



Queensland
Human Rights
Commission

Review of mining lease objections processes

Submission to Queensland Law Reform
Commission

30 September 2024

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Introduction

1. This is the Queensland Human Rights Commission's (**QHRC**) submission to the Queensland Law Reform Commission (**QLRC**) on their review of the mining lease objections process.
2. The terms of reference for the review provided by the Attorney-General ask the QLRC 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 the review of such decisions. In doing so, the QLRC is expressly asked to consider the implications of the *Human Rights Act 2019* (**Human Rights Act**).
3. On 15 July 2024, the QLRC released 2 consultation papers inviting feedback on reform proposals and asking 26 questions.¹
4. This submission focuses on answering the following questions with respect to the application of Human Rights Act:
 - Q1 – Are the guiding principles of 'fair, efficient, effective and contemporary' appropriate for reform of the current processes?
 - Q15 – What are the QHRC's views on the proposal to require decision-makers on mining lease and associated environmental authority applications to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage?
 - Q18 – What are the QHRC's views on the proposed role for the Land Court as a merits review body and a judicial review body whose decisions are appealable to the Court of Appeal?
 - Q19 – What preconditions, if any, should there be to commence a combined review (i.e, standing)?
 - Q21 – Should each party pay their own costs of the merits review or should a different rule apply?

Summary of submission

5. In this submission, the QHRC:
 - a. Identifies broad principles to assist the development of law and policy that is compatible with human rights, namely: lawful and non-discriminatory,

¹ 'Review Publications', Queensland Law Reform Commission (Web Page, 2024) <<https://www qlrc.qld.gov.au/reviews/mining-lease-objections-processes-review/review-publications>>.

evidence-based, ensures participation, and transparent and accountable. (Q1)

- b. Identifies the value of statutory criteria to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples, even though decision-makers will be required to properly consider the human rights of Aboriginal peoples and Torres Strait Islander peoples under the Human Rights Act. (Q15)
- c. Discusses the scope of cultural rights as interpreted by the United Nations Human Rights Committee under Article 27 of the International Covenant on Civil and Political Rights, upon which section 28 of the Human Rights Act is based (that is, the cultural rights of Aboriginal peoples and Torres Strait Islander peoples). (Q15)
- d. Outlines the obligations on public entities to act and decide compatibly with human rights and to give proper consideration to human rights under section 58 of the Human Rights Act, to support where possible streamlining these obligations with proposed requirements under mining and environmental legislation. (Q15)
- e. Recommends that the Land Court in conducting a merits review is expressly recognised as a public entity for the purposes of the Human Rights Act. (Q18)
- f. Recommends that the Land Court in conducting a merits review have the authority to receive and seek new evidence relevant to its obligations under section 58 of the Human Rights Act. (Q18)
- g. Sets out the Land Court's obligations under the Human Rights Act in conducting a judicial review. (Q18)
- h. Recommends that if standing to seek Land Court review is restricted, then standing should extend to those who have, or should have, formally engaged in the original decision-making process, and to environmental groups or organisations formed to protect the environment. (Q19)
- i. Sets out factors relevant to developing appropriate rules as to costs in review proceedings before the Land Court. (Q21)

About the Commission

- 6. The QHRC is an independent statutory body with functions under the *Anti-Discrimination Act 1991* (**Anti-Discrimination Act**) and the Human Rights Act. This includes dealing with complaints about contraventions of these Acts, and promoting an understanding, acceptance, and public discussion of human rights in Queensland.

Guiding principles (Q1)

7. The QHRC supports the review's guiding principles of 'fair, efficient, effective and contemporary' as defined in the consultation paper.² In this submission, the QHRC expands on the meaning of 'fair'.
8. The consultation paper defines 'fair' to mean the process should:
 - be impartial, just, robust, transparent, independent and accountable
 - be clear and certain
 - support access to justice and **be compatible with human rights**.(emphasis added)
9. Under the Human Rights Act, an act, decision, or statutory provision is 'compatible with human rights' if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.³ Section 13 provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and goes on to list factors that may be relevant to assessing whether a limit is reasonable and justifiable.
10. Application of the following principles drawn from the factors listed in section 13 will assist the development of law and policy that is compatible with human rights.

Lawful and non-discriminatory

11. Section 13 of the Human Rights Act requires any restrictions on rights must be in accordance with the law and cannot infringe applicable law.
12. The Anti-Discrimination Act prohibits discrimination on the basis of protected attributes in certain areas of activity. Discrimination means treating someone less favourably because of their attribute (direct discrimination), or imposing a term a person with the attribute is unable to comply that is unreasonable (indirect discrimination).⁴

² Queensland Law Reform Commission, *Reimagining decision-making processes for Queensland Mining: Review of mining lease objections processes* (Consultation Paper, July 2024) 7 (**Consultation paper**).

³ *Human Rights Act 2019* (Qld) s 8.

⁴ From 1 July 2025, the legal tests for direct and indirect discrimination will be updated. See *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7B.

13. Protected attributes include age, race, and impairment.⁵ Unlawful discrimination can also occur because it is on the basis of a characteristic that a person with the attribute generally has, is often imputed to have, or is presumed to have.⁶
14. It is unlawful under the Anti-Discrimination Act to discriminate in the performance of a function or the exercise of power under a State law or for the purpose of a State Government program.⁷
15. Consideration of discrimination laws are particularly relevant to proposals for a new participation process (P1) and the new online portal (P2).
16. Participation processes may be discriminatory if they impose systemic barriers that disproportionately affect Aboriginal peoples and Torres Strait Islander peoples, for example, imposing requirements on Aboriginal or Torres Strait Islander participants that are not culturally safe or appropriate. Some barriers may be reasonable and justified, but this would have to be assessed having regard to the special significance meaningful participation in these processes has for Aboriginal peoples and Torres Strait Islander peoples as acknowledged in the consultation paper.⁸ QLRC's work in identifying systemic barriers and consulting with Aboriginal peoples and Torres Strait Islander peoples is therefore essential in developing lawful and non-discriminatory participation processes.
17. Similarly, the QHRC is supportive of alternative notice and information-sharing requirements in addition to a new online portal, to ensure information is accessible by all affected persons, including people who might not have internet access or computer literacy.

Evidence-based

18. Decisions that limit human rights should be based on evidence of the nature and extent to which human rights will be limited, that the limitation will achieve the proposed purpose, and that the limitation is the least restrictive reasonably available way the purpose can be achieved.
19. The QHRC is supportive of any measures that promote publication of the evidence-base, and in a form that can be understood by people involved in the decision-making process. This will facilitate principles of participation and transparency and accountability, which are discussed in more detail below.

Ensures participation

20. Participation in decisions by people who will be affected by the decision enhances the evidence-base upon which the decision will be made, and is critical

⁵ *Anti-Discrimination Act 1991* (Qld) s 7.

⁶ *Anti-Discrimination Act 1991* (Qld) s 8.

⁷ *Anti-Discrimination Act 1991* (Qld) s 101.

⁸ Consultation paper [71].

to identifying the nature and extent to which human rights may be limited and any less restrictive ways that might be available to achieve the purpose. For First Nations peoples, collective participation is necessary for realising rights to self-determination and associated cultural rights.

21. In the QHRC's submission to the independent review of Queensland's Human Rights Act, the QHRC recommended the express inclusion of a duty on public entities to ensure participation of First Nations peoples, children, and persons with disability when developing policies or making decisions that directly or disproportionately affect their rights.⁹ This reflects recommendations made by the federal Parliamentary Joint Committee on Human Rights for a national human rights Act.¹⁰
22. With respect to participation of First Nations peoples, the *United Nations Declaration on the Rights of Indigenous Peoples* provides:
 - a. Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
 - b. Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
 - c. Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.
23. The Office of the High Commissioner for Human Rights has described the elements of free, prior and informed consent as:
 - *Free* implies that there is no coercion, intimidation or manipulation.
 - *Prior* implies that consent is to be sought sufficiently in advance of any authorization or commencement of activities and respect is shown to time requirements of indigenous consultation/consensus processes.
 - *Informed* implies that information is provided that covers a range of aspects, including the nature, size, pace, reversibility and scope of any proposed project or activity; the purpose of the project as well as its duration; locality and areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the

⁹ Queensland Human Rights Commission, Submission to Independent Reviewer, *Review of Queensland's Human Rights Act 2019* (8 July 2024) [203]–[209].

¹⁰ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (Report, 2024), Appendix 5: Example Human Rights Bill 2024 cl 39.

execution of the project; and procedures the project may entail. This process may include the option of withholding consent. Consultation and participation are crucial components of a *consent* process.¹¹

24. Proposals for a new participation process (P1) and information sharing through an online portal (P2) should ensure adequate opportunities for participation consistent with these criteria.
25. Assessing the effectiveness of participation processes will also be relevant when applying statutory criteria to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage (P5). The relevance of participation to the cultural rights of Aboriginal peoples and Torres Strait Islander peoples is discussed under *Content of cultural rights* below.

Transparent and accountable

26. Justice Kirby has said:¹²

There is no doubt that nurturing good governance is essential to ensuring respect for human rights. Without the rule of law, independent courts and other institutions of the modern society - essential components of good governance - the promise of human rights may remain just that: a promise unfulfilled. Enforcement of fundamental freedoms when it matters may be impossible. The lesson of history is that **transparent, responsible, accountable and participatory governance** is a prerequisite to enduring respect for human dignity and the defence of human rights. (emphasis added)

27. Transparent decision-making makes clear 'what is being done, how and why actions take place, who is involved, and by what standards decisions are made'.¹³ It requires attention to record keeping, preparation of reasons, and publication of information that is accessible and broadly understandable.
28. Accountability refers to the checks and balances on decision-making. There is overlap between accountability and transparency, but accountability also includes safeguards such as external oversight/auditing mechanisms, clarity of responsibility, and rights to merits or judicial review by interested parties.
29. Sufficient accountability and transparency mechanisms can make the difference to whether a law, policy or decision is least restrictive of rights, and whether the interference is compatible with human rights. The proposals for new participation processes (P1), a central online portal (P2) and a new review jurisdiction in the Land Court (P6) support increased transparency and accountability.

¹¹ United Nations Office of the High Commissioner for Human Rights, *Free, Prior and Informed Consent of Indigenous Peoples* (September 2013).

¹² Michael Kirby, 'Human Rights - Essential for Good Governance' (Seminar Paper, Good Governance Practices for the Promotion of Human Rights, Seoul, 15 September 2004).

¹³ . Michael Johnston, 'Good Governance: Rule of Law, Transparency, and Accountability' (2006) *United Nations Public Administration Network*, 3.

30. The principles of transparency and accountability are already included in the QLRC's formulation of 'fair'. The QHRC strongly supports their inclusion in guiding reform of current mining objection processes from a human rights perspective.

Requirement to consider cultural rights (Q15)

31. The consultation paper proposes to statutorily require decision-makers to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage in considering mining lease and associated environmental authority applications. (P5)

Value of embedding cultural rights in statutory criteria

32. Section 58(1) of the Human Rights Act already imposes overarching obligations on all public entities to:
- make act and make decisions compatible with human rights; and
 - give proper consideration to relevant human rights when making decisions.
33. The Human Rights Act protects the cultural rights of Aboriginal peoples and Torres Strait Islander peoples.¹⁴
34. It follows that government, when making decisions under the *Mineral Resources Act 1989* and the *Environmental Protection Act 1994*, are already obliged to give proper consideration to the cultural rights of Aboriginal peoples and Torres Strait Islander peoples.
35. However, the QHRC supports the proposal to expressly insert the requirement into the authorising legislation for the following reasons.
36. Firstly, the proposal signals the commitment of government to uphold and prioritise the rights of Aboriginal peoples and Torres Strait Islander peoples whose rights will often be disproportionately affected by decisions to approve mining lease and associated environmental authorities. As observed in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21:

[1568] The First Nations right is about the survival of culture. The Torres Strait Island peoples face an existential risk from sea level rise. Already First Nations peoples in the north of Australia are experiencing the effects of climate change impacts on their ability to enjoy, maintain, control, and develop culture. More severe impacts mean greater interference with cultural rights. Displacement has the potential to destroy culture. Something that cannot be measured in monetary terms, is at odds with the purpose of s 28 and, set against the history of dispossession of First Nations peoples in this country, counts against the Project being approved.

¹⁴ *Human Rights Act 2019* (Qld) s 28.

37. Secondly, the proposal provides an opportunity to articulate the requirement to consider cultural rights in a way that is meaningful for this context, potentially making it easier for government decision-makers to understand and apply.
38. Thirdly, express statutory criteria strengthens the enforceability of rights. A failure to comply with section 58 of the Human Rights Act renders the decision unlawful. However, relief or remedy for unlawfulness arising under section 58 can only be obtained by ‘piggy-backing’ on proceedings that raise an independent ground of unlawfulness, for example judicial review.¹⁵ Inserting a statutory criteria to consider cultural rights provides a stand-alone ground for judicial review, upon which other human rights arguments may be attached.
39. Another limitation of section 58 of the Human Rights Act is that an act or decision of the public entity is not invalid merely because of a contravention of section 58(1).¹⁶ Statutory criteria will enhance judicial capacity to make such a finding in appropriate cases.

Content of cultural rights

40. Section 28 of the Human Rights Act provides special protection for the distinct cultural rights held by Aboriginal peoples and Torres Strait Islander peoples.
41. International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision, while recognising that differences in international law and the contexts in which they are applied may mean jurisprudence is not relevant to human rights as they are recognised and protected in Queensland.¹⁷
42. Section 28 of the Human Rights Act is modelled on Article 27 of the *International Covenant on Civil and Political Rights (ICCPR)* and also Articles 8, 25, 29 and 31 of the *UN Declaration on the Rights of Indigenous Peoples*.¹⁸ Article 27 refers to the right of cultural minorities to ‘not be denied the right, in community with other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.’ Unlike section 28 of the Human Rights Act, Article 27 does not specifically relate to Indigenous peoples, but has been interpreted in light of the *United Nations Declaration on the Rights of Indigenous Peoples*.

¹⁵ *Human Rights Act 2019 (Qld)* s 59.

¹⁶ *Human Rights Act 2019 (Qld)* s 58(6).

¹⁷ HRA S 48(3), Explanatory Notes, Human Rights Bill 2018 (Qld) 31.

¹⁸ Explanatory Notes, Human Rights Bill 2018 (Qld) 23.

43. The following section summarises a sample of UN Human Rights Committee decisions (**communications**¹⁹) which have applied Article 27 in relation to Indigenous peoples. The cases indicate:
- a. The right is directed at ensuring the survival and continued development of cultural identity.
 - b. 'Culture' for Indigenous peoples must recognise the close material and spiritual ties of Indigenous peoples to the land, which must be respected and protected to prevent the degradation of their particular way of life, preserve their cultural legacy, and ensure their capacity for intergenerational transmission of culture.
 - c. Economic activities of Indigenous peoples can be within the scope of Article 27 if they are an 'essential element of the culture', and not just because of economic dependence.
 - d. Article 27 is an individual right, but turns on the ability to share culture with others. Individuals not directly impacted by an act or decision may nevertheless have standing as a result of collective harm to the community.
 - e. Article 27 involves both negative and positive measures for protection. The right to non-discrimination (Article 2) and the right to privacy (Article 17) may also be relevant.
 - f. Where there are conflicting Indigenous perspectives, effective consultation with all groups and the impact of overall outcomes will be important.
 - g. A measure will be incompatible with Article 27 if it amounts to a denial of the right of a community to enjoy its own culture. Measures that do not amount to denial may be justified where there has been effective consultation and the measures are proportionate.

Scope of cultural rights

44. In a communication concerning the environmental degradation of indigenous territory as a result of State sanctioned agricultural practices, the Human Rights Committee said:

... in the case of indigenous peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting. Thus, **the protection of this right is directed towards ensuring the survival and continued development of the cultural identity.** As also stated by the Committee on Economic, Social and Cultural Rights, the strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands,

¹⁹ The Human Rights Committee can receive and consider individual communications, also known as complaints, from or on behalf of a person or group of persons claiming to be victims of a violation of the *International Covenant on Civil and Political Rights* by a State party. Complainants are referred to as 'authors'.

territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Therefore, **“indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life**, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity”. Furthermore, the Human Rights Committee notes that the Committee on the Elimination of Racial Discrimination has stated that **the close ties of indigenous peoples to the land must be recognized and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival. Their relations to the land are a material and spiritual element which they must fully enjoy to preserve their cultural legacy and transmit it to future generations and are, therefore, a prerequisite to “prevent their extinction as a people”**. The Committee finds that article 27, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity.²⁰ (emphasis added, citations omitted)

45. For economic activities in connection with a resource or environment to come within the scope of Article 27, something more than mere economic dependence on a resource or environment is required. The economic activities must be ‘an essential element in the culture of an ethnic community’.²¹ In *Poma Poma v. Peru*, raising llamas was accepted to be an ‘essential element of the culture’ of the Aymara community, since it is a form of subsistence and an ancestral tradition handed down from parent to child.²²
46. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.²³
47. In *Käkkäljärvi et al. v. Finland*²⁴, a complaint was brought to the Human Rights Committee by members of the Sami people following a decision by the Supreme Court of Finland to grant the right to vote in elections for the Sami Parliament to individuals who had not been considered eligible by the competent organs of the

²⁰ Human Rights Committee, *Views: Communication No 2552/2015*, UN Doc CCPR/C/132/D/2552/2015 (21 September 2022) [8.6] (*Pereira and the other members of the Campo Agua’ë indigenous community v. Paraguay*).

²¹ Human Rights Committee, *Views: Communication No 197/185*, UN Doc CCPR/C/33/D/197/1985 (27 July 1988) [9.2] (*Kitok v Sweden*); Human Rights Committee, *Views on Communication No 671/1995*, UN Doc CCPR/C/58/D/671/1995 (22 November 1996) [10.2] (*Jouni E Länsman et al. v. Finland*).

²² Human Rights Committee, *Views: Communication No 1457/2006*, UN Doc CCPR/C/95/D/1457/2006 (27 March 2009) [7.3] (*Poma Poma v. Peru*).

²³ Human Rights Committee, *Views: Communication No 3624/2019*, UN Doc CCPR/C/135/D/3624/2019 (21 July 2022) [34] (*Billy and others v. Australia*).

²⁴ Human Rights Committee, *Views: Communication No 2950/2017*, UN Doc CCPR/C/124/D/2950/2017 (2 November 2018) (*Käkkäljärvi et al. v. Finland*).

Sami Parliament. In assessing whether the authors had been directly affected by the Supreme Court's ruling, the Committee said:

[9.9] ...The rights to political participation of an indigenous community in the context of internal self-determination under article 27, read in the light of article 1, of the Covenant, and in pursuance of the preservation of the rights of members of the community to enjoy their own culture or to use their own language in community with the other members of their group, are not enjoyed merely individually. Consequently, when considering the individual harm in the context of this communication, the Committee must take into account the collective dimension of such harm. With respect to dilution of the vote of an indigenous community in the context of internal self-determination, harm directly imposed upon the collective may injure each and every individual member of the community. The authors are members of an indigenous community and all of their claims are related to their rights as such.

48. Article 27 may require the State to take positive legal measures to protect the right and measures to ensure the effective participation of members of minority communities in decisions which affect them.²⁵ Positive measures may be needed against acts of the State party itself, and also against the acts of other persons within the State party. Together with Article 2 (non-discrimination), States may be under an obligation to adopt temporary special measures in order to diminish or eliminate conditions that cause or help to perpetuate discrimination.²⁶
49. Interferences with traditional ways of life can also engage Article 17 (the right to privacy, family, home etc), which comprises of both an obligation to refrain from arbitrary interference and an obligation to adopt positive measures to ensure effective rights under Article 17 in the presence of interference by the State authorities and physical or legal persons.²⁷

Divergence of views within First Nations groups

50. In *Mahuika et al. v. New Zealand*²⁸ Maori traditional fishing rights were altered through the 'Fisheries Settlement', reflected in a Deed of Settlement and enacted into New Zealand legislation, with broad Maori support but were against the wishes of members of a Maori minority. The Committee said:

[9.6] ...In such circumstances, where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or

²⁵ Human Rights Committee, *General Comment adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights - Addendum*, UN Doc CCPR/C/21/Rev.1/Add.5 (26 April 1994) [6.1]-[6.2].

²⁶ Human Rights Committee, *Views: Communication No 2020/2010*, UN Doc CCPR/C/124/D/2020/2010 (1 November 2018) [7.11] (*McIvor and Grismer v. Canada*); Human Rights Committee, *CCPR General Comment No 18: Non-discrimination*, 37th sess, (10 November 1989) [9]-[10].

²⁷ Human Rights Committee, *Views: Communication No 3624/2019*, UN Doc CCPR/C/135/D/3624/2019 (21 July 2022) [8.10] (*Billy and others v. Australia*).

²⁸ Human Rights Committee, *Views: Communication No 547/1993*, UN Doc CCPR/C/70/D/547/1993 (27 October 2000) (*Mahuika et al. v. New Zealand*)

of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected.

51. The Committee noted that prior to the Fisheries Settlement, the existing quota management system was in possible infringement of Maori rights because in practice, Maori had no part in it and were therefore deprived of their fisheries. With the Fisheries Settlement, Maori were given access to a great percentage of quota. For commercial fisheries, Maori authority and traditional methods of control as recognised in the Treaty of Waitangi were replaced with a new control structure, an entity in which Maori had effective control. For non-commercial fisheries, the Crown's obligations under the Treaty of Waitangi continued, and regulations were made recognising and providing for customary food gathering.
52. Taking this and the government's broad consultation process in which special attention was paid to the cultural and religious significance of fishing for the Maori, the Committee concluded that the Fisheries Settlement was compatible with Article 27.
53. In *Ailsa Roy v. Australia*²⁹, the author, an elder of the Wunna Niyaparli, was unable to participate in native title proceedings over traditional lands which were ultimately granted to another Indigenous People, empowering them to negotiate mining concessions over the land to the exclusion of the Wunna Niyaparli.³⁰ As a consequence, it would be impossible for the Wunna Niyaparli to keep looking after the culturally important areas on their traditional lands and would mean the extinction of their rights to their traditional territory. The issue brought to the Human Rights Committee was not about who had a better claim to native title, but whether the State had failed to provide the Wunna Niyaparli with an adequate procedure for the determination of their rights to traditional territory.
54. The Committee observed that the Wunna Niyaparli were only given 2 weeks to prepare for a hearing on a separate question with important implications, were not legally represented and had been denied legal aid (contrary to the other party), had difficulties in accessing the internet to allow access to information about the court's orders, and had been noted by the Federal Court to possibly being confused as to procedural orders. The Committee considered the State party failed to ensure the Wunna Niyaparli's effective participation in the proceedings. Further, in those circumstances, the Federal Court's decision to not allow the Wunna Niyaparli to adduce evidence and not to adjourn proceedings was arbitrary in violation of the principles of fair trial and equality of arms.

²⁹ Human Rights Committee, *Views: Communication No 3585/2019*, UN Doc CCPR/C/137/D/3585/2019 (15 March 2023) ('*Ailsa Roy v. Australia*')

³⁰ The application for native title by the Wunna Niyaparli had been prompted by the development of several mines on traditional territory without any information being shared with or consultation with the Wunna Niyaparli.

55. By attributing the Wunna Nyiyaparli's traditional territory to another Indigenous group without their effective participation in the proceedings, the State had affected the Wunna Nyiyaparli's survival as a people in violation of Article 27, as well as violating Article 14 (fair trial) and Article 2 (non-discrimination).
56. The Human Rights Committee held that the State party should reconsider the Wunna Nyiyaparli's native title claim, as well as review the mining concessions already granted within the claimed traditional territory without consulting the Wunna Nyiyaparli, in order to evaluate whether a modification of the rights of the concessionaires is necessary to preserve the survival of the Wunna Nyiyaparli. The Committee also indicated the State was under an obligation to review legal aid and funding models with respect to overlapping Indigenous native title claims, in order to prevent similar violations from occurring in the future.³¹

Violation of Article 27

57. Unlike the Queensland Human Rights Act, there is no general limitations clause authorising the limitation of rights under the ICCPR. However, the Human Rights Committee has indicated that Article 27 can be subject to limitation, particularly where effective consultation has taken place.
58. Measures which result in a denial of the right of a community to enjoy its own culture is incompatible with Article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to a community will not necessarily amount to a denial of rights under Article 27.³²
59. Reindeer husbandry is an essential element of the culture of the Sami people in Finland. In *Länsman (Jouni) et al. v. Finland*³³, the question was whether State approved plans for logging on land which was part of winter herding grounds for reindeer was of such proportions as to deny the authors of the right to enjoy their culture in that area. The Committee found it was not, having particular regard to evidence that the authors were consulted on logging plans through their representative body, who had not reacted negatively to the plans. The authors' dissatisfaction with that process, or that the process was capable of greater interaction did not alter the Committee's assessment. Further, the State parties had weighed the authors' interests and the general economic interests in the area when deciding on the most appropriate measures of forestry management.
60. While the approved logging would create additional work and expense for the authors, it did not appear to threaten the survival of reindeer husbandry. However, the Committee was at pains to point out that while activities by themselves may not constitute a violation of Article 27, activities taken together

³¹ Human Rights Committee, *Views: Communication No 3585/2019*, UN Doc CCPR/C/137/D/3585/2019 (15 March 2023) [10] ('*Ailsa Roy v. Australia*')

³² Eg, Human Rights Committee, *Views: Communication No 1457/2006*, UN Doc CCPR/C/95/D/1457/2006 (27 March 2009) [7.4] ('*Poma Poma v. Peru*').

³³ Human Rights Committee, *Views: Communication No 671/1995*, UN Doc CCPR/C/58/D/671/1995 (30 October 1996) ('*Länsman (Jouni) et al. v. Finland*').

may do so. Therefore, it was incumbent upon the State to reconsider the rights of the Sami people under Article 27 if other large scale works were approved, or if the effects of the approved logging were shown to be more serious than currently foreseen.³⁴

61. State parties may regulate activities that constitute an essential element in a culture of a minority, provided that the regulation does not amount to a de facto denial of Article 27. In *Howard v. Canada*³⁵, requiring a person to obtain a fishing licence did not in itself violate the person's rights under Article 27. Rather, the issue was whether or not the person's ability to fish in reserves pursuant to treaty rights, or outside of reserves under licence, allowed the person to enjoy this element of his culture in community with other members of his group.
62. The Human Rights Committee has recognised that a State may legitimately take steps to promote its economic development, but that economic development must not undermine and should be commensurate with its obligations under Article 27. In the context of measures that interfered with the culturally significant economic activities of an indigenous community, compatibility with Article 27 has been said to depend:

on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process **must be effective**, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality **so as not to endanger the very survival of the community and its members**.³⁶ (emphasis added)
63. In *Poma Poma v Peru*³⁷, the State party had diverted ground water through the construction of wells from land on which the Aymara community had traditionally raised llamas, causing thousands of livestock to die and depriving the community of its livelihood. The Committee observed that the State party had not consulted with the community at any time concerning the construction of the wells, did not require studies to be undertaken by a competent independent body to determine the impact the wells would have on traditional economic activity, nor did it take measures to minimise the negative consequences and repair the harm done. The Committee concluded that the State's action had substantively compromised the way of life and culture of the author, as a member of her community, and had violated her rights under Article 27.

³⁴ Ibid [10.5]-[10.7]

³⁵ Human Rights Committee, *Views: Communication No 879/1999*, UN Doc CCPR/C/84/D/879/1999 (26 July 2005) ('*Howard v. Canada*').

³⁶ Human Rights Committee, *Views: Communication No 1457/2006*, UN Doc CCPR/C/95/D/1457/2006 (27 March 2009) [7.6] ('*Poma Poma v. Peru*').

³⁷ Ibid.

Obligations under section 58 of the Human Rights Act

64. To the extent that it is appropriate, the QHRC recommends alignment between the requirements of mining and environmental legislation with the requirements of the Human Rights Act, to support efficient and streamlined decision-making. To that end, the QHRC sets out the scope of the obligations under section 58 of the Human Rights Act.

Substantive obligation - acting and deciding compatibly with human rights

65. Acting and deciding compatibly with human rights means not limiting a right, or only limiting rights to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Human Rights Act.³⁸
66. While it is for the person relying on a human right to establish the limitation to rights, it is up to the public entity to justify the limitations caused by their act or decision.³⁹ The burden on public entities has been described as a ‘heavy one and cannot be discharged simply by the decision-maker reciting that [they] held a particular belief without providing any basis for that belief’⁴⁰ as well as requiring ‘a degree of probability commensurate with the occasion, and must be strictly imposed in circumstances where the individual concerned is particularly vulnerable’.⁴¹
67. Having regard to the factors in section 13 of the Human Rights Act, decision-makers on mining lease and associated environmental authority applications will need to gather sufficient information about:
- a. The nature and extent of impact a positive decision will have on the rights of individuals, including on the cultural rights of Aboriginal peoples and Torres Strait Islander peoples
 - b. The purpose (or benefits) of the mining lease / environmental authority, and evidence that a positive decision will help to achieve that purpose
 - c. Any less restrictive, reasonably available ways to achieve the purpose.

³⁸ *Human Rights Act 2019* (Qld) s 8.

³⁹ *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [128]-[129].

⁴⁰ *Ibid* [250].

⁴¹ *Johnston v Commissioner of Police* [2024] QSC 2 [73] citing *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441; [2017] VSC 251 [203].

Procedural obligation – proper consideration of human rights

68. The obligation to give proper consideration provides a systemic foundation to support acting and deciding compatibly with human rights.
69. The often-cited requirements for demonstrating proper consideration from the Victorian case of *Bare v Independent Broad-Based Anti-Corruption Commission and Others* (2015) 48 VR 129 [288] are:
- (1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision;
 - (2) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person;
 - (3) identify the countervailing interests or obligations; and
 - (4) balance competing private and public interests as part of the exercise of justification.
70. The Queensland Supreme Court in *Johnston v Commissioner of Police* adopted this approach and later Victorian Court of Appeal authority that proper consideration, while assisted by the framework set out in section 13 of the Human Rights Act, does not require direct and express consideration of each of the matters of section 13.⁴²
71. The QHRC notes that the Queensland Human Rights Act, in contrast to the Victorian *Charter of Human Rights and Responsibilities 2006*, defines 'giving proper consideration' to specifically include 'considering whether the decision would be compatible with human rights'.⁴³ 'Compatible with human rights' is defined by reference to the test in section 13.⁴⁴ As Crowley J noted in *BZN v Chief Executive, Department of Children, Youth Justice and Multicultural Affairs*, 'the notion of a decision being 'compatible with human rights' thus pervades both the substantive and procedural limbs of s 58'.⁴⁵
72. In any event, direct and express consideration of the factors in section 13 can only help a public entity to meet their obligations to properly consider human rights, and to in fact make decisions that are compatible with human rights.
73. 'Proper' means that the standard of consideration must be higher than that generally applicable at common law to take relevant considerations into account⁴⁶, however must be approached in a 'common sense and practical manner'.⁴⁷ The level of consideration needed depends upon the decision being made and the decision-maker making it; public entities are not expected to

⁴² *Johnston v Commissioner of Police* [2024] QSC 2 [75]-[77] citing *Thompson v Minogue* (2021) 67 VR 301; [2021] VSCA 358.

⁴³ *Human Rights Act 2019* (Qld) s 58(4).

⁴⁴ *Human Rights Act 2019* (Qld) s 8.

⁴⁵ [2023] QSC 266 [235].

⁴⁶ *Johnston v Commissioner of Police* [2024] QSC 2 [77].

⁴⁷ *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 [355]; *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [298–9] [137].

achieve the level of consideration that might be hoped for in a decision given by a judge.⁴⁸ In giving proper consideration, a decision-maker can refer to advice and recommendations made by others, but needs to be more than just the acceptance of advice.⁴⁹

74. Identifying whose human rights may be affected at an early stage, and genuinely engaging with those persons (or their representatives) to understand the impact on rights the decision may have, will help satisfy obligations to give proper consideration.

Role of the Land Court (Q18)

75. The QLRC proposes that mining lease and environmental authority applications be subject to merits and judicial review by the Land Court, which can then be appealed to the Court of Appeal on the grounds of errors of law or jurisdictional error (P6).

Human rights in merits review

76. In respect of a merits review, the consultation paper has already identified that the Land Court would likely be considered a 'public entity' under the Human Rights Act and therefore have obligations under section 58(1).⁵⁰ To avoid legal argument on this point, the QHRC recommends that legislation expressly provide that the Land Court is a public entity for the purposes of the Human Rights Act when conducting a merits review.
77. The consultation paper proposes that a merits review be conducted on the same evidence that was before the original decision-maker, with a discretion to admit new evidence in exceptional circumstances.⁵¹
78. To ensure that the Land Court has sufficient information to be satisfied it is giving proper consideration to human rights and making a decision that is compatible with human rights, the Commission recommends:
 - a. gaps in evidence before the original decision-maker, or new evidence arising since the original decision was made, relevant to these issues should be admissible;
 - b. the Land Court has powers to seek such information if it is not led by either party.⁵²

⁴⁸ *BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266 [260]

⁴⁹ *Johnston v Commissioner of Police* [2024] QSC 2 [65]

⁵⁰ Consultation paper [215].

⁵¹ Consultation paper [85], [210].

⁵² Who pays for the preparation of this information will need to be considered.

Human rights in judicial review

79. For judicial review, the Land Court will have obligations to directly apply human rights that relate to the court's functions⁵³ and to interpret statutory provisions compatibly with human rights⁵⁴.
80. Additionally, the Land Court may be asked to consider whether the original decision-maker contravened section 58(1) in making its decision, by piggy-backing human rights grounds under section 59 of the Human Rights Act. A litigant may successfully obtain relief on the grounds of unlawfulness arising from section 58(1), even if they are not successful on judicial review grounds.
81. The courts have indicated that consideration of section 58 in judicial review proceedings goes beyond what is traditionally adopted by courts for judicial review, but is not a merits review. Justice Martin in *Johnston v Commissioner of Police* set out the following principles:
 - a. The intensity of the review is greater because of the application of section 13 of the Human Rights Act – it is a 'high standard of review'.
 - b. A degree of deference should be afforded a decision-maker who has a highly developed appreciation of the make-up, structure and operations of a particular workforce. But what constitutes appropriate weight to be afforded to the decision-maker's conclusion remains a matter for the court and 'what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.'
 - c. The Court's evaluation of proportionality is by reference to the circumstances at the relevant time and should not take into account factors that post-date the decision.⁵⁵
82. While there are significant differences in the application of human rights in judicial review proceedings as compared to merits review proceedings, the QHRC has not been able to identify difficulties this might raise for the Land Court in having a combined jurisdiction. On one hand, a decision on the merits to affirm, vary or substitute the original decision will render a determination of judicial review proceedings unnecessary. On the other hand, the Land Court's consideration of human rights on the merits, and its evaluation of the original decision-maker's approach to human rights in judicial review, would both be of value if the matter is remitted to the original decision-maker for their reconsideration.

⁵³ *Human Rights Act 2019* (Qld) s 5(2)(a). See also *Attorney-General for the State of Queensland v Grant (No 2)* [2022] QSC 25

⁵⁴ *Human Rights Act 2019* (Qld) s 48.

⁵⁵ *Johnston v Commissioner of Police* [2024] QSC 2 [21]-[29]; [430]-[435].

Standing (Q19)

83. Standing to seek a review is critical to safeguarding effective participation in decision-making, which in turn can mean the difference between a decision that is compatible with human rights, and a decision that is not.
84. From a human rights perspective, any person who can establish their rights will be limited or interfered with by the grant of the mining lease and associated environmental authority should have the opportunity to formally engage in the decision-making process, and then have standing to seek review of the decision.
85. However, it is possible that an interested individual or group, through no fault of their own, are not given the opportunity, or sufficient opportunity, to formally engage in the process. This cohort should have standing to seek review, unless their exclusion can be justified.
86. Environmental groups and other civil society organisations are often active parties to Land Court objection hearings, having the ability to represent common interests, pool resources, and shoulder risk which may deter people from individually participating. There is no apparent reason why standing for environmental groups should be narrowed; the need for such groups to focus scant resources on meritorious and public interest matters addresses any concerns about 'lawfare' and increased litigation.

Costs in a merits review (Q21)

87. Like standing, costs is an access to justice issue: the potential risk of adverse costs orders can be a significant deterrent to exercising review rights, while the prospect of costs may increase access to no win no fee arrangements or litigation funding.⁵⁶
88. Other factors that may be relevant to developing appropriate costs rules are:
 - a. The respective financial positions of each of the parties. The respondent will always be a well-resourced government department, and one of the parties, the mining applicant. Generally, opposite the mining applicant will be less well-resourced individuals, non-profit environmental groups and other entities.
 - b. The approach of the department respondent to the proceedings. If similar to the statutory party's role in existing Land Court objections processes, the department will endeavour to assist the court to understand the assessment of the application and conditions imposed, assist the court to identify

⁵⁶ Consultation paper [242].

amendments or new conditions which may address a ground of review, and conduct itself in accordance with the Model Litigant Principles.⁵⁷

- c. The costs to the parties involved in a merits review and/or judicial review should be lower than what is currently incurred in Land Court mining objection review hearings, since the evidence has already been prepared and placed before the original decision-maker.
 - d. Whether the applicant's interest in the review is commercial, or for other reasons, which may or may not include commercial reasons.
89. Given the potential variability of these factors from case to case, it may be difficult to have a general rule as to costs. However, one model could be:
- a. In reviews by the applicants with only a commercial interest in the review (including the mining lease applicant), costs follow the event or each party bears their own costs.
 - b. In reviews by other individuals or entities, the 'asymmetrical' cost model suggested in the consultation paper may be appropriate, that is, if the applicant is successful, they may recover costs from the department respondent but if the department respondent is successful, each party bears its own costs.⁵⁸
 - c. Respondents other than the department bear their own costs irrespective of the outcome of the litigation, unless their conduct justifies a different order.
90. Another option could be to enable the court to limit or cap liability for costs against certain parties at the outset of proceedings, which may reassure some litigants who have concerns about their financial risk.
91. In the QHRC's view, the above considerations apply to costs in both merits review and judicial review proceedings.

⁵⁷ Land Court of Queensland, *Practice Direction 4 of 2018: Procedure for Mining Objection Hearings*, Amended 7 April 2020 [27].

⁵⁸ An asymmetric costs model has been adopted in the recently passed Australian Human Rights Commission Amendment (Costs Protection) Bill 2024 (Cth) cl 46PSA. The government produced a consultation paper leading to the reform: Attorney-General's Department, Australian Government, *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws* (Consultation paper, February 2023).