BRIEFING PAPER
This briefing paper was provided to the Commission and contains options for consideration prior to publication of a consultation paper.

Briefing note 2 – Participation

Notes to the Commission

This briefing note considers the current framework for participation in the process to decide contested applications for MLs and associated EAs.

In reviewing and making recommendations about the objections process, we are asked to have regard to 'providing opportunities for community participation' and the Government election commitment, which was delivered, to reinstate third party notification and objection rights for ML applications and associated EAs.

Key issues for consideration for the options identified are:

- If the current objections process is reframed as a contemporary participation process, what opportunities for participation there should be for:
  (a) ML applications
  (b) associated EA applications.

Terminology

- In this briefing note, we use the term 'participation' to refer to the ways people can be involved in the processes to decide contested ML applications and associated EAs (including the processes to decide applications for major amendments to an EA or progressive rehabilitation and closure plan), established under the MR Act and EP Act (the objections processes). This is distinct from broader, voluntary community engagement that the miner may engage in with the community over the mine life, other consultation required as part of the ML and EA process, and other consultation or participation that may be either voluntary or required under other legislative processes.
- In particular, this briefing note covers:
  - making a submission on an EA application (which may be made through an EIS process)
  - objecting to an EA
  - objecting to a ML application.
- Community members may also be able to participate in the decision-making process by seeking judicial review following the decision. This is covered in briefing note 6.

Overview of current law

- The primary mechanisms for participation in processes to decide applications for MLs and associated environmental authorities are the objections processes established by the MR Act and the submission and objection processes under the EP Act.
- Participation formally commences by the making of a written submission or objection.
- Objections trigger a referral of the application to the Land Court. Any person who has made an objection to the EA and/or ML can elect to be an 'active objector' and participate as a party to the mining objections hearing in the Land Court.

Making a submission on the EA application

- Any person can make a submission about an EA application (or, if there is an EIS for a project, they can make a submission on the EIS, with a properly made submission also taken to be a submission on the EA application). Submissions must be in writing and lodged on or before the last submission day in order to be considered 'properly made'. Making a submission on the EA application allows community members to provide input to the mining project assessment and any approval. Submissions must be considered by the Department of Environment, Science and Innovation ('Department') in deciding the application and granting any draft EA.[1]
- A 'properly made' submission creates the right to object should the EA be approved (while the Department may accept a written submission that is not properly made, only properly made submissions will give rise to objection rights).[2]
- It is open to the person making a submission to state the grounds of their submission and the facts and circumstances relied on in support of the grounds.[3] The EP Act does not provide any limitations or guidance as to grounds, although the statutory criteria for decisions may provide guidance.[4] For variation and site-specific applications, the statutory criteria includes the standard criteria, which includes for example the public interest (see briefing notes 4 and 5 for further discussion of statutory grounds).[5]
- Where an application that has undergone the EIS process requires re-notification, submissions may only be made about limited matters linked to the changes which triggered re-notification.[6]
- The ability to make a submission on an application generally only occurs only once, during the notification stage (or the EIS process).[7] This occurs prior to the development of any draft EA to allow for comments and issues raised in submissions to be considered in the assessment of the project and any preparation of a draft EA.[8]

Objecting to the EA application

- Following a decision by the Department to approve an EA application, which for large mines also includes the granting of a draft EA, submitters will be informed of the decision and advised of their rights to object to the application. A person who has made a 'properly made' submission on the EA

application may make an objection,[9] by making a request that their submission be taken as an objection.[10] Objections must be made by submitting a written notice of objection within 20 business days after notice is provided.[11]

- The EP Act requires that the grounds of objection are set out by the submitter at the time of submitting the objections notice.[12] This occurs after the making of the original submission, and after the granting of the application, at which time the submitter has been provided with reasons for the decision and a copy of the draft EA and any applicable PRCP schedule.[13] There are no express legislative requirements as to the grounds. There are also no clear limitations in the EP Act akin to s 268(3) MR Act, which prohibits the Land Court from considering any objection or evidence in relation to an objection that was not included in the original objection.

Objecting to the ML application

- Any person can make an objection to an ML application.[14] Objections must be made by submitting a formal written notice of objection during the objections period.[15] To be a 'properly made objection', it must be made on or before the last objection day and must be made in writing in the approved form and lodged with the chief executive.[16] The objection must state the grounds of the objection and the facts and circumstances relied on by the objector to support those grounds.[17]
- There are no statutory grounds for objections. However, the statutory criteria for decisions about MLs (see briefing note 5) may provide guidance for objections. The Land Court hearing is limited in scope to the grounds stated in the objection(s).[18] Changes and additions cannot be made at a later stage.[19]
- If an objection has been properly made, the Department must refer the ML application, all properly made objections, and all objections to the associated EA application to the Land Court.[20]

Land Court hearing

- Once the Land Court receives a referred application it must fix a date for a mining objections hearing.[21] Where objections have also been made to the associated EA application (which occurs in most cases), the Land Court will hear the objections together in a joint hearing, if practicable (see briefing note 4).[22] The Land Court hearing must proceed unless all properly made objections are withdrawn by the objector or struck out by the Court.[23] This hearing must occur even where no objectors elect to actively participate in the hearing process.[24]

Issues identified

The overarching issue with the current objections process is that making an objection to the ML application (or submission and objection for the EA application) automatically triggers a referral to the Land Court, and this is the primary way to participate.

Issue	Details for consideration	Stakeholder	Commissioner notes
Form of participation	**The process lacks collaborative and consultative participation mechanisms:** • The current participatory framework imposes an adversarial process on parties and frames participation as a contest, before the decision on the application is made. In many cases, participants want to have input into a proposed mining project but may not wish to become an active party to a court hearing or challenge the grant. • A range of stakeholders note that sometimes the issues raised are amenable to resolution but lack an alternative avenue to engage in decisions about the mining project, particularly in relation to how the environmental impacts of the project are managed. • Local Government have raised concerns objections process is the only way for them to participate. Given the impacts of mining projects on local communities, they need to have input into decisions (and are expected by the community to be involved). Local government have repeatedly called for an expanded role in decision-making processes. • Community stakeholders suggest that the current forms of participation in the assessment process are too limited and that Government should engage early with the community in relation to the location of proposed mines. Rather than placing the responsibility of raising issues on the community at the ML	Environmental organisations, Industry, Community, Local Government, First Nations	

Issue	Details for consideration	Stakeholder	Commissioner notes
	stage, community stakeholder suggests the government should be proactive in engaging in this discussion prior to deciding where mines can operate (eg baseline assessments prior to release of tenures). • A desire for early, collaboration, information sharing and engagement resonates strongly from First Nations stakeholders. Academic stakeholders also note the deficits of the current participatory model in terms of the requirements of Free, Prior and Informed Consent.		
	Costs and resources: • The costs of the current participation model are raised as an issue by a range of stakeholders. • Industry suggests there is an increasing amount of time being required to complete the objection process and the resultant project uncertainty and cost of delay (including lost opportunity costs) comes with such a timeframe. Industry raises issues that the common timeframes for completion of the objections process is at least 12 months, not including any timeframes associated with potential judicial review of the land court recommendation or the approval decision. • Industry states it is experiencing increasing costs associated with the objections hearing processes for ML and associated environmental authorities. They suggest that public interest litigation is increasingly occurring and is increasing complex and technical, leading to longer and more costly proceedings. It is suggested that the costs of litigation and lost opportunity costs through delays are act as a disincentive to mining. • Industry says the impact of costs associated with objections may be especially significant for smaller mining companies, who may choose to walk away from the application. As smaller	Industry, Government, Environmental organisations, Community	

Issue	Details for consideration	Stakeholder	Commissioner notes
	mining operations are predicted to increase with growth in critical minerals this is increasingly relevant. • The costs of participating in Land Court hearings was noted as a significant resourcing issue by the Department of Environment, Science and Innovation. • Community and environmental stakeholders also raise the time and costs of participation as a key issue with the current model.		
	Opportunity to elect to be involved is too limited: • Environmental stakeholders and legal professionals note concerns with the 'one off' nature of the current participatory model. • Stakeholders, including landholders and legal professionals, consider there is insufficient time for people to read and understand the information given with the notice (which may be lengthy and technical), understand the effects and what rights the person has, and respond to it. • Further, the information available about the mining operations and its impacts can evolve significantly over the time of the application. • Aa submission on an EA application can generally only be made once, during the notification stage (or the EIS process). This occurs prior to the development of any draft EA to allow for comments and issues raised in submissions to be considered in the preparation of the draft EA. • However, if there is a major amendment to an EIS that has been completed prior to the EA application, the EA must be notified. Submissions cannot be made on the entire application but must be limited to the changes which triggered re-notification. There is limited timeframe from the time the application is made (min 20 days) to either make an objection (for ML applications) or	Legal professionals, landholders, environmental organisations	

Issue	Details for consideration	Stakeholder	Commissioner notes
	submission (for EA applications). There is no further right to participate (for EA applications, only a person who has made a submission can object, and only objectors can become an active party in the Land Court hearing). • This means the decision to participate must be made shortly after the application is made, on the information available at that time. This decision may be one of many, particularly for First Nations communities, that they have to prioritise. • Stakeholders, including landholders and legal professionals, consider there is insufficient time for people to read and understand all the information given with the notice (some of which may be quite technical) and adequately assess and respond to it (by either making an objection to the ML application or a submission to the EA application).		
	The 'one size fits all' approach lacks the ability to tailor participation opportunities to the size and risk of proposed project • The objections process applies to all applications from very large mines and very small mines, from new mine application to expansion operations, from those who have completed a rigorous EIS process and those that have not. It also applies regardless of whether any objectors elect to be an active party in the proceedings, resulting in instances where the proponent is the only party actively presenting to the court. • Industry is concerned that this uniformed approach is unnecessarily adding delay, costs and re-litigation of issues in cases where it is not justified. • Industry suggests that certain applications (for example existing mines, critical minerals, metallurgical coal etc) should not be subject to the same processes as new applications.	Industry Cf: Community, landholders, legal professionals, environmental organisations	

Issue	Details for consideration	Stakeholder	Commissioner notes
	Rather an expedited process should apply for certain applications. • Community, landholders, legal professionals and environmental organisations consider that even smaller or lower-risk operations have an impact on the community and public participation is a fundamental right and essential for social licence. • The Mineral and Energy Resources (Common Provisions) Act 2014 sought to introduce reforms to remove public notification and participation rights for standard and variation EA applications. It was noted that these are smaller scale/lower risk projects and that they are already subject to public consultation when they are being developed. These reforms were criticised for removing public notification and participation rights for standard and variation EA applications and were repealed before they commenced. See also Appendix below.		
Scope of participation	**Standing to participate:** • Industry members argue that broad standing makes the court process open to misuse or abuse as it is being utilised to bring unsubstantiated objections by organisations not directly impacted by the mine but who oppose mining generally. • Some legal professionals have suggested that there should be some threshold or requirements around when the matter is referred to the Land Court for objections hearing. • Legal professionals and landholders have also said that objections may be made to 'preserve' or 'strengthen' claims under other processes (for example, landholder compensation). • Conversely, community members, landholders and environmental organisations view open standing for both the	Industry	

Issue	Details for consideration	Stakeholder	Commissioner notes
	ML and EA as a fundamental right and essential for natural justice and public confidence in the project. • Environmental organisations point out there is no evidence that broad standing rights are being abused, it does not appear there are any instances where a community objector to the Land Court has been found to be 'frivolous or vexatious', and a reduction in these rights would be detrimental to the decision-making process. • Commentary on standing suggests that open standing rules do not lead to abuse of the courts or 'lawfare'.		
	The breadth and uncertainty of the grounds for objection: • The grounds on which objections can be made on the ML are essentially unlimited and often unclear, especially in relation to climate change. The grounds for submissions on an EA or EIS are equally as open. • There is also no legislative clarity as to the status of Coordinator-General conditions for the purpose of objections. • Industry has expressed concern with the fact that objections can be made on any environmental ground, or for "any good reason" that the ML should not be granted, or due to the "public interest". • Industry is concerned that this encourages the development of the broadest possible objections grounds, which increases complexity, time and costs, and adds to the ability to misuse the process through 'lawfare'. • Industry suggests that the permissible grounds of objection should be clearly articulated. Suggestions have also been made that the grounds should be weighted with regard to the objectives of the legislation and have some nexus to the parties that are able to make an objection.	Industry	

Issue	Details for consideration	Stakeholder	Commissioner notes
	Duplication in the grounds for objection: • Consultation suggests that the broad grounds for objection on the ML and EA often lead to significant overlap. • There are also specific areas of duplication between the statutory criteria which inform the development of grounds of objection. For example, the EP Act requires consideration of a mining company's environmental record and the MR Act requires consideration of the applicant's past performance; both Acts require consideration of the public interest, although this is differently framed; the MR Act includes consideration of environmental grounds despite the EP Act dealing primarily with environmental impacts. • Industry stakeholders consider that the Land Court process essentially replicates the EIS process where that has been required, re-agitating the issues already considered and requiring a new set of experts. • Industry stakeholders assert the duplication should be removed and the ML criteria limited to resource considerations and that environmental considerations be removed. • Community stakeholders maintain that this duplication is necessary to ensure that both assessments turn their mind to critical elements of consideration, particularly the public interest. • For First Nations peoples and communities, this duplication occurs through objections and negotiations to the granting of the ML under the Native Title Act 1993 (Cth) and by engaging in the relevant state cultural heritage processes in relation to content that may similarly be reflected in the EA application process. This stretches the capacity for First Nations communities to participate in all relevant processes and requires individuals and communities to focus their time on	Industry, First Nations Cf: Community	

Issue	Details for consideration	Stakeholder	Commissioner notes
	processes that are siloed to the ML objections process in the Land Court. • The Mineral and Energy Resources (Common Provisions) Act 2014 sought to introduce reforms to limit objection rights for ML applications to directly impacted owners and local governments. As noted above, these reforms were repealed before they commenced. See also Appendix.		
Barriers to participation	**Costs:** • The costs associated with making submissions and participating in an objection hearing are too high for most impacted and concerned community members to participate. • Community members are often required to obtain expert advice, consultants, legal representation, take time off work and away from families etc to participate. These costs are cited as a disincentive to engage. • For First Nations peoples and communities participating in the native title and cultural heritage processes, there are some, but limited, avenues for costs recovery for engaging in the process. For example, where there is a 'prescribed body corporate' that represents the native title party, the prescribed body corporate may be able charge the ML applicant, for their time and costs in obtaining legal advice. For other matters, like cultural heritage, or where there is no prescribe body corporate, native title representative bodies will often do the legal work for the native title parties without funding as it is connected with their substantive retainer with the native title party (prosecuting the native title claim, which is funded). These costs avenues are not available under the ML objections process (save for a costs order made by the Land Court).	Community, First Nations	
	Formality:	Community	

Issue	Details for consideration	Stakeholder	Commissioner notes
	• Community stakeholders state that the formal requirements for making a submission (in writing, strict cut off periods etc) and participating in a Land Court process, can operate to exclude certain affected and interested parties from participating in the process and having their voices heard. There is a wealth of evidence that adversarial processes are highly exclusionary. • It is suggested that the use of informal and non-adversarial methods of participation (e.g. oral testimony, public meetings etc) be considered to increase the ability of all impacts and interested parties to provide input to the decision-making process.		
	Knowledge and education: • Community stakeholders suggest there is a lack of knowledge and understanding both on the procedural elements of the process, the rights of community members to participate, and the technical content of application material. • These knowledge gaps mean community members are not adequately informed undermining genuine and meaningful engagement. • Accessible information about processes and building understanding for First Nations and regional communities is essential for access to justice and rights to work. • Conversely, there can be a lack of knowledge on the miner's part about the proper and appropriate mechanisms for who can 'speak for Country' within a particular area. Native title is complex system that may not necessarily reflect the traditional rules for Country. A number of diverse Aboriginal groups may be arbitrarily placed together in a claim to satisfy the Native Title Act's requirements, but does not mean all combined communities have cultural authority over the entire claim area.	Community	

Issue	Details for consideration	Stakeholder	Commissioner notes
	Support: • Community stakeholders take issue with the lack of support for regional and self-represented parties. • The obligation of raising the public interest impacts (environmental and community impacts) related to a proposed mining project fall to individuals and community objectors rather than the state. • It can be challenging for community members to raise and substantiate these grounds with the limited time and resources available to them. For example, community members may be employed full-time and have limited resources to engage experts to provide evidence in support of their objection. • Community members may also be engaging in several approvals processes and have limited time and resources available to commit to all processes, requiring them to select those deemed most important. Support must be provided to regionally located and self-represented parties to participate in objections processes.	Community	
First Nations rights	**Lack of respect and recognition of First Nations rights:** • Consultation and research suggests that the opportunities for participation in the current process does not align with the requirements of free, prior and informed consent (FPIC). Noting that FPIC is increasing recognised as the model for best practice engagement and participation by First Nations communities in decision-making processes. • First Nation participation in decisions relating to mining projects will be considered in detail in the materials for the supplementary consultation paper.	First Nations	

Reform options

The overarching reform option is to reframe the objections process as a contemporary participation process that includes early and ongoing non-adversarial ways of participation in the processes to decide ML applications and associated EAs. Associated with this is the removal of the objections hearing by the Land Court before the decision is made on each application and the introduction of merits review post-decision (discussed in briefing note 4).

Elements of proposed model

- Opportunities for early participation/early engagement. Options for consideration include:
  - Providing an early public information session for large projects, during which the community can be provided information about the proposal and the assessment process. This could include where to find more information, how to be involved in the process, and who to contact to discuss the application further. See further briefing note 3.
  - Development of a co-designed consultation plan to ensure that the impacted community has the ability to provide input into the methods and timing of consultation throughout the assessment process.
- Reframing the objections process for ML and associated EA applications as a contemporary participatory process. This can include:
  - removing unnecessary duplication of statutory criteria between the ML application and EA application (discussed in briefing note 5).
  - tailoring opportunities and processes for participation for individual projects (a threshold test or risk-based model may be introduced to determine the appropriate pathway), with all projects open to some form of community participation
  - removing the Land Court objections hearing before the final decisions (and introducing merits review by a court post-decision, discussed in briefing note 4).
- Options to consider for the ML application include:
  - providing a public submission period for the ML application (like that which currently applies for an EA)
  - providing a forum for those with private interests in the land to have input.
- Options to consider for the EA application include (in addition to submissions):
  - holding public hearings/meetings/forums
  - establishing advisory panels
  - setting up a community reference group.

- Key issues for further consideration
  - To what extent can public interest considerations be removed from the ML, and therefore to what extent the participation methods for the ML can be limited (i.e. to private interest dispute resolution only).
  - The ability to incentivise early (pre-lodgement) community engagement
  - The form of expanded participation methods to allow increased community
  - The appropriate risk-based thresholds for requiring expanded participation in the EA process.

Appendix: Previous reforms to objections process

- Among other things, the Mineral and Energy Resources (Common Provisions) Act 2014 sought to introduce the following reforms to the objections processes:
  - ML applications−
    - removal of the general public notification requirements (however, directly affected landholders, local government and infrastructure providers were still directly notified)
    - limiting objection rights to directly impacted owners and local governments.
  - EA applications−
    - removal of the public notification and submissions process for standard and variation EA applications (retaining only for site-specific EA applications).
- The reforms were intended to 'streamline' and reduce duplication between the MR Act and the EP Act, differentiate between projects according to size and level of risk (instead of having the same requirements for all projects without taking into account the size and impact of the mining operation), reduce project delays, encourage investment and lower costs for industry.[25]
- However, the reforms were also criticised for reducing or removing community notification and participation rights and they were repealed before they commenced. As noted in our terms of reference, the Government is committed to implementing its election commitment, which was delivered, to reinstate third party notification and objection rights for ML applications and associated environmental authorities, and to ensuring that the community is able to participate in processes to decide applications for mining projects.

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1 Environmental Protection Act 1994 (Qld) s 176(2)(b)(ii) ; Environmental Protection Act 1994 (Qld) schedule 4, standard criteria definition (f)

2 Environmental Protection Act 1994 (Qld) ss 55(3), 54, 150, 161(3); Symbolic Resources Pty Ltd v Kingham [2020] QSC 193 [59].

3 Environmental Protection Act 1994 (Qld) s 161(1)(e)
4 Environmental Protection Act 1994 (Qld) s 176
5 Environmental Protection Act 1994 (Qld) Appendix 4.
6 Environmental Protection Act 1994 (Qld) s 161(5); For an EA— the environmental risks of the activity that have changed as a result of the proposed changes to the way the relevant activity is to be carried out; or the proposed changes to the way the relevant activity is to be carried out; For a proposed progressive rehabilitation and closure plan— the post-mining land use or non-use management area that has changed; or the change to the day by which rehabilitation of land to a stable condition will be achieved.
7 Environmental Protection Act 1994 (Qld) ss 54, 160; State Development and Public Works Organisation Act 1971 s 33.
8 Environmental Protection (Greentape Reduction) and Other Legislation Amendment Bill 2012 explanatory note p 5. Note that prior to this change commencing in 2012, notification and submissions where made on the draft EA.
9 Environmental Protection Act 1994 (Qld) s 160 and s 54.
10 Environmental Protection Act 1994 (Qld) s 182; https://environment.des.qld.gov.au/__data/assets/word_doc/0038/89975/rs-fm-objection-request-referral-land-court.docx.
11 Environmental Protection Act 1994 (Qld) s 182
12 Environmental Protection Act 1994 (Qld) s 182(3)(b)
13 Environmental Protection Act 1994 (Qld) s 181.
14 Mineral Resources Act 1989 (Qld) s 260. See also Acts Interpretation Act 1954 (Qld) s 36 sch 1 (definition of 'entity').
15 Mineral Resources Act 1989 (Qld) s 260
16 Mineral Resources Act 1989 (Qld) s 260(1). (Note: refers to an 'entity' – defined in the Acts Interpretation Act 1954 (Qld) s 36 sch 1 to include a person and an unincorporated body).
17 Mineral Resources Act 1989 (Qld) s 268(3)
18 *Cement Australia (Exploration) Pty Ltd & Anor v East End Mine Action Group Inc & Anor* (No 4) [2021] QLC 22 [35-36]; *Symbolic Resources Pty Ltd v Kingham & Ors* [2020] QSC 193, 21 July 2020.
19 Mineral Resources Act 1989 (Qld) s 268(3)
20 Mineral Resources Act 1989 (Qld) s 265
21 Mineral Resources Act 1989 (Qld) s 265 (7)
22 Mineral Resources Act 1989 (Qld) s 265 (9); Environmental Protection Act 1997 s 188(2)
23 Mineral Resources Act 1989 (Qld) s 265 (10)
24 Land Court practice directions.
25 Explanatory Notes, Mineral and Energy Resources (Common Provisions) Bill 2014 (Qld), pp 9−10. See also Parliamentary Agriculture, Resources and Environment Committee, Mineral and Energy Resources (Common Provisions) Bill, Report, September 2014, p 20.