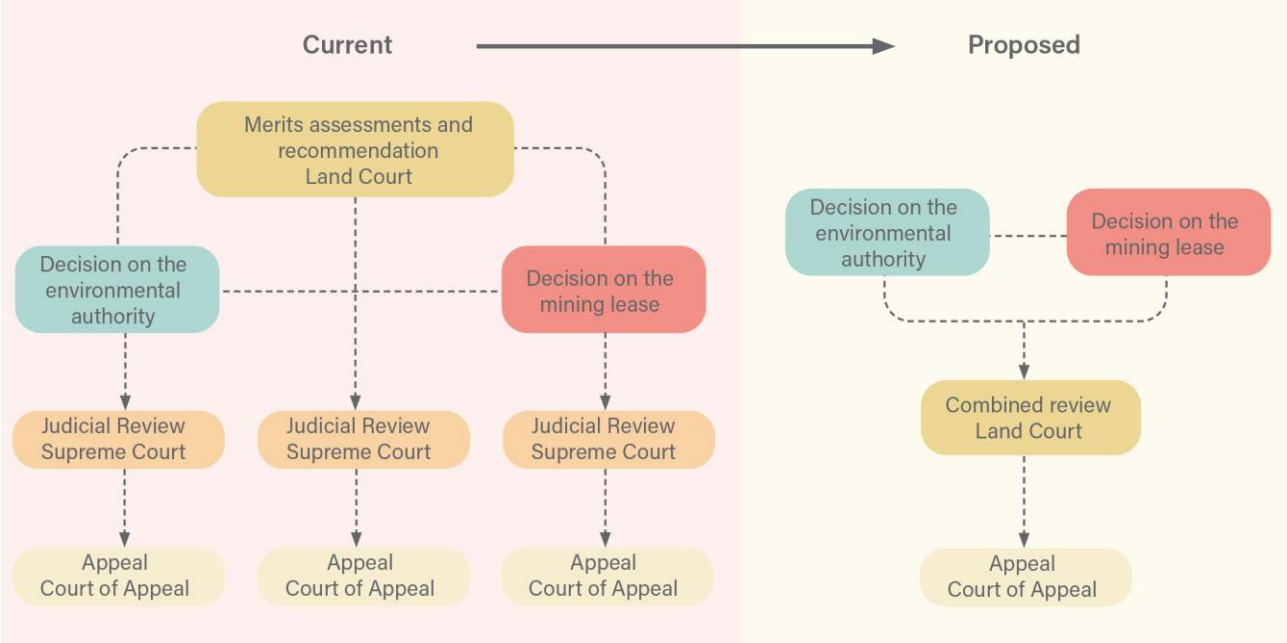
- introduces merits review by the Land Court after both decisions on the mining lease and environmental authority applications are made. A person will be able to seek merits review of either or both decisions
- extends the Land Court's power to conduct declaratory proceedings (judicial review) of decisions about mining lease or associated environmental authority applications in combination with merits review of decisions. Currently this power is limited to making declarations on matters concerning its own jurisdiction[137]
- provides for appeals of Land Court decisions directly to the Court of Appeal. Ordinarily, Land Court decisions are appealable to the Land Appeal Court and then the Court of Appeal on errors of law or jurisdictional error.[138] We do not consider this intermediate appeal to the Land Appeal Court appropriate for decisions about mining projects. Our proposed appeal pathway is like the pathway for merits review of planning decisions by the Planning and Environment Court and subsequent appeal to the Court of Appeal.[139] This streamlined approach benefits efficiency without removing appeal rights.

206. In the current processes:

- there is pre-decision merits assessment but no merits review[140]
- all decisions, including the Land Court's recommendation, are subject to judicial review by the Supreme Court of Queensland.[141]

207. Figure 7 shows the key changes we are proposing to the appeal pathways.

Figure 7: Current and proposed review pathways



208. Our proposal maintains the Land Court's ability to consider the merits of the applications and builds upon recognised strengths of the current processes by:

- providing a way for members of the public to access justice, by extending a comprehensive form of review to the Land Court, which has a fair and effective process of resolving mining disputes
- improving Government decision-making, by providing feedback and guidance on decisions
- fostering trust and confidence in mining decisions, by having an impartial and credible Land Court conduct a transparent and rigorous assessment of mining decisions, supported by published reasons
- retaining the identified advantages of the Land Court, including its specialist expertise in resolving mining disputes and its established practices and procedures.

209. Our proposal gives the Land Court a more conventional role for a court in reviewing Government decisions. It also simplifies the current processes, replacing multiple judicial review pathways with a single avenue for review and appeal.

Merits review

210. Merits review by the Land Court will involve a reconsideration of the facts, law and policy of the original decisions. It will:

- occur after the decisions on the mining lease and associated environmental authority applications are made
- be available for both the mining lease and associated environmental authority application decisions, together or separately
- not require internal review before external review
- be conducted on the same evidence that was before the original decision-maker, with a discretion to admit new evidence in exceptional circumstances
- be appealable to the Court of Appeal.

211. Merits review will only be available after the final decisions on the applications have been made. This recognises the interrelated nature of the authorities and ensures the Land Court cannot review a decision linked to a pending decision.

212. Merits review will be available for either or both decisions. When separate applications for review are made, the Land Court will have power to join the hearings.

213. Some merits review schemes require an applicant to seek internal review first. An internal review is a type of merits review that is conducted by another officer in the same agency as the original decision-maker, rather than by an independent body. We consider that introducing internal review would create unnecessary delay without improving outcomes.

214. Merits review would be conducted on the same material that was before the original decision-makers, with discretion for the Land Court to admit new evidence any party may wish to lead in exceptional circumstances. This is to:

- ensure that quality and completeness of information before the decision-makers
- promote efficiency by limiting the review to the contested issues.

215. When conducting merits review, the Land Court will be acting administratively and is likely to be considered a 'public entity' under the Human Rights Act 2019.[142] This means the Land Court will be required to consider human rights in making decisions and act and make decisions that are compatible with human rights.[143] That is consistent with the current processes.

216. The original decision-maker will be a respondent to the merits review. This may be the chief executive of the Department of Environment, Science and Innovation, the Minister for Resources, or both. We will consider whether other parties should be statutory parties, such as the Coordinator-General, for coordinated projects and prescribed projects, and the miner. When Human Rights Act 2019 considerations are raised, the Attorney-General or Queensland Human Rights Commission can join as a party.[144]

Judicial review

217. The Land Court currently has a limited ability to conduct declaratory proceedings, which is judicial review by a body other than the Supreme Court.[145] Our proposal would amend the Mineral Resources Act 1989 and the Environmental Protection Act 1994 to extend this jurisdiction to allow merits and judicial review to be heard and decided together by the Land Court. This would create efficiencies by removing separate merit and judicial review hearings.

218. Declaratory proceedings consider whether there has been an error of law.[146] If the Land Court finds that a decision has been made unlawfully, it can declare it invalid and send it back to the original decision-maker to remake correctly.

219. When conducting declaratory proceedings, the Land Court will be acting judicially and will not be considered a 'public entity' by the Human Rights Act 2019.[147] The Court must still interpret the law in a way that is compatible with human rights, to the extent possible.[148]

220. The Planning and Environment Court has a combined merits review and declaratory function for planning decisions. There are potential efficiency and effectiveness advantages because the review pathways from the original decisions lead to a single court with specialist expertise in resolving mining disputes.

Question

Q18 What are your views on proposal 6?

Other matters for consideration

221. In developing our proposal for review, key considerations are:

- who should be able to seek review (standing)
- the orders the court can make (powers)
- who should pay the costs of the review (costs).

222. These issues are briefly discussed below. We would welcome your views.

Standing

223. Our terms of reference ask us to consider the basis of standing, including for community members and relevant Government entities.[149]

224. Standing is the right of a person to commence proceedings in a court or tribunal.[150] To have standing under common law, a person must show that they have a sufficient connection to the decision, such that their interests are adversely affected. In practice, this means establishing a special interest in the decision or an impact beyond that of the general public.[151] However, many Acts provide for more expansive or restrictive standing for particular types of decisions.

225. The current processes have open standing, provided there is compliance with some procedural requirements. Any person may object to a mining lease application, and any person who has made a submission on the environmental authority application, or relevant EIS, may object to an environmental authority application. An objection brings with it a right to be heard at a Land Court objections hearing.

226. Decision-makers must have regard to statutory criteria but there is no restriction on the grounds of objection. In practice, many objectors do refer to the statutory criteria.

227. This open standing also applies to Government entities other than the decision-makers. This is the only formal mechanism for local government and other statutory agencies, such as the Director of National Parks, to formally participate in the current processes. This is an unusual role for a government entity. For local government, lodging an objection can carry political risks, as community members views on a mining proposal may differ.

228. Standing to judicially review Government decisions is narrower and is determined by the ordinary rules for judicial review.[152] Our proposed process removes the objections hearing prior to decisions and introduces combined merits and judicial review. This requires us to consider who should have standing to seek review.

229. Options for standing include:

- open standing (no restrictions)[153]
- extending standing to those who have formally engaged in the decision-making process before the original decision was made[154]
- extending standing to environmental groups or organisations formed to protect the environment.[155]

230. Relevant considerations include the direct and broad impacts of mining projects and public interest considerations, such as social, economic and environmental impacts.

231. Given the current process has open standing, we must consider the justification for imposing restrictions. While concerns about ‘lawfare’ are raised as justification for a more restrictive approach to standing, there is limited evidence to support this position. The experience in other jurisdictions does not show a connection between open standing and increased

litigation. It also does not show a connection between making a submission to a decision-maker and electing to be a party in a court process.[156]

232. Under the current processes, an objector cannot choose whether an objections hearing takes place. If they make an objection the Land Court must hold an objections hearing. The objector's only choice is about the role they play in the objections hearing – active or inactive. An active party participates fully with all the obligations that apply to a party in a court process. An inactive objector relies on their written objection and takes no part in the objections hearing. The Land Court provides this option through its practice direction, which it developed in response to feedback from objectors concerned about being part of a court process.[157]

233. If standing was to be limited, the standing criteria would need to be clear and unambiguous. Further, any limitations should have regard to the rights protected by Human Rights Act 2019, particularly the rights of Aboriginal peoples and Torres Strait Islander peoples whose special relationship with lands, waters and other resources is recognised by that Act.

The Court's powers

234. The Land Court's powers in declaratory proceedings are fixed by the principles of judicial review. The Land Court can:

- affirm the original decision
- declare the original decision invalid and remit it back to the original decision-maker to remake according to law.

235. For merits review, the powers of the court or tribunal are usually broad and can include power to:[158]

- affirm the original decision
- vary the original decision
- set aside the original decision and substitute its own
- set aside the original decision and return it to the decision-maker to remake, with recommendations or directions (collectively, 'full powers').

236. If the Land Court is given full powers, it will have the ability to make the final decision on the applications. An advantage of this approach is that the Court is an impartial, specialised and credible arbiter that can make good decisions free from political influence or the risk of corruption. It is also consistent with the review powers of the Planning and Environment Court for planning decisions.

237. Another option is to limit the powers of the Land Court to affirm or send the matter back to the original decision-maker to decide again. That raises the question of the basis upon which the original decision-maker must remake the decision. For declaratory proceedings, the decision-maker could be required to remake the decision having regard to the Land Court's findings on the merits. This limited approach respects the political nature of decisions about mining projects and places final responsibility and accountability with Government. However, it lacks certainty and finality. It also leaves open the possibility of further information being provided to the decision-maker after the review, one of the problems identified with the current processes.

238. A final option is to limit the powers of the Land Court to affirm, affirm with varied conditions or send the matter back to the original decision-maker. An advantage of this approach is that it gives the Land Court flexibility to vary the conditions of approval to improve the delivery of the project without needing to send the matter back to the original decision-maker. In effect it would give the Land Court the final decision if it considered the applications should be granted

on the same or different conditions, but it would not have the power to make a final decision that the applications should be refused.

239. Our terms of reference require us to consider the practices and procedures of a court involved in the reformed process. The practices and procedures are a strength of the current processes. If the Land Court is given jurisdiction to conduct a combined review, they will need to be reconsidered. We invite you to share your views on this matter.

Costs

240. All litigation rules, including for merits review and declaratory proceedings, determine how costs are allocated. These rules determine whether a party pays their own costs or must also pay the costs of another party when unsuccessful.

241. In the Land Court, the ordinary rule is that each party pays their own costs, regardless of the outcome.[159] This is different to the usual approach taken in civil litigation, where the unsuccessful party is normally required to pay the costs of the successful party.[160]

242. The significance of costs rules extends beyond the financial consequences of recovering costs or having to pay another party's costs. Some argue the ability to recover costs from an unsuccessful party is grounded in fairness, as it compensates the successful party for incurring costs they should not have had to. On the other hand, the risk of an adverse costs order may discourage a person from seeking review, even when their case has merit. Further, many public interest matters are litigated with the assistance of counsel engaged on a speculative basis. Whether a party may be able to recover costs could affect their ability to secure legal representation.

243. The appropriate approach to the award of costs in litigation with public interest and human rights considerations has been the subject of recent focus.[161] Potential models include:

- Costs follow the event: this is the model used in Queensland for most civil litigation.[162] It requires the unsuccessful party to pay the costs of the successful party at the conclusion of litigation.
- 'Soft' costs neutrality: requires each party to bear their own costs, irrespective of the outcome of the litigation, although the court has a discretion to order otherwise.
- 'Hard' costs neutrality: requires each party to bear their own costs, irrespective of the outcome of the litigation. The court can only make a different order if there has been conduct on behalf of a party considered to warrant it.
- 'Asymmetrical' costs model: a blended model. If the applicant is successful, they may recover costs from the respondent. If the respondent is successful, each party bears their own costs.

244. In developing recommendations about the appropriate costs model, we recognise the importance of considering circumstances that uniquely impact Aboriginal peoples and Torres Strait Islander peoples, including the relevance of cultural obligations for decisions about land, water and resources, as well as considerations of equity and access to justice. This includes concerns about the collection, use and disclosure of information, which has historically been linked with systemic injustice.[163]

Questions

Q19 What preconditions, if any, should there be to commence combined review?

Q20 Should the Land Court have the power to substitute its own decision on the application or should it be required to send it back to the decision-maker?

Q21 Should each party pay their own costs of the merits review or should a different rule apply?

Interactions with other laws

245. Other Queensland and Australian laws apply to mining projects. These laws establish various assessment and approval processes that must occur before a mine can operate. For example, a mine may need to comply with requirements for land access, native title, cultural heritage, state and federal environmental approvals, water, coordinated projects and regional planning interests.

246. Our terms of reference are focussed on reviewing and making recommendations about the current processes. In making our recommendations, we must also consider how any recommended process would interact with decisions made under a range of other Acts, including:

- Aboriginal Cultural Heritage Act 2003
- Torres Strait Islander Cultural Heritage Act 2003
- State Development and Public Works Organisation Act 1971
- Water Act 2000
- Planning Act 2016
- Local Government Act 2009
- Environment Protection and Biodiversity Conservation Act 1999 (Cth)
- Native Title Act 1993 (Cth).

247. The above list is non-exhaustive, and we have also identified the Regional Planning Interests Act 2014 and the Strong and Sustainable Resource Communities Act 2017 as relevant Acts in the larger Government assessment framework for mines in Queensland.

248. In this section we are looking at interactions we have identified as relevant to the current and proposed processes. We are interested in views about how the current processes interact with the processes under these Acts.

Cultural Heritage Acts

249. Aboriginal and Torres Strait Islander cultural heritage is protected by the Aboriginal Cultural Heritage Act 2003 and the Torres Strait Islander Cultural Heritage Act 2003. The cultural heritage Acts set out processes for the management and protection of cultural heritage by establishing a 'cultural heritage duty of care'.[164] The duty requires all land users conducting activities to 'take all reasonable and practicable measures' to ensure cultural heritage is not harmed.[165] This duty of care applies regardless of native title status.

250. The cultural heritage Acts set out mechanisms to comply with the cultural heritage duty of care:[166]

- acting in accordance with the 'duty of care guidelines'
- through a 'cultural heritage management plan'
- by a native title or other agreement with the relevant Aboriginal party or Torres Strait Islander party.

251. The cultural heritage Acts also define an 'Aboriginal party' or 'Torres Strait Islander party' for the relevant area. The primary determinant of party status is native title status.[167] Aboriginal parties and Torres Strait Islander parties play a fundamental role under the cultural heritage Acts. This includes conducting surveys for an area to assess possible cultural heritage and being party to a cultural heritage management plan.[168] While the cultural heritage Acts establish a process for conducting a survey, the requirement is limited to avoiding damage to cultural heritage. There are no requirements for how cultural heritage is identified and a lack of safeguards to ensure Traditional Owners engage in and authorise surveys.

252. There is no direct requirement for decision-makers for the mining lease or associated environmental authority application to consider cultural heritage as part of their assessment. However, there is a linkage between the cultural heritage Acts and the Environmental Protection Act 1994, which provides that an environmental authority application requiring an EIS cannot be granted unless a cultural heritage management plan is approved, or a condition is imposed on the environmental authority that no significant work is commenced until one is approved.[169]

253. However, while a cultural heritage management plan may be 'approved', it may not necessarily reflect the Aboriginal or Torres Strait Islander party's intentions and agreement. This is because the cultural heritage Acts allow for the approval of a cultural heritage management plan without an Aboriginal or Torres Strait party or when an irresolvable dispute has arisen between the parties.[170]

254. The current approach to conditioning environmental authorities also only requires the approval of a cultural heritage management plan and does not ensure compliance with its terms.[171] The cultural heritage Acts do not provide an accessible mechanism to enforce compliance with cultural heritage management plans and the Land Court has no jurisdiction to do so.[172]

255. Because the current processes are separate from the processes under the cultural heritage Acts, decision-makers tend to rely on the cultural heritage process as constituting sufficient consideration of Aboriginal or Torres Strait Islander interests.[173] The cultural heritage Acts have been under review since 2019.[174] The problems with enforcement under the Acts have been acknowledged in that review. Our consultations suggest wide dissatisfaction among Aboriginal peoples and Torres Strait Islander peoples about outcomes under those Acts. This suggests relying on the cultural heritage Acts may not be an adequate way to consider the interests of Aboriginal peoples and Torres Strait Islander peoples when making decisions about mines. Our review will track any developments to ensure that our recommendations will result in a contemporary process.

State Development and Public Works Organisation Act

256. The State Development and Public Works Organisation Act 1971 aims to promote and facilitate economic and social development through the Coordinator-General. The Coordinator-General has broad powers to plan, deliver and coordinate projects of State significance, including mining projects, while ensuring their environmental impacts are properly managed.

257. These powers may be exercised and interact with the current processes in key ways:[175]

- Coordinated projects: the Coordinator-General facilitates the environmental assessment and manages the EIS process. The Coordinator-General works closely with the Department of Environment, Science and Innovation in this process. It may impose conditions on the mining lease and environmental authority that bind the Land Court and final decision-makers on these authorities by taking precedence over any other conditions to the extent of any inconsistency.

- Prescribed projects: the Coordinator-General can prescribe administrative processes for other decision-makers or step-in to make decisions to facilitate coordination of significant projects or those affecting environmental interests. Decisions required to be made by the Governor in Council or a Minister are excluded from the prescribed project legislation and therefore decisions on mining lease applications are excluded from this process.[176] However, a decision on an associated environmental authority application can be declared a prescribed project.

258. The State Development and Public Works Organisation Act 1971 contains statutory clauses that limit judicial review of decisions, action or conduct by the Coordinator-General for coordinated and prescribed projects.[177] This includes the recommendations and conditions set down in the Coordinator-General's evaluation report following an EIS.

259. Concerns have been expressed about the nature and extent of the Coordinator-General's powers and the impact of decisions made by the Coordinator-General under the State Development and Public Works Organisation Act 1971.

260. We are interested in views about how the current processes interact with those under the State Development and Public Works Organisation Act 1971 and any thoughts as to how the processes could be better aligned.

Water Act

261. Water is regulated by a framework of statutory instruments set up under the Water Act 2000.[178] The Act has a specific framework for managing the impacts on underground water by the resource sector.[179]

262. In the context of mining, there is an important distinction between 2 types of water:

- 'Associated water' is underground water that is unavoidably taken or interfered with due to mining activities.[180] Examples include mine dewatering and the evaporation of water displaced by mining.
- 'Non-associated water' is any water (surface or groundwater) that is not associated water. A miner may require this water for purposes including dust suppression, mineral processing and consumptive uses.

263. The use of non-associated water is regulated by an authorisation system established under the Water Act 2000, which is separate from applications for a mining lease or associated environmental authority.[181]

264. The use of associated water is authorised as part of the mining lease.[182] However, the impacts of the use of associated water are assessed and conditioned as part of the environmental authority.[183] This requires the miner to give details of proposed usage, impacts, and strategies for mitigating impacts with their application for an environmental authority. Issues regarding the use and impact of associated water are then open to submissions and any subsequent objections hearing.[184]

265. Once a mining lease is granted, the ongoing impacts on groundwater are managed through the underground water management framework in chapter 3 of the Water Act 2000. The framework requires a miner to prepare and publicly notify an underground water impact report.[185] The report must then be submitted to the Department of Environment, Science and Innovation for assessment and approval before the water can be taken or interfered with.[186]

266. The underground water obligations are in addition to assessment and conditioning that takes place as part of the environmental authority. The requirements of the environmental authority are to be complementary to those of the unground water impact report.[187] However, issues

have been raised with perceived duplication of content and procedural redundancies in these processes.

267. We are interested in views about how the current processes interact with those under the Water Act 2000 and any thoughts as to how the processes could be better aligned.

Planning Act

268. The Planning Act 2016 establishes Queensland's planning framework, which aims to regulate land use and promote ecologically sustainable development.[188] It does this by requiring certain developments or projects to obtain a 'development approval' authorising development to be undertaken.[189]

269. Mining does not require a development approval under the Planning Act 2016. The activities that are authorised by a mining lease and associated environmental authority are specifically excluded from the planning framework.[190] Planning considerations for resource projects are addressed through the Regional Planning Interest Act 2014, discussed below. If mining-related infrastructure is not authorised by a mining lease, it may require a development approval.[191] In those cases, the local government will commonly be the decision-maker who authorises or refuses the development approval.[192]

270. While the Planning Act 2016 does not directly interact with the current processes, there are several similarities in the processes adopted under the respective frameworks for assessing and deciding project applications.[193] It is therefore a useful reference in developing our recommendations.

Regional Planning Interests Act

271. The Regional Planning Interests Act 2014 regulates the impact of proposed resource activities on designated areas of regional interest.[194] Miners must obtain a regional interests development approval ('RIDA') in order to operate in an area of regional interest.[195]

272. This approval is required in addition to, and independent of, any land use assessment that occurs under the mining lease and environmental authority assessment process. This raises issues of potential duplication between the processes.

273. There is no legislative requirement regarding the timing of a RIDA. In practice, it could occur in parallel. Generally, it occurs post-approval of the environmental authority and mining lease. This is because the information requirements for a RIDA application are usually generated during the mining lease and environmental authority processes. This sequencing may lead to a perception that the RIDA decision will not be refused. It may also add to the uncertainty of the approval process, because it could be refused after the environmental authority and mining lease are approved.

274. The timing of a RIDA decision has consequences for the mining lease and environmental authority decisions due to the paramountcy of RIDA conditions. The Regional Planning Interests Act 2014 holds that RIDA conditions for approvals in priority agricultural areas or strategic cropping areas are paramount.[196]

275. The Environmental Protection Act 1994 reflects and extends the paramountcy of all RIDA conditions by providing a process for the administering authority to amend an environmental authority or PRCP schedule to ensure they are consistent with a RIDA.[197] This is a limited amendment process with no public notice or comment.

276. Recent reviews into the operation of the Regional Planning Interests Act 2014 by both the Gasfields Commission (now Coexistence Queensland) and Queensland Audit Office found that stakeholders had concerns with the complexity of the framework. Community stakeholders

questioned the ability of the Regional Planning Interests Act 2014 to effectively manage the coexistence of coal seam gas ('CSG') activities and agricultural interests.[198] Following these reviews, and as one of the actions in QRIDP, the Government has recently amended the Regional Planning Interests Act 2014.[199] Our review will track these developments and consider the implications of any reforms to the Regional Planning Interests Act 2014 on our recommendations.

277. We are interested in views about how the current processes interact with those under the Regional Planning Interests Act 2014 and any thoughts as to how the processes could be better aligned.

Strong and Sustainable Resource Communities Act

278. The Strong and Sustainable Resource Communities Act 2017 is administered by the Coordinator-General. The Act has 3 main elements to ensure the benefit of large resource projects to local communities:[200]

- preventing a 100% fly-in fly-out workforce[201]
- preventing discrimination of local workers from recruitment processes[202]
- requiring a social impact assessment ('SIA') for projects undergoing an EIS process.[203]

279. The integration and prescription of an SIA as part of an EIS creates a direct interaction with the processes for deciding mining lease and associated environmental authority applications.

280. A core matter that must be addressed in the SIA is community and stakeholder engagement.[204] This engagement is separate, and additional, to the public participation processes required as part of the EIS. However, engagement in these processes alone do not give people the right to object or participate in an objections hearing.

281. The SIA report is prepared by the miner as part of the project's EIS. It must contain a social impact management plan that will provide a practical basis for implementation. The miner has an obligation to monitor implementation of their plan throughout the project's lifecycle.[205] Concerns have been raised about the enforceability of commitments made in the social impact management plan, particularly when there is a change of ownership of the mine.

282. The decision-maker, whether the Coordinator-General or the Department of Environment, Science and Innovation, considers the SIA report to evaluate the social impacts of a project when assessing the EIS and deciding whether to allow the project to proceed.[206]

283. The Coordinator-General undertook an initial post-implementation review of the Act in 2018. Then, few SIAs had been undertaken and it was not possible to evaluate the effectiveness of the SIA process. The Coordinator-General recommended a further review of the Act.[207] This is yet to be done.

284. We are interested in views about how the current processes interact with those under the Strong and Sustainable Resource Communities Act 2017 and any thoughts as to how the processes could be better aligned.

Local Government Act

285. The Local Government Act 2009 establishes the responsibilities and powers of local government and provides a system of local government in Queensland that is accountable, effective, efficient and sustainable.[208] Aboriginal and Torres Strait Islander councils may have additional obligations as trustee under the Aboriginal Land Act 1991 or the Torres Strait Islander Land Act 1991. This adds an additional layer to land and resource decision-making processes for those communities.[209]

286. The current processes for deciding mining lease and associated environmental authority applications do not contain any specific links to decisions under the Local Government Act 2009. There are no explicit processes by which the relevant local government can be involved in the decision-making processes for mining lease and environmental authority applications in their region. While decision-makers may choose to informally consult local government as part of their decision-making, the only formal avenue for participation in the decision-making process is by making an objection and participating in an objections hearing.

287. This lack of a legislated role is an issue of concern for local governments, as it:

- does not reflect the unique interest local government holds for an area in which a mine is proposed
- requires local governments to make an objection to participate in the decision-making process, which is an unusual position for a Government entity, especially when they are the decision-maker for associated approvals for the mine (such as planning approvals).

288. While there is a lack of formal participation mechanisms as part of the current processes, there are some avenues where local government may be involved or consulted in mining proposals. For example, if an SIA is required as part of an EIS, the miner must consult with the relevant local government.[210]

289. Local government has identified concerns including:

- miners making applications which do not reflect the commitments made during an earlier EIS, especially before the commencement of the Strong and Sustainable Resource Communities Act 2017
- miners intentionally making applications that fall just below threshold limits triggering an EIS, which removes the requirement for an SIA and the local government consultation under that process. There are concerns that this avoids genuine evaluation of social impacts or projects and opportunities for stakeholder and community participation, which would have been provided in the EIS process
- the burden placed on local governments having to respond during limited consultation windows.

290. The strongest roles for local government is when they are appointed as an assessing agency under the Regional Planning Interests Act 2014.[211] This only occurs when the resource activity is proposed in a priority living area.[212] If appointed as the assessing agency, the local government will be responsible for assessing the impacts of the mining proposal on the local area.[213] While the local government is not the final decision maker for the RIDA, they will provide a recommendation that must be considered by the final decision-maker.[214] This could include recommending conditions for the approval or recommending the application is refused.[215]

291. Other jurisdictions recognise the impacts of resource activities on regional areas and allow for social commitments to be directly enforced by local government. For example, in New South Wales, the Environmental Planning and Assessment Act 1979 (NSW) allows for a voluntary planning agreement (planning agreement) to be reached between local councils and a miner who is applying for a development consent.[216] Pursuant to a planning agreement and in the pursuit of a 'public purpose', the miner may agree to give the local government land free of cost, pay a monetary benefit or otherwise provide a material public benefit.[217] The terms of a planning agreement cannot be inconsistent with the New South Wales planning legislation.[218] It also cannot impose an obligation on a consent authority (decision-maker) to grant a development consent or exercise some other of its functions.[219] Planning agreements must

contain a dispute resolution clause and provide for an enforcement mechanism (for example, court proceedings, bond, guarantee) to ensure that they are implemented.[220] They may also be registered to run with the land, which would then bind any future owners.[221]

292. We are interested in exploring further the role of local government in the process to decide mining proposals.

Environment Protection and Biodiversity Conservation Act

293. The Environment Protection and Biodiversity Conservation Act 1999 (Cth) ('EPBC Act') is the Commonwealth's primary environmental Act. It protects 9 matters of national environmental significance, including listed threatened specifies, ecological communities and water resources that concern unconventional gas developments and large coal mining developments.[222]

294. Proposed mines that have, will have, or are likely to have a significant impact on a protected matter are assessed and require approval under the EPBC Act. This is in addition to any state-based approvals, such as the mining lease and associated environmental authority.

295. Bilateral agreements operate between the Commonwealth and states and territories which accredit certain state-based assessments.[223] This accreditation enables each state or territory to assess certain actions on behalf of the Commonwealth, removing the need for separate assessment.[224] In Queensland, the EIS process under both the Environmental Protection Act 1994 and State Development and Public Works Organisation Act 1971 are accredited.[225] As a result, our review will need to consider this interaction in developing our recommendations and ensure that it will not impact the ability for the process to remain accredited.

296. Despite the existence of the bilateral agreement, issues have been raised with the duplication between the federal and state assessment and approval processes, both in terms of content and process. This duplication is cited as increasing the time and costs associated with the process, which deters investment in mining.

297. The recent independent review of the EPBC Act led by Professor Graeme Samuel AC (the 'Samuel review') concluded that the Act is outdated and requires fundamental reform. The Samuel review found that the EPBC Act is complex and results in duplication with state and territory development approval processes.[226] It recommended a range of reforms.

298. The Australian Government has released the Nature Positive Plan, which responds to the Samuel review recommendations. A key reform is to introduce National Environmental Standards which will apply to all decision-making under national environmental law. It proposes to introduce 9 standards, including one on consultation and another on Indigenous engagement and participation in decision-making.[227] The standards are yet to be finalised. Once in force they will affect state decision-making processes because all accredited processes, such as those under a bilateral agreement, will be subject to the National Environmental Standards.

299. Our review will continue to consider the Government's response to the Samuel review. This will help to ensure that our recommendations will result in a contemporary process that can work effectively and efficiently alongside any changes to the EPBC Act.

Native Title Act

300. Native title law establishes a process for formal recognition of individual and communal Aboriginal and Torres Strait Islander rights and interests in land and water.

301. The Native Title Act 1993 (Cth) aims to recognise and protect native title in 2 main ways:

- by establishing an application process for the determination of native title

- through the 'future act regime', which sets out procedural requirements that must be complied with for certain land dealings. This regime is currently under review by the Australian Law Reform Commission.[228]

302. There are several ways Aboriginal peoples and Torres Strait Islander peoples may participate and seek to reach agreement about a mining project under the native title regime, including:

- for certain native title decisions, all native title claim group members or native title holders must be notified and invited to attend a meeting to authorise the decision. Voting can be done either under traditional law and custom or another process agreed upon by all in attendance[229]
- being given notice of a proposed mining lease that outlines the mining lease area and type of mining under the lease and given an opportunity to make oral or written submissions and negotiate about the granting of the lease.[230] This is known as the 'right to negotiate'. Often, the native title claim group will invest authority for agreement-making decisions in several members known as the 'applicant'.

303. There are a variety of concerns with the application and limitations of the native title regime which may have implications for our review, including the significant threshold native title applicants must overcome to have their native title recognised. Native title applicants must show that their traditional laws and customs have been acknowledged and observed without substantial interruption since sovereignty.[231]

304. When the Queensland Government grants a mining lease it will usually be a 'future act'. This means that the Queensland Government must follow the processes in the Native Title Act 1993 (Cth) before the mining lease can be granted. This can be done in 3 ways:

- through an Indigenous land use agreement ('ILUA')
- through a section 31 agreement. Queensland operates in a 'dual deed' system where the Government, the miner and the native title party can enter into a section 31 deed and the miner and native title party can enter into a private ancillary agreement, the terms of which remain confidential[232]
- pursuant to a determination of the National Native Title Tribunal, when agreement cannot be reached through the right to negotiate process.[233]

305. When there is an ILUA or a section 31 agreement, the mining lease will be subject to that agreement and any of its conditions.[234] If the National Native Title Tribunal makes a determination, it may impose conditions.[235]

306. In practice, ILUAs and ancillary agreements, while primarily dealing with the mining lease's impact on native title, may include conditions about the mine's potential environmental impact. However, there is no legislative mechanism for these conditions to be considered or reflected in the environmental authority assessment. The confidentiality of ancillary agreements results in a lack of transparency and an inability to achieve consistency between native title agreements and environmental authority conditions.

307. If the National Native Title Tribunal makes a determination that the future act can proceed, the Department of Environment, Science and Innovation can amend the environmental authority or impose conditions on a PRCP schedule to ensure compliance with the Tribunal's conditions.[236]

Questions

Q22 Are there any issues arising from interactions with decisions made under other Acts that we should consider?

Q23 What opportunities are there, if any, to integrate interacting Queensland Acts with the processes to decide mining lease and associated environmental authority applications?

Other matters

308. In this paper, we have explained and asked questions about 6 consultation proposals. We also invite you to tell us about any other matters or options for reform that you consider are important for our review.

309. One other matter that we have identified is the role of pre-lodgement services.

Pre-lodgement

310. The Department of Resources and the Department of Environment, Science and Innovation recommend that miners attend a pre-lodgement meeting with the Department before submitting a mining proposal.[237] The Coordinator-General also encourages pre-lodgement meetings.[238] Pre-lodgement meetings are provided as an opportunity to discuss early concepts (pre-design) to determine the feasibility of the mining proposal or seek direction and advice on whether it will meet legislative requirements.

311. These processes are voluntary and the requirements for what pre-lodgement should address are not legislated. Decisions made about the application at pre-lodgement are not binding and the uptake of pre-lodgement services vary.

312. To encourage the use and improve the effectiveness of pre-lodgement processes, the Department of Environment, Science and Innovation has developed a detailed checklist specifically for resource projects. It includes guidance for various applications, including major amendment applications and applications requiring an EIS.[239]

313. Pre-lodgement processes could clarify the information requirements for an application and avoid the uncertainty and delays in information requests by the decision-makers to address deficiencies in the application material.

314. Pre-lodgement processes could play a role in the participation processes for a mining proposal, by encouraging early engagement and discussing the scope and form of consultation. For example, in British Columbia, major projects are required to undergo an extensive formal pre-application process as part of the environmental assessment process. This includes an early engagement phase that gives all participants the opportunity to better understand the project and allows Indigenous nations to become involved in the assessment process.[240]

Questions

Q24 Should there be a legislated pre-lodgement process?

Q25 Is there anything else you would like to tell us about the current processes?

Q26 Are there any additional options for reform of the current processes you would like us to consider?

Appendix A: Terms of reference – extract

1. The Commission is asked to review and make recommendations about the processes to decide contested applications for mining leases under the Mineral Resources Act 1989 and associated environmental authorities under the Environmental Protection Act 1994, including review of such decisions (the objections processes).
2. The Commission is asked to have regard to:
    (a) the fairness, efficiency and effectiveness of the objections processes;
    (b) providing opportunities for community participation, including access to justice and the cost of participating;
    (c) maintaining the ability for a court to consider the relative merits of mining lease applications and related environmental authorities;
    (d) the basis of standing to make an objection and participate in the objections processes, including for community members and relevant government entities;
    (e) the role of statutory criteria under the Mineral Resources Act 1989 and the Environmental Protection Act 1994 in making an objection, deciding an application, and reviewing the decision;
    (f) at what stage or stages in the process, an entity, such as an advisory panel or a court, should consider an objection to an application, and what role that entity should play in the process to decide an application or review a decision on the application;
    (g) practices and procedures for the conduct of proceedings or hearings to decide an application and to review a decision, that would enhance the fairness, efficiency and effectiveness of the objections processes; and
    (h) the government election commitment, which was delivered, to reinstate third party notification and objection rights for mining lease and related environmental authority approvals.
3. Noting that different regulatory frameworks apply, the Commission is also asked to consider whether any recommended changes to the objections processes should apply to applications for resource production tenures under the following Acts:
    (a) Greenhouse Gas Storage Act 2009
    (b) Geothermal Energy Act 2010
    (c) Petroleum and Gas (Production and Safety) Act 2004
4. In making its recommendations, the Commission is asked to consider:
    (a) how any recommended process would interact with decisions made under other Acts including:
        i. Aboriginal Cultural Heritage Act 2003
        ii. Torres Strait Islander Cultural Heritage Act 2003
        iii. State Development and Public Works Organisation Act 1971
        iv. Water Act 2000
        v. Planning Act 2016
        vi. Local Government Act 2009
        vii. Environment Protection and Biodiversity Conservation Act 1999 (Cth)

viii. Native Title Act 1993 (Cth)

(b) the implications of other Acts including:

i. Human Rights Act 2019

ii. Judicial Review Act 1991

(c) any amendments to current legislative frameworks that will be required to implement any recommended process.

5. In making its recommendations, the Commission is also asked to consider:

(a) current legislative and regulatory frameworks in other Australian and comparative international jurisdictions

(b) views expressed to the Commission during stakeholder consultation; and

(c) any other matters the Commission considers relevant.

View the full terms of reference on our website[241]

Appendix B: List of consultation proposals and questions

Our guiding principles

Q1 Are the guiding principles of 'fair, efficient, effective and contemporary' appropriate for reform of the current processes?

The current processes

Q2 Do you agree these are the strengths and problems of the current processes? Are there others not mentioned here which are appropriate to be considered for reform of the current processes?

Participating in the Government's decision-making processes

P1 Participation in the current processes should be reframed by:

(a) removing the Land Court objections hearing pre-decision

(b) including an integrated, non-adversarial participation process

(c) establishing an Aboriginal and Torres Strait Islander Advisory Committee for relevant mining proposals to facilitate Aboriginal and Torres Strait Islander input as part of the new participation process.

Q3 What are your views on proposal 1?

Q4 What forms of participation should be included in the new participation process?

Q5 How would removing the objections hearing affect private interests?

Q6 Should there be tailored participation processes depending on the nature of the project? If so:

(a) what criteria should be used to determine different requirements for participation (for example, size, nature of risk, interest or other factors)?

(b) what should be the forms of participation?

Q7 How can we ensure the new participation process is accessible and responsive to the diverse needs of communities?

P2 A central online Government portal should be established to facilitate public notice and give up-to-date information about mining proposals. The Mineral Resources Act 1989 and the Environmental Protection Act 1994 should be amended to require material to be published on the online portal, including:

(a) notice of applications

(b) notice of opportunities to participate

(c) outcomes of participation processes

(d) information requests

(e) decisions.

Q8 What are your views on proposal 2?

Q9 What additional notice and information-sharing requirements should be included in legislation as part of the new participation process?

Q10 What direct notice requirements should be included for applications for:

(a) mining leases?

(b) associated environmental authorities?

Q11 What else is required to notify Aboriginal peoples and Torres Strait Islander peoples who may have an interest in the mining proposal?

Deciding each application

P3 An Independent Expert Advisory Panel should be established that is:

(a) comprised of people with recognised expertise in matters relevant to the assessment of environmental authority applications

(b) formed as project-specific committees to give independent expert advice to inform decisions on environmental authority applications that meet specified criteria.

Q12 What are your views on proposal 3?

Q13 What should be the criteria to form an Independent Expert Advisory Committee for an environmental authority application?

P4 The statutory criteria in the Mineral Resources Act 1989 and the Environmental Protection Act 1994 should be amended to require the relevant decision-maker to consider:

(a) for decisions about mining lease and associated environmental authority applications – information generated through the new participation process

(b) for decisions about environmental authority applications – any advice of the Independent Expert Advisory Committee.

P5 The statutory criteria in the Mineral Resources Act 1989 and the Environmental Protection Act 1994 for decisions about mining lease and associated environmental authority applications should be amended to require each decision-maker to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage.

Q14 What are your views on proposal 4?

Q15 What are your views on proposal 5?

Q16 Should the decision-maker for the mining lease application be required to consider the decision (and reasons for decision) of the decision-maker for the environmental authority application in reaching their decision on the statutory criteria for:

(a) public interest?

(b) adverse environmental impacts?

(c) the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage (see proposal 5)?

(d) any other criteria?

Q17 Are there additional reforms to the statutory criteria under the Mineral Resources Act 1989 and the Environmental Protection Act 1994 you would like us to consider?

Reviewing the Government's decisions

P6 Review by the Land Court should be available after the Government has decided the mining lease and environmental authority applications. Decisions of the Land Court should be appealable to the Court of Appeal on the grounds of errors of law or jurisdictional error. The Land Court should:

(a) conduct proceedings after decisions on both applications are made

(b) conduct combined (merits and judicial) review

(c) conduct the review on the evidence before the primary decision-makers, unless exceptional circumstances are established

(d) apply existing practices and procedures.

Q18 What are your views on proposal 6?

Q19 What preconditions, if any, should there be to commence combined review?

Q20 Should the Land Court have the power to substitute its own decision on the application or should it be required to send it back to the decision-maker?

Q21 Should each party pay their own costs of the merits review or should a different rule apply?

Interactions with other laws

Q22 Are there any issues arising from interactions with decisions made under other Acts that we should consider?

Q23 What opportunities are there, if any, to integrate interacting Queensland Acts with the processes to decide mining lease and associated environmental authority applications?

Other matters

Q24 Should there be a legislated pre-lodgement process?

Q25 Is there anything else you would like to tell us about the current processes?

Q26 Are there any additional options for reform of the current processes you would like us to consider?

Appendix C: Statutory criteria – legislation extracts

Mineral Resources Act 1989

269 Land Court's recommendation on hearing

...

(4) The Land Court, when making a recommendation to the Minister that an application for a mining lease be granted in whole or in part, shall take into account and consider whether—

(a) the provisions of this Act have been complied with; and

(b) the area of land applied for is mineralised or the other purposes for which the lease is sought are appropriate; and

(c) if the land applied for is mineralised, there will be an acceptable level of development and utilisation of the mineral resources within the area applied for; and

(d) the land and the surface area of the land in respect of which the mining lease is sought is of an appropriate size and shape in relation to—

(i) the matters mentioned in paragraphs (b) and (c); and

(ii) the type and location of the activities proposed to be carried out under the lease and their likely impact on the surface of the land; and

(e) the term sought is appropriate; and

(f) the applicant has the necessary financial and technical capabilities to carry on mining operations under the proposed mining lease; and

(g) the past performance of the applicant has been satisfactory; and

(h) any disadvantage may result to the rights of—

(i) holders of existing exploration permits or mineral development licences; or

(ii) existing applicants for exploration permits or mineral development licences; and

(i) the operations to be carried on under the authority of the proposed mining lease will conform with sound land use management; and

(j) there will be any adverse environmental impact caused by those operations and, if so, the extent thereof; and

(k) the public right and interest will be prejudiced; and

(l) any good reason has been shown for a refusal to grant the mining lease; and

(m) taking into consideration the current and prospective uses of that land, the proposed mining operation is an appropriate land use.

271 Criteria for deciding mining lease application

In considering an application for the grant of a mining lease, the Minister must consider—

(a) any Land Court recommendation for the application; and

(b) the matters mentioned in section 269(4).

Environmental Protection Act 1994

191 Matters to be considered for objections decision

In making the objections decision for the application, the Land Court must consider the following—

(a) the application;

(b) any response given for an information request;

(c) any standard conditions for the relevant activity or authority;

(d) any draft environmental authority or draft PRCP schedule for the application;

(e) any objection notice for the application;

(f) any relevant regulatory requirement;

(g) the standard criteria;

(h) the status of any application under the Mineral Resources Act for each relevant mining tenure.

194B Matters to be considered in making final decision

(1) In making a final decision on an application under section 194A, the administering authority must—

(a) have regard to—

(i) any objections decision for the application; and

(ii) advice given by the MRA Minister or State Development Minister to the administering authority under section 193; and

(iii) if a draft environmental authority was given for the application, or conditions were stated for the draft PRCP schedule for the proposed PRC plan for the application—the draft environmental authority or conditions; and

(b) if a draft environmental authority was not given for the application, or conditions were not stated for the draft PRCP schedule—

(i) comply with relevant regulatory requirements; and

(ii) subject to subparagraph (i), have regard to each matter mentioned in subsection (2).

(2) For subsection (1)(b)(ii), the matters are—

(a) the application; and

(b) if the application is for an environmental authority—the standard conditions for the relevant activity or authority; and

(c) a response given to an information request for the application; and

(d) the standard criteria.

Appendix D: Spectrum of public participation

IAP2 Spectrum of Public Participation

IAP2's Spectrum of Public Participation was designed to assist with the selection of the level of participation that defines the public's role in any public participation process. The Spectrum is used internationally, and it is found in public participation plans around the world.

INCREASING IMPACT ON THE DECISION

	INFORM	CONSULT	INVOLVE	COLLABORATE	EMPOWER
PUBLIC PARTICIPATION GOAL	To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.	To obtain public feedback on analysis, alternatives and/or decisions.	To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	To place final decision making in the hands of the public.
PROMISE TO THE PUBLIC	We will keep you informed.	We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision.	We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.	We will look to you for advice and innovation in formulating solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible.	We will implement what you decide.

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[125] Aboriginal Cultural Heritage Act 2003 (Qld) part 7, divs 5–7; Torres Strait Islander Cultural Heritage Act 2003 (Qld) part 7, divs 5–7.

[126] Pickering v Pedersen [2023] QLC 12 at [80]; New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc. (No 2)[2021] QLC 44 at [277]; Hannigan and Associates Pty Ltd & Anor v Da Cunha & Anor [2022] QLC 14 at [82].

[127] See definition of 'cultural heritage' in Aboriginal Cultural Heritage Act 2003 (Qld) s 8; Torres Strait Islander Cultural Heritage Act 2003 (Qld) s 8.

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172 However, this issue is subject to the current review of the cultural heritage Acts: see Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships, Options paper: Finalising the review of Queensland's Cultural Heritage Acts, December 2021, p 15. See also Land Court Act 2000 (Qld) pt 2 div 6B.

173 Pickering v Pedersen [2023] QLC 12 at [80].

174 Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts (Qld), 'Aboriginal and Torres Strait Islander cultural heritage', 5 July 2022 https://www.dsdsatsip.qld.gov.au/our-work/aboriginal-torres-strait-islander-partnerships/culture/aboriginal-torres-strait-islander-cultural-heritage. See

also the Department of Aboriginal and Torres Strait Islander Partnerships, Consultation paper: Review of the Cultural Heritage Acts, 2019; Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships, Options paper: Finalising the review of Queensland's Cultural Heritage Acts, December 2021.

175 State Development and Public Works Organisation Act 1971 (Qld) pt 4 div 2; pt 5A div 2.

176 State Development and Public Works Organisation Act 1971 (Qld) pt 5A, s 76D (definition of 'prescribed decision').

177 State Development and Public Works Organisation Act 1971 (Qld) ss 27AD, 76W.

178 This includes the Water Act 2000 (Qld), Water Regulation 2016 (Qld), Water Plans, Water Management Protocols, Water Entitlement Notices.

179 Water Act 2000 (Qld) ch 3.

180 Mineral Resources Act 1989 (Qld) s 334ZP(1), (3).

181 See Water Act 2000 (Qld) ch 2 pt 3.

182 Mineral Resources Act 1989 (Qld) s 334ZP(1).

183 Environmental Protection Act 1994 (Qld) ss 126A, 207(1)(h).

184 New Acland Coal Pty Ltd v Smith [2018] QSC 88 at [226]; Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd (No. 1) (2019) 2 QR 271 at 308 [106], 309–310 [110]–[115]. This was not disturbed by the High Court on appeal in Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd [2021] HCA 2; (2021) 272 CLR 33.

185 Water Act 2000 (Qld) s 370(1)–(2). A miner is a 'responsible entity': see s 368(b). There are some narrow exclusions to the requirement in ss 369A, 370A–370B. The report must be publicly notified in accordance with Water Act 2000 (Qld) s 381.

186 Mineral Resources Act 1989 (Qld) s 334ZP(2)(b); Water Act 2000 (Qld) s 385(1)–(2).

187 Department of Environment and Science (Qld), Underground Water Impact Reports and Final Reports: Guideline, 8 June 2021, p 4.

188 Planning Act 2016 (Qld) s 3.

189 Development that is assessable (i.e. not accepted or prohibited) will require development approval: Planning Act 2016 (Qld) s 44(3). See also what constitutes 'development': Planning Act 2016 (Qld) sch 2 (definition of 'development').

190 Mineral Resources Act 1989 (Qld) s 4A. Under the planning framework, development that is authorised by a mining lease cannot be made 'assessable' development: Planning Act 2016 (Qld) ss 43(5)(b), 44(4), 44(6)(a); Planning Regulation 2017 (Qld) reg 16, sch 6, cl 22.

191 There may be some development that is related to the mine but is not 'authorised' by a mining lease, so requires development approval: Mineral Resources Act 1989 (Qld) s 4A(1).

192 The decision-maker is referred to as the 'assessment manager': Planning Act 2016 (Qld) s 48(2). There are a variety of possible assessment managers, depending on the type of development, although it is most often the local government for the area where the development is proposed: Planning Regulation 2017 (Qld) sch 8.

193 See Planning Act 2016 (Qld) ch 3.

194 Regional Planning Interests Act 2014 (Qld) s 3.

195 Regional Planning Interests Act 2014 (Qld) pt 3.

196 Regional Planning Interests Act 2014 (Qld) s 59.

197 Environmental Protection Act 1994 (Qld) s 212A.

198 Gasfields Commission Queensland, Review of the Regional Planning Interests Act 2014 Assessment Process, Report, October 2021, updated August 2023, p 5, referring to Queensland Audit Office, Managing Coal Seam Gas Activities, Report 12, 2019–20.

199 Mineral and Energy Resources and Other Legislation Amendment Act 2024 (Qld).

200 Large resource projects are defined in the Strong and Sustainable Resource Communities Act 2017, sch 1 (definition of 'large resource project') as a resource project — (a) for which an EIS is required; or (b) that holds a site-specific environmental authority under the Environmental Protection Act 1994 and — (i) has, or is projected to have, a workforce of 100 or more workers; or (ii) has a smaller workforce decided by the Coordinator-General and notified in writing by the Coordinator-General to the owner of the project.

201 Strong and Sustainable Resource Communities Act 2017 (Qld) s 6.

202 Strong and Sustainable Resource Communities Act 2017 (Qld) s 3(2)(c).

203 Strong and Sustainable Resource Communities Act 2017 (Qld) s 9.

204 Strong and Sustainable Resource Communities Act 2017 (Qld) s 9(3)(a).

205 Strong and Sustainable Resource Communities Act 2017 (Qld) s 10; The Coordinator-General, 'Social Impact Assessment Guideline', March 2018, pp 2, 9–10.

206 Environmental Protection Act 1994 (Qld) s 40; The Coordinator-General, 'Social Impact Assessment Guideline', March 2018, p 1.

207 State Development and Infrastructure, 'Post-implementation review', 9 November 2021 https://www.statedevelopment.qld.gov.au/coordinator-general/strong-and-sustainable-resource-communities/post-implementation-review.

208 Local Government Act 2009 (Qld) s 3.

209 Aboriginal Land Act 1991 (Qld); Torres Strait Islander Land Act 1991 (Qld).

210 Strong and Sustainable Resource Communities Act 2017 (Qld) s 9(5).

211 Regional Planning Interests Act 2014 (Qld) s 26.

212 Regional Planning Interests Act 2014 (Qld) s 26.

213 Regional Planning Interests Act 2014 (Qld) s 41(2).

214 Regional Planning Interests Act 2014 (Qld) s 42.

215 Regional Planning Interests Act 2014 (Qld) s 42.

216 See Environmental Planning and Assessment Act 1979 (NSW) pt 7 div 7.1 sub-div 2.

217 Environmental Planning and Assessment Act 1979 (NSW) s 7.4(1)–(2).

218 Environmental Planning and Assessment Act 1979 (NSW) s 7.4(10).

219 Environmental Planning and Assessment Act 1979 (NSW) s 7.4(9).

220 Environmental Planning and Assessment Act 1979 (NSW) ss 7.4(f)–(g).

221 Environmental Planning and Assessment Act 1979 (NSW) s 7.6.

222 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 34. See section 34 of the EPBC Act for a summary of 'matter protected' by part 3 of the EPBC Act.

223 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 45.

224 Environment Protection and Biodiversity Conservation Act 1999 (Cth) ch 3 pt 5 div 2 sub-div A.

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226 Professor G Samuel AC, Independent review of the EPBC Act – Final Report, Department of Agriculture, Water and the Environment, October 2020, pp ii, viii.

227 Australian Government, Nature Positive Plan: better for the environment, better for business, December 2022, pp 1, 11.

228 There is a current review by the Australian Law Reform Commission on the future acts regime: ALRC, 'Review of the Future Acts Regime', 4 June 2024 https://www.alrc.gov.au/inquiry/review-of-the-future-acts-regime.

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233 Native Title Act 1993 (Cth) s 35.

234 Mineral Resources Act 1989 (Qld) s 276B.

235 Native Title Act 1993 (Cth) s 38(1)(c).

236 Environmental Protection Act 1994 (Qld) s 212(2).

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