QUEENSLAND LAW REFORM COMMISSION

FACT SHEET
This fact sheet was provided to the Commission to inform their decision-making

Lawfare

What is Lawfare?

1. There is continuing public debate about the use, particularly by environmental groups, of legal review mechanisms to delay or frustrate major resource projects. This concept is commonly described as 'lawfare', or 'green lawfare'.

2. Lawfare and the rules relating to standing to review mining lease decisions cannot be discussed separately. The two concepts are interconnected. The debate is rooted in the idea that broad, open standing models play a crucial role in enabling lawfare to exist.[1]

3. This note gives context to our proposals relating to standing.

Concern about Lawfare

4. In response to the consultation proposals described in our Consultation papers, industry identified lawfare as a major issue in Queensland's current mining lease approval process. The Queensland Resources Council (QRC) define lawfare as the strategic use of legal actions by project opponents to delay, disrupt or halt development efforts.[2]

5. Industry see Queensland's open standing model as inefficient and unfair because it encourages lawfare by third parties.[3] They are concerned the court process is being 'inappropriately exploited by organisations whose personal interests are not directly affected by the specific project or decision'.[4] Such misuse leads to abuse of the system, causing procedural delays and additional burdens for decision-makers.

6. To prevent the risk of lawfare, there was a consensus across industry bodies that standing for making objections and for judicial review should be restricted to those directly affected by a specific project.

The Evolution of Lawfare

7. The media use the term 'lawfare' to criticise public interest litigation, particularly at the federal level.[5] Lawfare at the federal level, and extended standing provisions for judicial review under s 487 of the *Environmental Protection and Biodiversity Conservation Act* (Cth) ('EPBC Act'), has been the focus of the debate. There is less public discourse about the existence of lawfare in Queensland's mining objections process, but it was a key issue raised by industry in submissions and in QRC's 2024 Streamlining Report.

The Federal Context

8. Following the decision to set aside approval of the Adani Carmichael Coal mine in 2015, the Commonwealth Government publicly criticised environmental advocates for engaging in lawfare.

9. Then Attorney-General, the Hon George Brandis, released a press statement on 18 August 2015:

> Section 487 of the EPBC Act provides a red carpet for radical activists who have a political, but not a legal interest, in a development to use aggressive litigation tactics

> to disrupt and sabotage important projects. … The activists themselves have declared that that is their objective – to use the courts not for the proper purpose of resolving a dispute between citizens, but for a collateral political purpose of bringing developments to a standstill, and sacrificing the jobs of tens of thousands of Australians in the process…

10. In response, the *EPBC Amendment (Standing) Bill* was introduced to repeal s 487. In the associated second reading speech, Minister Hunt indicated that the Bill normalised standing provisions under the EPBC Act by restricting standing to only those 'with a genuine and direct interest in a matter' to prevent 'US style topdown litigation' designed to 'disrupt' economic activity. [6] The Minister said that s 487 was a 'legal loophole' for 'green activists' with political agendas who intentionally seek to increase 'investor risk' to frustrate private mining projects.[7] The speech also claimed this was part of an orchestrated campaign by a range of activist groups, notably Greenpeace and EDO.[8]

11. The Bill was referred to the Senate Environment and Communications Legislation Committee, and stayed there until it lapsed in April 2016, when Parliament was prorogued.[9]

The Queensland Context

12. There has been less political discourse about the risk of lawfare within Queensland's mining objection process, despite its open standing model. QRC have, however, maintained their concern about lawfare in several submissions and publications in recent years.[10]

13. In 2014, industry voiced concerns that the process was being misused to vexatiously delay projects during the introduction of the *Mineral and Energy Resources (Common Provisions) Bill.* The Bill limited participation rights under the Mineral Resources Act 1989 and the Environmental Protection Act 1994.

14. The amendments sought to change the process to notifying 'affected persons', with no public notification or objection opportunities.[11] Only site-specific mining activities would be publicly notified and have the opportunity for objections.[12] An argument for doing so was that the existing process had 'increasingly been used to delay project, affecting investment in the sector'.

15. The QRC submitted that the objections process was being 'abused' [13] because it provided 'opportunities for vexatious and frivolous objections' to delay approvals and 'a forum for broad philosophical objections'.[14]

16. Landowners, legal professionals, environmental, farming and other interest groups disputed that claim. Member for Dalrymple and Committee member, Shane Knuth, described the Bill as 'biased toward the mining giants while further removing landowners' rights'.[15]

17. In submissions to our review, we received contrasting views about the existence of lawfare in Queensland. For example, QRC and Australian Energy Producers were very concerned about lawfare. In contrast, the Queensland Human Rights Commission noted:

> 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.

Evidence of Lawfare

18. While concerns about lawfare are raised as justification for a more restrictive approach to standing to object to and appeal decisions about tenure, there is limited evidence to support this position.

Federal

19. Very few decisions under the EPBC Act are judicially reviewed, in comparison to the number of referrals. For example, the Senate committee for the EPBC Standing Bill noted that from 2000 until 19 August 2015, 5364 projects had been referred to the Department. Of those, 817 projects had been approved by the Minister. There had been 37 applications (0.43%) for judicial review made by third parties under s 487 in relation to 23 separate projects. Commenting on this data, Justice Pepper of the Land and Environment Court of NSW said, 'this can hardly be characterised as a flood of litigation stymying development and impeding economic growth'.[16] This data is consistent with reports by Professor Samuel in 2020,[17] Macintosh, Roberts and Constable in 2017,[18] Dr McGrath in 2015[19] and 2016[20] and Dr Hawke AC in 2009.

20. Judicial reviews under the EPBC Act are not a part of a pattern to overwhelm the court or industry with constant litigation. Professor Samuel AC found that the number of third-party legal actions relating to development approval decisions has remained consistent each year over the life of the EPBC Act, varying from 0-8 judicial reviews and 0-4 injunctions annually. Professor Samuel AC concluded that the focus should not be on limiting the capacity of the public to seek legal review, but rather participation, transparency and communication. This effort will increase certainty and minimise drivers for legal challenge, particularly for vexatious litigants.

21. The Court has rarely considered the vexatious nature of judicial review applications by third parties under the EPBC Act. In their final report on major project development assessment processes, the Productivity Commission could not find any examples of summary dismissal [under the EPBC Act] for vexatious litigation.[21]

New South Wales

22. The results are similar in New South Wales where, despite its open standing model, less than 2% of development applications are challenged via judicial or merits review.[22]

23. In a 2017 paper, Justice Pepper cited the following:

> … in the financial year 2008–09 there were approximately 87 056 development applications. Of these, approximately 884 — that is, 1.02 per cent — were the subject of challenge (both merits and judicial review). In 2014–15 there were 61 108 development applications, of which there were approximately 872 applications for review — that is,1.43 per cent. Moreover, it may safely be assumed that the challenges did not enjoy a 100 per cent success rate.[23]

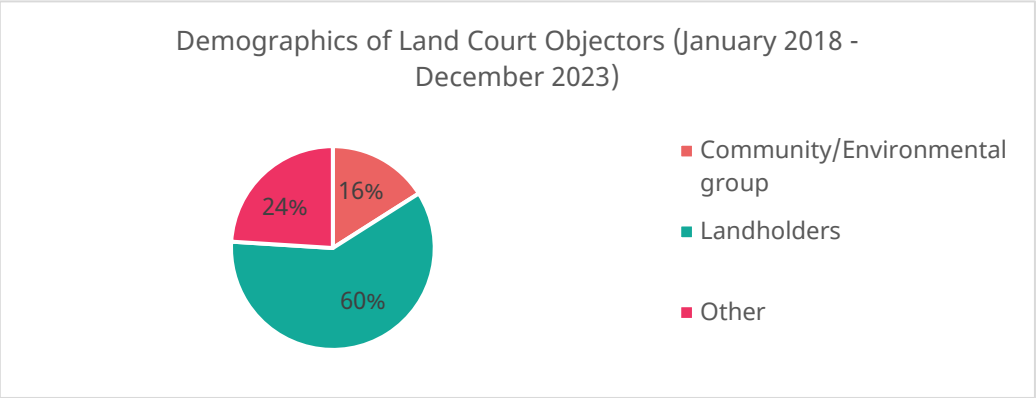
Queensland

24. Like in other jurisdictions, the number of mining lease applications that are challenged and ultimately end up before a Court in Queensland is negligible. For example, from July 2018 – June 2021, the Department issued 124 mining lease notices (in response to 124 mining lease applications). In that same period, only 29 applications (less than 25%) under the Mineral Resources Act were objected to and referred to the Land Court for consideration.[24]

25. Looking to the demographic of objectors from January 2018 to December 2023, community or environmental groups represented approximately 16% of objectors, while landholders accounted for around 60%.

26. This is consistent with prior findings in a 2013 discussion paper called Reducing Red Tape for Small Scale Alluvial Mining, where the Department stated:

> Approximately 70% of mining lease applications progress without objection. Of the objections received, the majority are made by the landholder and are generally regarding compensation.[25]



27. The Land Court has the power to strike out an objection if it finds it is frivolous or vexatious pursuant to s 267A(1)(b) of the Mineral Resources Act 1989. President Kingham defined the terms as follows:

> A frivolous objection is one which lacks reasonable grounds. A vexatious objection is one instituted without grounds for winning, purely to cause trouble or annoyance, in this case to the applicant.[26]

28. A search of the Supreme Court Library website shows that this provision has only been cited once, in *Hail Creek v Michelmore*,[27] where the Court found that one objection was frivolous but not vexatious.

29. Lawfare and vexatious or frivolous litigation was also raised as an issue in other QRC submissions, including to the *Mineral and Energy Resources (Common Provisions) Bill 2014* and to the Department on duplication and inefficiency in 2018. These submissions do not provide empirical evidence to support that claim, nor was such evidence provided at relevant public hearings.

30. Often, arguments about green lawfare relate to the cost of delaying approvals and investor risk.[28] However, it has been widely accepted in the literature that environmental public interest cases do not significantly hinder economic growth by delaying and stopping development.[29] While it is true that delay[30] causes risk to investors, a balance must be struck between the need to ensure public participation and the need to ensure that the decision-making is efficient and fair to all parties.

[1] QRC Streamlining Report 2024, 11.

[2] QRC Streamlining Report 2024, 11.

[3] QRC, Submission 37.

[4] QRC, Submission 37.

[5] For example, see Plibersek approves three NSW coal mine extensions; Climate in the courtroom: all sides are using 'green lawfare', and it's good for democracy; The week that put 'green lawfare' in the dock; Inside lawfare plot to block Santos's $5.8bn Barossa gas project; Greenies' destructive 'lawfare' must be stopped [opinion]; 'Made up': Judge slams green activists in Santos gas case

[6] Commonwealth, Parliamentary Debates, House of Representatives, 20 August 2015, 8989 (Greg Hunt, Minister for the Environment).

[7] More broadly, critics argue that extended standing provisions like s 487 have the potential to 'unleash a flood of litigation' (brandis) by 'busybodies' and 'intermeddlers'; *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 261 (Gaudron, Gummow and Kirby JJ).

[8] In 2011, Greenpeace, Coalswarm and the Graeme Wood Foundation published a report entitled 'Stopping the Australian Coal Export Boom' which encouraged running 'legitimate arguable cases' to disrupt and delay 'key projects'. This document was referred by the Attorney-General and in the Minister's speech to prove the existence of lawfare under s 487 EPBC Act. However, Reynolds, Ray and O'Connor analysed all public interest cases brought under the EPBC Act, and the strategies espoused in the document, and concluded there is no 'flood' of tactical litigation under the EPBC Act, nor is tactical lawfare occurring; Annika Reynolds, Andrew Ray and Shelby O'Connor, 'Green Lawfare: Does the Evidence Match the Allegations? – An Empirical Evaluation of Public Interest Litigation under the EPBC Act from 2009 to 2019' 37 *EPLJ* 497.

[9] Sophie Power and Juli Tomaras, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, No 37 of 2015-16, 3 November 2015.

[10] Often citing the Greenpeace Report as evidence. See, for example, Submission to the Department of Resources, Improving resource approval efficiency (8 October 2018); QRC Streamlining Report 2024.

[11] Agriculture, Resources and Environment Committee (Queensland Parliament) Report No. 46 Mineral and Energy Resources (Common Provisions) Bill 2014 13-4.

[12] Agriculture, Resources and Environment Committee (Queensland Parliament) Report No. 46 Mineral and Energy Resources (Common Provisions) Bill 2014 13.

[13] Agriculture, Resources and Environment Committee (Queensland Parliament) Report No. 46 Mineral and Energy Resources (Common Provisions) Bill 2014 14.

[14] Department of Natural Resources and Mines, 'Mining lease notification and objection initiative discussion paper - including regulatory assessment' (Discussion Paper, 2014) 37 <https://www.seng.org.au/sites/default/files/u931/1403_mining-lease-notification-and-objection-discussion-paper.pdf>.

[15] Agriculture, Resources and Environment Committee (Queensland Parliament) Report No. 46 Mineral and Energy Resources (Common Provisions) Bill 2014 371.

[16]The Hon Justice Rachel Pepper, 'Ms Onus and Mr Neal: Agitators in an Age of "Green Lawfare"' (2017) 90 *AIAL Forum* 52.

[17] Professor Graeme Samuel AC, *Independent Review of the EPBC Act* (Final Report, October 2020).

[18] Andrew Macintosh, Heather Roberts and Amy Constable, 'An Empirical Evaluation of Environmental Citizen Suits under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2017) 39 Sydney Law Review 85.

[19] Chris McGrath also observed that '[t]he number of judicial review challenges based on s 487 of the EPBC Act is very, very low in comparison to the number of referrals, which indicates that the widened standing has not resulted in a flood of litigation. Based on the figures presented in the Appendix, only 25 judicial review cases have been brought by third parties under the EPBC Act in the 15 years since it commenced. This means that only 0.46% of the 5399 referrals made under the Act (as at 27 August 2015) have been the subject to judicial review challenges and the average rate of such challenges is less than two per year.' See Chris McGrath, Submission 96 to Senate Standing Committee on Environment and Communications,

Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 11 September 2015, [3].

[20] Chris McGrath, 'Myth drives Australian Government attack on standing and environmental "lawfare"' (2016) 33 Environmental and Planning Law Journal 3.

[21] Productivity Commission, Major Development Assessment Processes (Research Report, 2023).

[22] Andrew Macintosh, Phillip Gibbons, Judith Jones, Amy Constable and Deb Wilkinson, 'Delays, stoppages and appeals: An empirical evaluation of the adverse impacts of environmental citizen suits in the New South Wales land and environment court' (2018) 69 *Environmental Impact Assessment Review,* 94-103.

[23] The Hon Justice Rachel Pepper, 'Ms Onus and Mr Neal: Agitators in an Age of "Green Lawfare"' (2017) 90 *AIAL Forum* 52.

[24] This data was supplied to the Commission by the Land Court of Queensland and the Department of Resources earlier in the review.

[25] Department of Natural Resources and Mines. Reducing Red Tape for Small Scale Alluvial Mining (Discussion Paper, 2013), 8.

[26] *Hail Creek Coal Holding Pty Ltd & Ors v Michelmore* [2020] QLC 16 [14].

[27] *Hail Creek Coal Holding Pty Ltd & Ors v Michelmore* [2020] QLC 16

[28] See, for example, MRC Report: Open Lawfare and IPA Section 487: How activists Use Red Tape To Stop Development And Jobs.

[29] Macintosh A, Gibbons P, Jones J, Constable A and Wilkinson D (2018) 'Delays, stoppages and appeals: An empirical evaluation of the adverse impacts of environmental citizen suits in the New South Wales land and environment court', Environmental Impact Assessment Review, Vol.69:94-103.

[30] Whether that be by virtue of an appeal by an environmental group or for some other reason.