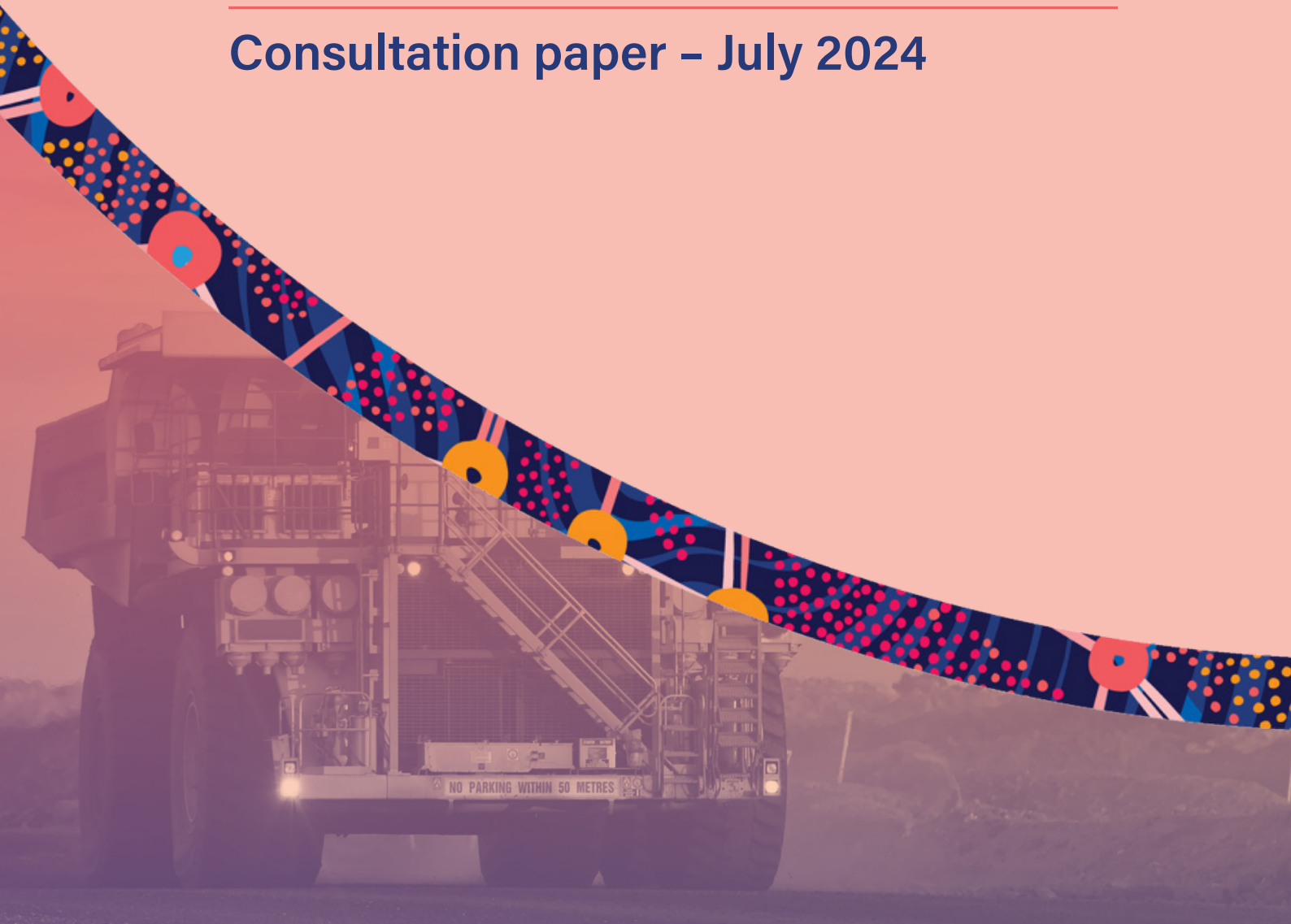
QUEENSLAND
LAW REFORM
COMMISSION

Valuing the perspectives of Aboriginal peoples and Torres Strait Islander peoples

Review of mining lease objections processes

Consultation paper – July 2024



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

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

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

QLRC, Reimagining decision-making processes for Queensland mining, Consultation paper 1, July 2024.

Legislation:

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

Contents

Introduction

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

We recognise the special importance for Aboriginal peoples and Torres Strait Islander peoples of culture and the distinct and diverse connections to land, water and natural resources. We also recognise that mining has unique impacts on Aboriginal peoples and Torres Strait Islander peoples.

We know that there are systemic and ongoing issues affecting participation by Aboriginal peoples and Torres Strait Islander peoples and that their voices are rarely heard in the current processes.

We are committed to understanding the perspectives of Aboriginal peoples and Torres Strait Islander peoples and their communities in developing recommendations for reform.

This consultation paper:

- considers strengths and problems with the current processes for Aboriginal peoples and Torres Strait Islander peoples
- discusses and seeks feedback on specific issues for Aboriginal peoples and Torres Strait Islander peoples and their communities
- invites feedback on our consultation proposals and questions.

You can share your views with us in any way, including by making submissions through our website or emailing or writing to us. Submissions close on **13 September 2024**.

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

Our review

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

2. We have also been asked to consider:
    - how any recommended process would interact with decisions made under other Queensland and Australian laws, including:
        - Native Title Act 1993 (Cth)
        - Aboriginal Cultural Heritage Act 2003 and Torres Strait Islander Cultural Heritage Act 2003 ('cultural heritage Acts')
    - the implications of other laws, including:
        - Human Rights Act 2019
        - Judicial Review Act 1991
    - whether any changes we recommend should apply to applications for resource production tenures under the Greenhouse Gas Storage Act 2009, the Geothermal Energy Act 2010 and the Petroleum and Gas (Production and Safety) Act 2004. This includes petroleum lease projects.

Making a submission

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

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

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

You can send us your submission through our website.

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

View our Submissions policy and our Right to information policy on our website[1]

Terminology

In this paper:

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

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

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

Our consultations

6. We are committed to engaging in consultations in a way that reflects the principles in our Aboriginal and Torres Strait Islander communities engagement commitment:[2]

- recognition and respect for human rights
- recognition and respect for knowledge and expertise
- earning trust through meaningful relationships
- culturally safe and trauma-informed
- community-driven and co-designed
- open and accessible.

7. We recognise the importance of Indigenous data sovereignty. In line with our engagement commitment, we will respect cultural protocols and individual preferences about how Aboriginal and Torres Strait Islander knowledge is used.

8. We have developed this consultation paper to foster engagement by Aboriginal peoples and Torres Strait Islander peoples in our review and to ensure we have identified all relevant issues and reform options. We are committed to hearing the perspectives of Aboriginal peoples and Torres Strait Islander peoples and their communities in developing recommendations for reform.

9. We have not started formal consultation with Aboriginal peoples and Torres Strait Islander peoples. However, we have looked for opportunities to meet with people and communities about our review. This informal consultation has given us information and been invaluable in helping us to understand key issues with the current processes and options for reform. We will commence a targeted consultation process soon to ensure we have a strong understanding of the range of perspectives of Aboriginal peoples and Torres Strait Islander peoples. We aim to meet with as many people and communities as we can. If you would like to meet with us and you are not sure whether a meeting is scheduled, please contact us by:

   - Telephone: (07) 3564 7777
   - Email: qlrc-miningobjections@justice.qld.gov.au

10. This paper is for all Aboriginal peoples and Torres Strait Islander peoples and their communities who are interested in our review, regardless of native title status. It is also for individuals and organisations who work with Aboriginal peoples and Torres Strait Islander peoples and other interested people and organisations. It has been developed with guidance from our Commissioners, Waanyi and Kalkadoon barrister Joshua Creamer and Wangkamahdla barrister Avelina Tarrago.

11. We have released a separate consultation paper that considers strengths and problems with the current processes and discusses proposals for reform. Both consultation papers contain the same proposals and questions.[3]

12. We have also developed a set of 4 summary papers with expert advice from cross-cultural linguist Dr Diana Eades. We have designed these papers for Aboriginal peoples and Torres Strait Islander peoples who speak English as an additional language. They give summary information and invite views on our reform proposals.[4]

Our next steps

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

14. In November 2024, we will publish a submissions paper, summarising the submissions received on our consultation papers. We will also publish a consultation paper about whether any changes we recommend should apply to resource production tenures under the Greenhouse Gas Storage Act 2009, the Geothermal Energy Act 2010 and the Petroleum and Gas (Production and Safety) Act 2004.

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

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

The current processes

17. To machine-mine, a miner must have a mining lease, granted by the Minister for Resources under the Mineral Resources Act 1989. The Minister cannot grant a mining lease unless the

miner has an environmental authority, granted by the chief executive of the Department of Environment, Science and Innovation under the Environmental Protection Act 1994.[5]

18. An environmental impact statement ('EIS') is the most rigorous form of environmental assessment in Queensland and gives the decision-maker detailed information about the potential environmental, social and economic affects of the project and ways to avoid, minimise, mitigate or offset them.

19. The environmental authority application for all large mines must also include a progressive rehabilitation and closure plan ('PRCP') schedule.[6] Resource activities authorised by a mining lease do not require a development approval under the Planning Act 2016.

20. Any person can participate in the current processes by:

- making an objection to a mining lease application
- making a submission on an associated environmental authority application, which could include a new or major amendment application (or on any EIS)
- making an objection to the draft environmental authority, the PRCP schedule or both (if they have made a submission).

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

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

23. A public entity must consider and act compatibly with the Human Rights Act 2019.[7] Both the Land Court when making its recommendation and the decision-makers for the applications are public entities bound by that Act.[8]

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

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

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

26. A range of other Queensland and Australian laws also apply to mining projects, establishing assessment processes that must occur before a mine can operate. For example, a miner may

need to comply with requirements for land access, native title, cultural heritage, State and federal environmental approvals, water, coordinated projects and regional planning interests.

27. Native title law establishes a process for formal recognition of individual and communal Aboriginal and Torres Strait Islander rights and interests in land and water. The 'future acts regime' in the Native Title Act 1993 (Cth) sets out requirements that must be met before a mining lease can be granted if its activities will affect native title rights and interests.[9] This regime is currently under review by the Australian Law Reform Commission.[10] The main ways to address affects on native title rights and interests by mining leases are Indigenous Land Use Agreements ('ILUAs') or other agreements made through the 'right to negotiate' process.[11]

28. While the right to negotiate process occurs at the federal level, there is the ability for Queensland to enact 'alternative state provisions', which can replace or modify the right to negotiate process.[12] Alterations must meet certain minimum criteria, be approved by the Commonwealth Attorney-General and not be rejected by Commonwealth Parliament.[13] Queensland previously enacted alternative state provisions to create a single integrated process for decision-making about mining under Queensland legislation.[14] The Commonwealth Parliament did not allow some aspects of the provisions,[15] and the Queensland Government abandoned the alternative process altogether.[16] While there is opportunity for an alternative process to exist in Queensland, none are currently in operation.

29. The cultural heritage Acts establish a 'cultural heritage duty of care'. This duty requires miners to take all reasonable and practical measures to ensure their activities do not harm Aboriginal and Torres Strait Islander cultural heritage, which includes a significant Aboriginal or Torres Strait Islander object or area in Queensland.[17] When a mining project requires an EIS as part of the environmental authority application, miners must develop a 'cultural heritage management plan' detailing how the project will manage the impact on cultural heritage.[18] Cultural heritage laws primarily rely on native title status to identify rights and interests. The cultural heritage Acts are currently under review.[19]

Engagement in current processes

30. We recognise the special importance for Aboriginal peoples and Torres Strait Islander peoples of culture and the distinct and diverse connections to land, water and natural resources. We also recognise that mining has unique impacts on Aboriginal peoples and Torres Strait Islander peoples. Yet we know that Aboriginal peoples and Torres Strait Islander peoples rarely participate in the current processes.

31. A plausible reason for this is that native title and cultural heritage laws and processes apply separately and additionally to environmental, resource, planning and water laws. This silos consideration of issues and creates an assumption that Aboriginal peoples' and Torres Strait Islander peoples' concerns about potential mining projects are adequately addressed through these separate processes. Communities have finite resources and engaging in these other processes can limit their ability to engage in the current processes. This is of particular concern with the growth of critical minerals mining, which has the potential to increase engagement demands on already overburdened communities.

32. We understand that Aboriginal peoples and Torres Strait Islander peoples have a range of interests in land and in proposed mining projects beyond those recognised through native title and cultural heritage rights and processes.

33. We also recognise that a complex and challenging relationship exists between Aboriginal peoples and Torres Strait Islander peoples and the Australian legal system that affects their engagement in legal processes.[20] The complexity of this relationship has its foundations in a

history of violence and dispossession, resulting in the 'dismantling of Indigenous Lore' and a significant distrust of the legal system and the Government.[21]

34. Accessing justice on equal terms for Aboriginal peoples and Torres Strait Islander peoples can be limited by a range of other factors, including:[22]

- language barriers for people who speak English as an additional language[23]
- cultural customs and practices, including authority to speak for certain subjects and what happens to information that is provided[24]
- costs of participating in legal processes, including time, legal fees, translation services and evidence[25]
- physical and technological access to appropriate services[26]
- the availability of legal information and education to understand rights and processes.[27]

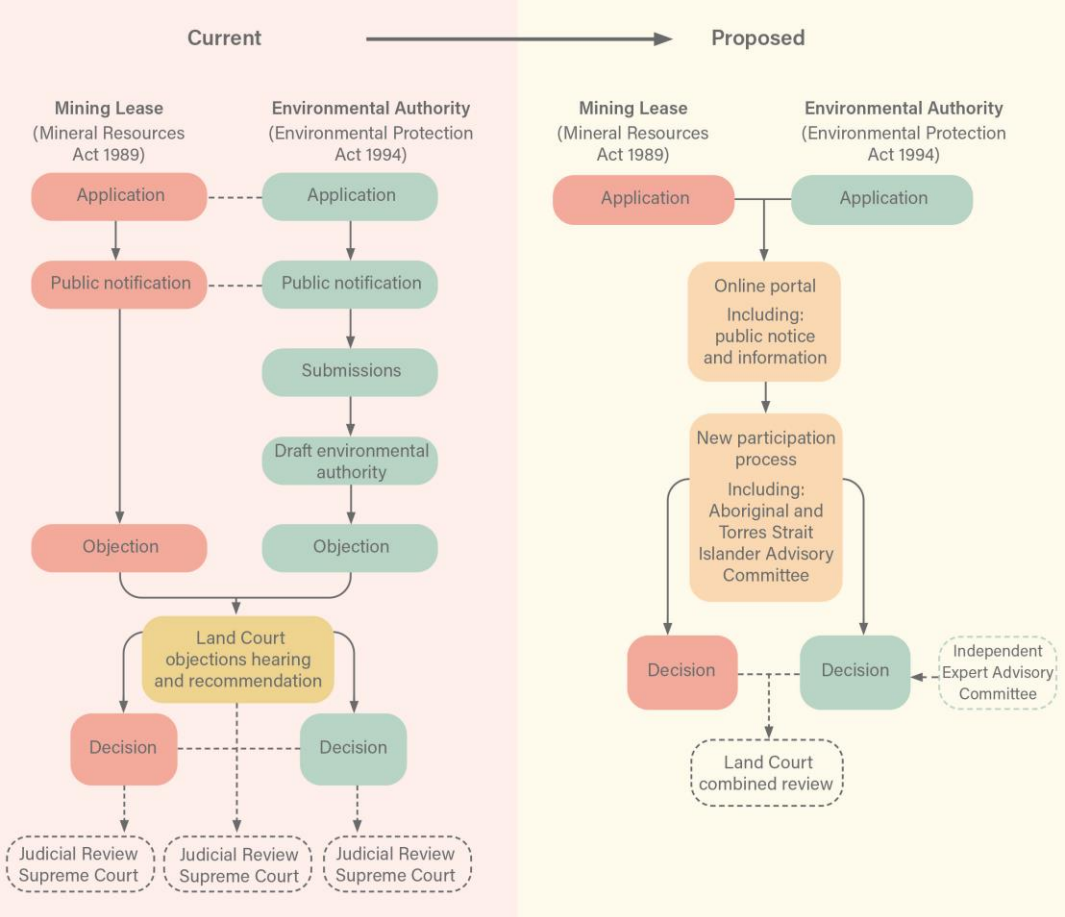
Overview of proposals and questions

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

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

37. Figure 1 shows the key changes we are proposing to the sequence of the processes.

Figure 1: Current and proposed processes



38. The proposals are intended to preserve the strengths of the current processes while addressing identified problems, through the lens of our guiding principles (of 'fair, efficient, effective and contemporary').[28]

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

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

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

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

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

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

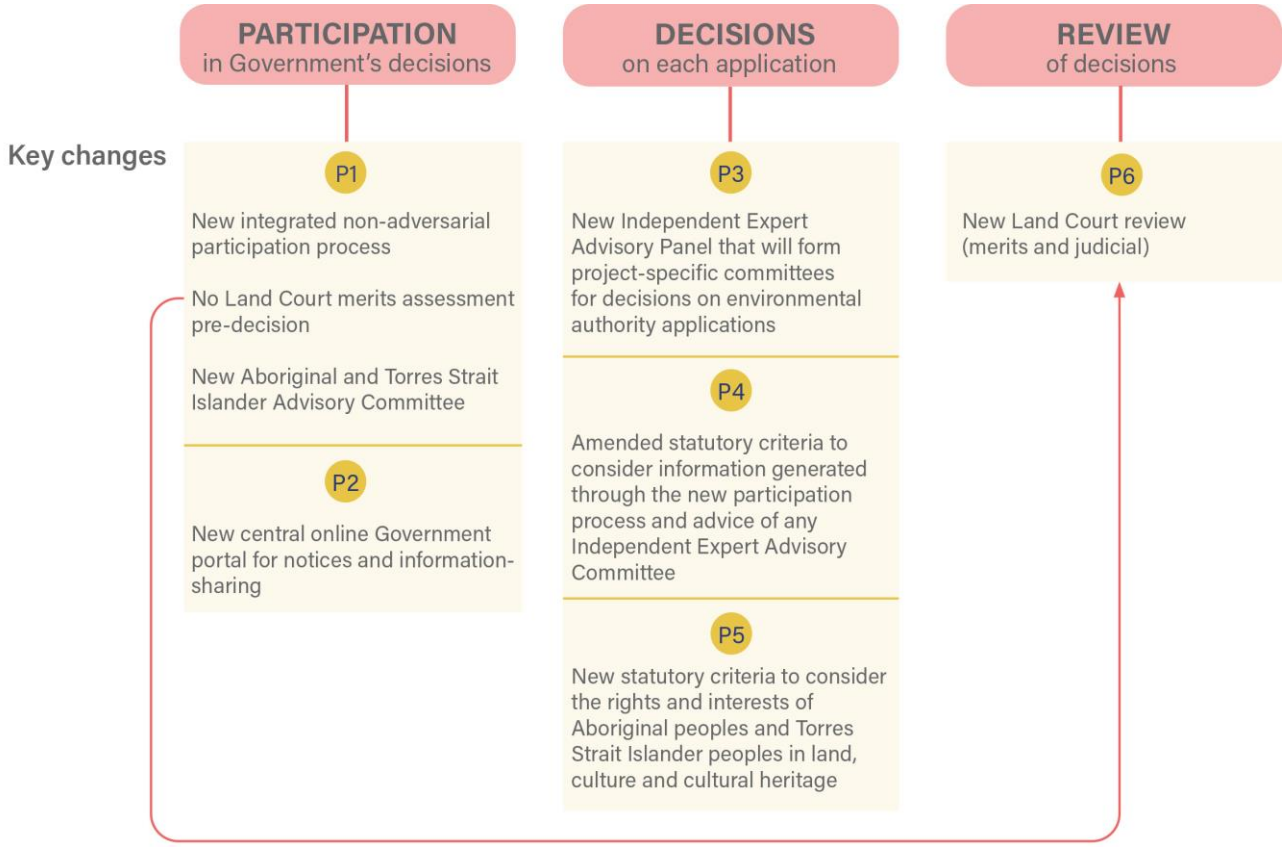
44. **We are proposing consequential amendments to the statutory criteria to require decision-makers to consider public input and expert advice (P4).** Decision-makers for both authorities would be required to consider information generated through the new participation process, to ensure it directly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

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

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

47. Figure 2 is an overview of our proposals for reform.

Figure 2: Overview of our consultation proposals



Consultation proposals and questions

48. Below is a list of all our consultation proposals and questions. You are welcome to respond to any or all proposals and questions.

Our guiding principles

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

The current processes

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

Participating in the Government's decision-making processes

P1 Participation in the current processes should be reframed by:

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

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

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

Q3 What are your views on proposal 1?

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

Q5 How would removing the objections hearing affect private interests?

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

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

(b) what should be the forms of participation?

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

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

(a) notice of applications

(b) notice of opportunities to participate

(c) outcomes of participation processes

(d) information requests

(e) decisions.

Q8 What are your views on proposal 2?

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

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

(a) mining leases?

(b) associated environmental authorities?

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

Deciding each application

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

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

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

Q12 What are your views on proposal 3?

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

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

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

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

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

Q14 What are your views on proposal 4?

Q15 What are your views on proposal 5?

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

(a) public interest?

(b) adverse environmental impacts?

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

(d) any other criteria?

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

Reviewing the Government's decisions

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

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

(b) conduct combined (merits and judicial) review

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

(d) apply existing practices and procedures.

Q18 What are your views on proposal 6?

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

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

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

Interactions with other laws

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

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

Other matters

Q24 Should there be a legislated pre-lodgement process?

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

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

Context

International context

49. International law recognises and protects the unique relationships Indigenous peoples have with Country and culture. It recognises the right to self-determination and its particular significance for Indigenous peoples and the importance of participation in processes that engage human rights.[29]

50. In 2009, Australia supported the United Nations Declaration on the Rights of Indigenous Persons ('UNDRIP'), which tailors existing human rights for Indigenous peoples.[30] UNDRIP identifies the right for Indigenous peoples to participate in decision-making about matters that would affect their rights.[31] Free, prior and informed consent ('FPIC') is recognised as a 'best practice' process for safeguarding the rights of Indigenous peoples, including rights to land, resources and self-determination.[32] UNDRIP requires governments to consult and cooperate with Indigenous peoples to obtain FPIC before making decisions that may affect them.[33]

51. For a process to meet FPIC requirements, the 'timing and method of consent, timeframes and sign-offs must be culturally appropriate and reflect decision-making processes that abide by the traditional law and custom of an Aboriginal group or Torres Strait Islander group'.[34]

52. There is increasing global recognition of the connection between environmental rights and human rights and the importance of these rights for those most likely to be affected by adverse environmental changes, including Indigenous peoples.[35]

53. The 1992 Rio Declaration on Environment and Development recognises the vital role of Indigenous peoples and communities in environmental management and development.[36] The Declaration recommends that governments support and enable effective participation in sustainable development.[37]

54. The 2022 resolution by the United Nations General Assembly on the human right to a clean, healthy and sustainable environment aims to address growing environmental injustices for people and communities in vulnerable situations, including Indigenous peoples.[38] It also recognises the importance of the right to participate in processes when collective rights are engaged and considered.[39]

55. Recently, the United Nations Human Rights Committee has given its views on effective participation for Indigenous peoples in processes that affect rights to Country. In particular, it has considered Australia's native title processes. The Committee considered that international law requires sufficient resources and timeframes to ensure Indigenous peoples can understand and be understood in legal proceedings.[40]

56. By ratifying international treaties, the Australian Government accepts legal obligations under international law. However, treaties only become a direct source of individual rights and obligations when they are legislated in Australian or Queensland law.[41]

Australian context

> [U]pon acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part, but native title to that land survived the Crown's acquisition of sovereignty and radical title. What survived were rights and interests in relation to land or waters.
>
> Gleeson CJ, Gummow and Hayne JJ in Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422 at [37].

57. The Australian Government has made a range of policy commitments about the rights of Aboriginal peoples and Torres Strait Islander peoples relevant to decisions about land and resources.[42]

58. The Australian Critical Minerals Strategy 2023-2030 recognises the value and importance of resource companies undertaking effective engagement and consultation with Aboriginal peoples and Torres Strait Islander peoples and their communities.[43] The Strategy describes respectful and effective engagement to include:[44]

- ensuring cultural capability
- building and maintaining trust and respect
- engaging early and often
- negotiating suitable timeframes
- building productive partnerships.

59. The National Agreement on Closing the Gap focusses on self-determination through shared decision-making, aiming to enable Governments to work in partnership with Aboriginal peoples and Torres Strait Islander peoples to deliver change.

60. The Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the 'Samuel review') recognised the importance of early and ongoing Aboriginal and Torres Strait Islander engagement and participation in decision-making processes about environmental matters. It also recommended 'National Environmental Standards' for decision-

making under the Environment Protection and Biodiversity Conservation Act 1999 (Cth), including a Standard for 'Indigenous engagement and participation in decision-making'.[45] The Government has committed to establishing these standards. They would require:[46]

- Aboriginal peoples' and Torres Strait Islander peoples' engagement and participation in projects of all size and scale and at all stages, including design
- the provision of adequate support and resources for Aboriginal peoples and Torres Strait Islander peoples to participate when legislation requires their engagement
- recognition of the right to self-determination in how Aboriginal peoples' and Torres Strait Islander peoples' knowledge is shared and used.

61. 'Dhawura Ngilan', a roadmap for 'best practice' cultural heritage management developed by the Heritage Chairs of Australia and New Zealand in 2020, endorsed having:

- a best practice standard for development approvals processes, which requires:
  - adequate information and time to consider proposals
  - early consultation for decisions that may affect Aboriginal or Torres Strait Islander cultural heritage, acknowledging that belated consultation can constrain opportunities for genuine participation and lead to frustration[47]
- a 'legitimate representative body' to exercise a community's cultural rights and responsibilities as a best practice model to attain UNDRIP standards.[48] Dhawura Ngilan suggests that this could be prescribed bodies corporate under the Native Title Act 1993 (Cth), due to the 'rigorous processes' of their appointment.[49] This approach has been criticised for not contemplating 'situations of conflict over Indigenous ownerships or shared Indigenous ownership of cultural heritage'.[50]

Queensland context

62. The Queensland Government has also made relevant commitments.

63. The Queensland Resources Industry Development Plan ('QRIDP') identifies strong and genuine partnerships with Aboriginal peoples and Torres Strait Islander peoples as a key focus area.[51] Specified outcomes include:

- that Aboriginal peoples and Torres Strait Islander peoples are true decision-making partners in resource projects taking place on Country, including realising economic benefits
- strong partnerships and meaningful engagement to recognise, protect and conserve Aboriginal peoples' and Torres Strait Islander peoples' cultural heritage.[52]

64. The Queensland Critical Minerals Strategy highlights the importance of genuine collaboration and partnership with Aboriginal peoples and Torres Strait Islander peoples and commits to protecting their cultural heritage.[53]

65. The Local Thriving Communities Action Plan 2022–2024 prioritises collaboration between the Queensland Government and Aboriginal and Torres Strait Islander communities to establish greater decision-making authority in service delivery and economic development, based on the principles of self-determination, collaboration, mutual respect and high-expectations relationships.[54]

66. The Statement of Commitment to reframe the relationship between Aboriginal peoples and Torres Strait Islander peoples and the Queensland Government sets out collaborative ways of working together, based on guiding principles of recognition, self-determination, respect,

locally led decision-making, shared commitment, responsibility and accountability, empowerment, FPIC and a strengths-based approach.[55]

67. The Path to Treaty is a shared journey between the Queensland Government, Aboriginal peoples and Torres Strait Islander peoples and non-Indigenous peoples to reframe the relationship.[56] In April 2024, the Truth-telling and Healing Inquiry and First Nations Treaty Institute Council were established under the Path to Treaty Act 2023.[57] The intent is that the Path to Treaty will result in the negotiation of a treaty or treaties. There may be significant implications for future participatory processes, including for decisions about mining proposals.

68. The Queensland Government has made commitments in the preambles, objects and purpose clauses of relevant laws, including:

- the Environmental Protection Act 1994 provides that, where possible, it is to be administered 'in consultation with, and having regard to the views and interests of' people and groups including Aboriginal peoples and Torres Strait Islander peoples[58]
- the Human Rights Act 2019 recognises the special importance of human rights for Aboriginal peoples and Torres Strait Islander peoples of Queensland as Australia's first people with their distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources, including the right to self-determination[59]
- the Path to Treaty Act 2023 identifies FPIC as an important aspect of treaty negotiations and treaty-making processes.[60]

Current practices

Native title is a separate process

69. Native title is the communal or individual rights and interests in land or water that are possessed under the traditional laws of Aboriginal peoples or Torres Strait Islander peoples.[61]

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

- by establishing an application process for the determination of native title
- through the 'future act regime', which sets out procedural requirements that must be complied with for certain land dealings.

71. When the Queensland Government grants a mining lease it will usually be a 'future act' under the Native Title Act 1993 (Cth).[62] This means that the Queensland Government must follow the processes in the Native Title Act 1993 (Cth) before the mining lease can be granted. This can be done in 3 ways:

- through an ILUA
- through a section 31 agreement. Queensland operates in a 'dual deed' system where the Government, the miner and the native title party can enter into a section 31 deed and the miner and native title party can enter into a private ancillary agreement, the terms of which remain confidential[63]
- pursuant to a determination of the National Native Title Tribunal, where agreement cannot be reached through the right to negotiate process.[64]

72. When there is an ILUA or a section 31 agreement, the mining lease will be subject to that agreement and any of its conditions.[65] When the National Native Title Tribunal makes a determination, it may impose conditions.[66]

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

74. If the National Native Title Tribunal makes a determination that the future act can proceed, the Department of Environment, Science and Innovation can amend the environmental authority or impose conditions on a PRCP to ensure compliance with the National Native Title Tribunal's conditions.[67]

75. Unless an objection is made under the Mineral Resources Act 1989, the Minister for Resources is not obliged to hear, or actively seek input, from the native title party about a mining lease application.[68] The native title determination process, and associated rights and procedures, can be time consuming and burdensome for those involved. A consequence of these associated rights and procedures is that Aboriginal peoples and Torres Strait Islander peoples lack the resources to participate in separate, siloed processes and prioritise participation in native title processes.

76. These siloed processes can include disputes about whether an act attracts the 'expedited procedure' or whether the parties have negotiated in 'good faith' to reach an agreement. These matters go to the National Native Title Tribunal or the Federal Court.[69] Outside of these procedural requirements to comply with the Native Title Act 1993 (Cth), there are very few interactions with the Mineral Resources Act 1989 and the Native Title Act 1993 (Cth).

There are limitations of the native title framework

77. While the Native Title Act 1993 (Cth) establishes mechanisms for formal recognition and protection, there are concerns with its application and limitations that may have implications for our review.

78. Fundamental difficulties with the native title process we have identified include the significant threshold native title applicants must overcome to have their native title recognised. Native title applicants must show that their traditional laws and customs have been acknowledged and observed without substantial interruption since sovereignty.[70] This significant threshold has at least 2 relevant consequences.

79. The first is that a native title determination application may be unsuccessful because there was a disruption in the required acknowledgement and observation of law and custom that existed pre-sovereignty.[71] Consequently, the particular claim group may be the right people to speak for Country, but face evidentiary difficulties in showing continued connection.[72] Similarly, native title applications may be withdrawn or amended to avoid the risk of a Federal Court determination that native title does not exist.

80. There may also be strategic decisions to leave out certain members or combine families for a greater chance of success. This can cause significant conflict and distress for those involved.[73] It can also influence the representation and ventilation of the interests of all affected Aboriginal peoples and Torres Strait Islander peoples.

81. While the Native Title Act 1993 (Cth) provides an avenue for native title parties to negotiate with mining companies about the proposed activities' affects on their rights and interests, it relies on effective and appropriate representation by an appointed negotiator.[74] Community members' interests are not always effectively represented as part of this process. This is compounded by the limited transparency of agreements between mining companies and native title parties due to the confidentiality of agreements.

Cultural heritage protections are limited

> When you try to push a square peg into a round hole, there are pieces that don't fit. Even if you knock off the edges, you are left with gaps that cannot be filled. The same thing happens when white law tried to address First Nations lore. There are pieces that don't fit and people like [the Aboriginal applicants] fall into the gaps.
>
> Member Stilgoe OAM in Davidson v Stockland Development [2022] QLC 19 at [1].

82. Aboriginal and Torres Strait Islander cultural heritage is protected by the cultural heritage Acts, which set out processes for the management and protection of cultural heritage by establishing a 'cultural heritage duty of care'. This duty applies regardless of native title status and requires all land users conducting activities to 'take all reasonable and practicable measures' to ensure cultural heritage is not harmed.

83. The cultural heritage Acts set out mechanisms to comply with this duty:

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

84. There are concerns with the effectiveness of these mechanisms. For example, concerns include that the duty of care guidelines can be relied upon by miners to avoid Aboriginal and Torres Strait Islander participation in land-use decisions.[75]

85. The cultural heritage Acts also establish an 'Aboriginal party' or 'Torres Strait Islander party' for the relevant area, who have a fundamental role under the Acts. This includes conducting surveys for an area to assess possible cultural heritage and being a party to a cultural heritage management plan. The primary determinant of party status is native title status.[76] While the cultural heritage Acts establish a process for conducting a survey, the requirement is limited to avoiding damage to cultural heritage. There are no requirements for how cultural heritage is identified and a lack of safeguards to ensure Traditional Owners engage in and authorise surveys.

86. The chief executive of the Department of Environment, Science and Innovation cannot allow an EIS to proceed beyond the initial stages if it considers it is unlikely the project could proceed without an 'unacceptable adverse impact on an area of cultural heritage significance'.[77] However, the consideration of cultural heritage is more limited than under the cultural heritage Acts and there is no formalised process to ensure consultation with the Traditional Owners to inform decision-making. Once the EIS proceeds, there is no express requirement under the Environmental Protection Act 1994 to consider cultural heritage for the environmental authority application to which the EIS relates.[78]

87. When an application for an environmental authority is approved, it may be made with several 'standard conditions'. These include a condition that the miner does not conduct activities 'within 100m of an identified historical, archaeological or ethnographical site'. It is possible that these broad site categories would include Aboriginal and Torres Strait Islander cultural heritage. However, this does not recognise Aboriginal and Torres Strait Islander cultural heritage as its own form of 'site' warranting protection. Further, identification of these sites requires assessment by the Traditional Owners, which is not required by the current processes and who may be reluctant to publicly share cultural knowledge and identify the location of cultural heritage.

88. The current approach to conditioning environmental authorities requires only the approval of a cultural heritage management plan (if one is required) and does not ensure compliance with its terms.[79] The Land Court, or any other body under the cultural heritage Acts, does not possess the jurisdiction to enforce compliance with cultural heritage management plans.[80] This compliance gap could be addressed by distinguishing between the requirement to have a cultural heritage management plan, as is currently regulated, and the requirement to comply with its conditions.

89. An example of how this could be achieved is by reference to the PRCP requirements under the Environmental Protection Act 1994. The Act requires certain environmental authority holders to also have a PRCP before conducting activities under a mining lease.[81] A PRCP is developed after community consultation and consists of 2 separate parts:

- the rehabilitation planning part, which contains general information about the site and rehabilitation techniques
- the binding PRCP schedule which contains specific criteria, conditions and time-based milestones to achieve the rehabilitation of land after mining. The PRCP schedule is approved and enforced by the Department of Environment, Science and Innovation. Failing to comply with a PRCP schedule is an offence.

90. The cultural heritage Acts have been under review since 2019.[82] In making our recommendations, we must be aware of the potential for substantial changes in the law.

91. Aboriginal and Torres Strait Islander cultural heritage may also be protected by the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), which aims to protect areas and objects of particular significance to Aboriginal peoples and Torres Strait Islander peoples by way of declaration, as well as evidence, of archaeological or historical significance, of Aboriginal or Torres Strait Islander occupation of an area of Queensland.[83] However, it is widely accepted that the Act does not provide effective protection and there can be difficulties in accessing it.

92. Any state law that is capable of concurrent operation with the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) will remain valid,[84] allowing dual operation. This is because the Commonwealth Minister cannot make a declaration until they have spoken with the relevant State Minister about whether there is a State law that offers effective protection to the cultural heritage.[85] This has led to the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) being described as 'legislation of last resort'.[86]

93. In 2021, the Department of Climate Change, Energy, the Environment and Water and the First Nations Heritage Protection Alliance entered a partnership to develop options for reform to the Commonwealth's cultural heritage legislation.[87] The outcomes of this are yet to be seen.

Recognition and protection of cultural rights under human rights law

94. Government decision-makers must consider and act compatibly with the Human Rights Act 2019.[88] The Act recognises that Aboriginal peoples and Torres Strait Islander peoples have a distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources under Aboriginal tradition and Ailan Kastom. It recognises that the right to self-determination is particularly significant for Aboriginal peoples and Torres Strait Islander peoples.[89]

95. Aboriginal and Torres Strait Islander knowledge is ordinarily a 'community property', held in common and in trust by the custodians all of whom have a shared responsibility for it.[90] It may be that a larger community group does not 'speak for' their entire Country. There may be smaller or other landholding or language groups that have the cultural authority to speak for

particular areas, despite native title and cultural heritage laws recognising them as all one Traditional Owner group.[91]

96. Section 28 of the Human Rights Act 2019 recognises and protects the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples, which include the right to enjoy, maintain, control, protect and develop identity and culture with other members of their community.[92] Unlike the Native Title Act 1993 (Cth) and the cultural heritage legislation, the protection and enforcement of these rights is not dependant on status and recognition by criteria set out in law, such as being a native title holder or claimant. Rather, the distinct cultural rights protected by the Act are possessed and enforceable by all Aboriginal peoples and Torres Strait Islander peoples within Queensland.

97. Section 28 codifies rights recognised in 2 international treaties: the International Covenant on Civil and Political Rights,[93] and UNDRIP,[94] which include the rights:[95]

- not to be subjected to forced assimilation or destruction of their culture
- to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas
- to conserve and protect the environment and the productive capacity of their lands, territories and waters
- to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.

98. A varied approach to the interpretation of section 28 is emerging from early case law.

99. In some cases, courts have taken a narrow approach to interpreting section 28 when there is an existing plan or process in place to consider and protect the rights or interests of Aboriginal peoples or Torres Strait Islander peoples (for example, a cultural heritage management plan). The existing processes are found to satisfy the requirement to consider cultural rights, and the existence of the commitment to meet the need to address cultural rights, with the result that there is found to be no, or no unjustifiable, infringement of section 28.[96]

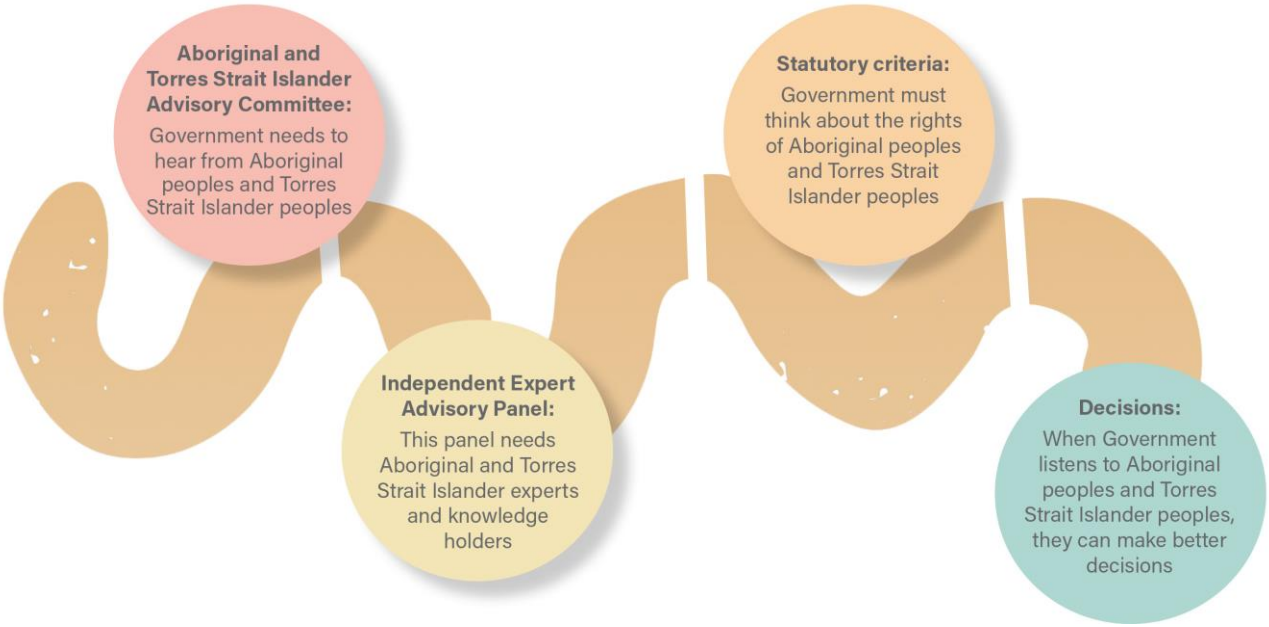
100. In other cases, courts have taken a more expansive approach, focussing on giving effect to the purpose of the right to protect the survival and continual development of culture. In Waratah (No 6), the Land Court considered the unique and disproportionate impacts that would likely result from climate change resulting from greenhouse gas emissions of the proposed mining activity on the cultural rights of Aboriginal peoples and Torres Strait Islander peoples.[97] In balancing the right and its proposed limitation, the Court found the balance in favour of preserving the right, having regard to the significance of the risk to the survival of Torres Strait Islander culture posed by rising sea levels associated with climate change.

101. The Act has also been used to support the adaptation of the Land Court's practices and procedures to increase their cultural safety and appropriateness. In Waratah (No 5), the Court made directions adopting a 'First Nations Protocol' for taking on-Country evidence 'in the presence of the people who have the collective authority to speak about matters of place and culture', based on the cultural rights in the Human Rights Act 2019.[98]

Specific issues for consultation

102. In our other consultation paper, we discuss the consultation proposals in detail, including different options and implementation considerations. In this consultation paper, we focus on specific aspects of our proposals that we think have particular significance for Aboriginal peoples and Torres Strait Islander peoples: see Figure 3.

Figure 3: Specific aspects of consultation proposals and their intended impact on decisions



Participation by Aboriginal peoples and Torres Strait Islander peoples

103. We aim to recommend a process that gives appropriate opportunities for early, ongoing and meaningful participation by people who may be affected by decisions about mining proposals, including Aboriginal peoples and Torres Strait Islander peoples and their communities.

Aboriginal and Torres Strait Islander Advisory Committee

Aboriginal and Torres Strait Islander Advisory Committee

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

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

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

106. Another example is South Australia's State Aboriginal Cultural Heritage Committee, comprised of Aboriginal South Australians appointed by the Minister. The Minister must endeavour to consult with the Committee, as well as any Traditional Owners or other Aboriginal people the

Minister thinks have a particular interest in the matter. The Committee's role under the legislation is to 'represent the interests of Aboriginal people' throughout South Australia.

107. This model can be adapted to the project level. For example, in British Columbia's environmental assessment process, Indigenous nations can be appointed to assess the potential effects of the project which then must be considered by the decision-maker.[99]

108. Advisory committees can help ensure the rights and interests of Aboriginal peoples and Torres Strait Islander peoples and their communities are respected and there is active involvement in decision-making processes for mining on traditional lands. A voluntary extension of the role is for community groups to co-manage or co-own the project, a model aligned with the right to self-determination.[100]

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

- how to ensure the most appropriate people are appointed from the relevant community – those who hold the cultural authority and knowledge for the relevant area, can speak for Country and represent their families and community groups on relevant issues
- gender diversity, to allow for the culturally appropriate sharing of information related to men's and women's business
- appropriate remuneration and recognition for committee members
- the importance of maintaining data sovereignty in the collection, handling, storage and use of Aboriginal peoples' and Torres Strait Islander peoples' information.[101]

110. As discussed above, Aboriginal and Torres Strait Islander knowledge is ordinarily 'community property', held in common and in trust by the custodians all of who have a shared responsibility for it.[102] It may be that a larger community group does not 'speak for' their entire Country, rather, there may be smaller landholding or language groups that have the cultural authority to speak for particular areas, despite native title and cultural heritage laws recognising them as all one Traditional Owner group.[103]

111. There are 7 questions about this issue.

112. **Questions 3 to 6** are about reframing the participation process and introducing new forms of participation, including an Aboriginal and Torres Strait Islander Advisory Committee.

113. **Question 7** is about ensuring the new participation process is accessible and responsive to the diverse needs of communities. We welcome your views.

The role of local government

114. We recognise the challenges in the current processes of ensuring that the views of Aboriginal peoples and Torres Strait Islander peoples and their communities are heard and considered, including about potential social and economic consequences. While a mine may bring benefits for local communities, these benefits do not necessarily reflect community preferences.

115. Local governments can play a significant role in identifying and representing the interests of the local community, including Aboriginal and Torres Strait Islander interests. However, the ability for the local government to voice these concerns are limited in the current processes because there is no formal mechanism for local government to give advice or be involved in the decision-making process, unless they make an objection. Being an objector is an unusual position for a Government entity, especially when they are the decision-maker for approvals for the mine (such as planning approvals).

116. While there is a lack of formal participation mechanisms as part of the current processes, there are some avenues where local government may be involved or consulted in mining proposals.

If a social impact assessment is required as part of an EIS, the miner must consult with the relevant local government.[104] If a mining proposal is for a priority living area, the local government may also become the assessing agency and must make a recommendation to the decision-maker under the Regional Planning Interests Act 2014. The local government can recommend conditions for the approval or a refusal of the application.[105]

117. Aboriginal and Torres Strait Islander councils may also have obligations as trustee under the Aboriginal Land Act 1991 or the Torres Strait Islander Land Act 1991 that add an additional layer to land and resource decision-making processes.

Ensuring the right people are notified

118. We are proposing to introduce a new online portal to give notice and information about mining proposals. We understand that lack of participation by Aboriginal peoples and Torres Strait Islander peoples in the current process can be because they are not made aware of mining proposals within the timeframe that allows them to give input.

119. Access to relevant, up-to-date information supports effective participation, increases transparency and efficiency, improves decision-making and instils greater community trust and confidence in decisions and improves efficiencies and helps policy and industry development. However, we know that not everyone has access to the internet and that other forms of notice may be needed.

120. We are interested in considering what forms of additional notice may be required, as well as who should be given direct notice of applications.

121. Options we have identified that may be helpful for Aboriginal peoples and Torres Strait Islander peoples and their communities include:

- requiring notice in a relevant special interest publication, directed mainly, or exclusively, to an audience of Aboriginal peoples or Torres Strait Islander peoples, such as the Koori Mail[106]
- giving notice to the native title representative body for the area, to facilitate contact with Traditional Owners.[107]

122. There are 4 questions about this issue.

123. **Questions 8 to 11** are about giving notice and sharing information, including by establishing an online portal, and understanding what may help to make Aboriginal peoples and Torres Strait Islander peoples and their communities aware of mining proposals. We welcome your views.

Valuing Aboriginal and Torres Strait Islander expertise

124. The process should reflect the key elements of a good decision-making process. This requires that it is transparent and accountable, meets the requirements of procedural fairness, involves proper consideration of human rights and has a convincing evidence base.

125. We are proposing to establish an Independent Expert Advisory Panel comprised of experts appointed by the Government with recognised expertise in matters relevant to the assessment of environmental authority applications. The panel could include experts in cultural heritage and Aboriginal and Torres Strait Islander rights and interests.

126. The panel would form a project-specific committee for environmental authority applications that meet specified criteria ('Independent Expert Advisory Committee'). The committee would give expert advice to inform decisions. The advice would be distinct from, and additional to, any information and advice given by the Aboriginal and Torres Strait Islander Advisory

Committee. The Independent Expert Advisory Committee would need to consider processes for ensuring data sovereignty in the collection and use of information and advice by the committee. The Samuel review recognised the importance of valuing Indigenous environmental, economic and social knowledge and of ensuring decision-makers have access to this information to inform decision-making.[108]

127. Criteria could be set to establish the expertise for an area. Examples of this approach are reflected in both the Land Court Act 2000 and the Federal Court Act 1976 (Cth) in establishing 'assessors' roles to assist the court in certain proceedings related to Aboriginal and Torres Strait Islander interests. For example, the Land Court Act 2000 establishes the role of an 'Indigenous assessor', whose role is to advise the Land Court of matters within the assessor's knowledge and experience related to the proceeding.[109] To be eligible to be an assessor with the Land Court, the person must have:[110]

- at least 5 years' experience in a range of public and professional services or in research and publication in areas of law, history, anthropology or Indigenous issues and
- a high level of knowledge or experience in 2 or more areas, such as cross-cultural, cultural heritage or Indigenous matters.

128. Similarly, the Federal Court of Australia Act 1976 (Cth) establishes the role of an assessor to assist the Federal Court in exercising its jurisdiction under the Native Title Act 1993 (Cth).[111] To qualify as an assessor with the Federal Court, the person must have special knowledge in:[112]

- Aboriginal and Torres Strait Islander societies
- land management
- dispute resolution or
- any other matter considered to have substantial relevance to an assessor's duties.

129. When practicable, the Federal Court assessor should identify as an Aboriginal person or Torres Strait Islander person.[113]

130. Adopting a similar approach, the Aboriginal or Torres Strait Islander expert panel member could possess the necessary experience and demonstrated skill in assessing relevant information given by the Aboriginal and Torres Strait Islander Advisory Committee, identifying information gaps, and providing advice to inform decision-making. If possible, the panel member could identify as an Aboriginal or Torres Strait Islander person.

131. There are 2 questions about this issue.

132. **Questions 12 and 13** are about the proposal to establish an Independent Expert Advisory Panel, which could include expertise on Aboriginal and Torres Strait Islander rights and interests. We welcome your views.

Aboriginal and Torres Strait Islander input into decisions

133. Decision-makers should consider relevant information and expertise, including information from Aboriginal peoples and Torres Strait Islander peoples and their communities about relevant Country, in making decisions about mining proposals.

134. We are proposing consequential amendments to the statutory criteria:

- for decisions about mining lease and environmental authority applications – to require decision-makers to consider information generated through the new participation process, including information from individuals, community groups, local governments and other relevant entities and information from the Aboriginal and Torres Strait Islander Advisory Committee.

- for decisions about environmental authority applications – to require the decision-maker to consider any advice of the Independent Expert Advisory Committee, including advice from experts in Aboriginal and Torres Strait Islander rights and interests.

135. **Question 14** is about the proposal to require decision-makers to consider information given by the committee, as well as information generated by the new participation process. We welcome your views, including about how information from Aboriginal peoples and Torres Strait Islander peoples and their communities may be given and used.

Consideration of Aboriginal and Torres Strait Islander rights and interests

136. The rights and interests of Aboriginal peoples and Torres Strait Islander peoples and their communities should be a relevant consideration for decisions about mining leases and associated environmental authorities that may affect them or their Country.

137. We are proposing to expand the statutory criteria in the Mineral Resources Act 1989 and the Environmental Protection Act 1994 to require decision-makers to consider Aboriginal and Torres Strait Islander rights and interests as part of the decision-making process for the mining proposal.

138. While certain native title and cultural heritage requirements must be met before a mining lease and associated environmental are approved, this happens through separate processes.[114] The Queensland Government is not required to consider Aboriginal peoples and Torres Strait Islander peoples and their communities' rights and interests when deciding mining lease and environmental authority applications.

139. The separation of the processes and a narrow reading of the statutory criteria can lead decision-makers for the mining proposal to rely on those separate processes as constituting sufficient consideration of Aboriginal and Torres Strait Islander interests. In Pickering v Pedersen, the Land Court held that separate processes, such as cultural heritage, 'provide a level of protection of rights and interests' of Aboriginal peoples and Torres Strait Islander peoples and that consequently no further consideration was required. [115] A similar approach has been taken in other decisions.[116] This also has the effect of excluding consideration of the best evidence about rights and interests in an area as part of mining lease decision-making.

140. Further, a cultural heritage management plan may be 'approved' but may not necessarily reflect the Aboriginal or Torres Strait Islander party's intentions and agreement. This is because the cultural heritage Acts allow for the approval of a cultural heritage management plan without an Aboriginal or Torres Strait party if an irresolvable dispute arises between the parties.[117]

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

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

142. The cultural heritage Acts protect 'significant' Aboriginal and Torres Strait Islander areas and objects, as well as 'evidence, of archaeological or historical significance, of [Aboriginal/Torres Strait Islander] occupation of an area of Queensland'.[118] What is missing is certainty about what is meant by 'significance'. The South Australia cultural heritage legislation requires that, when determining the significance of cultural heritage, the Minister must accept the views of the relevant Traditional Owners for the area.[119] There is no similar requirement in Queensland.

143. The current approach to defining cultural heritage does not include intangible, or living, cultural heritage. Intangible cultural heritage is knowledge or expression of Aboriginal and Torres Strait Islander traditions, customs and beliefs. It recognises that places where a community's ancestors and creators once lived continue to be living and should be protected.[120] Intangible cultural heritage is protected in some other Australian jurisdictions.[121] It has been the subject of consideration as part of cultural heritage reforms in Queensland and Australia.[122]

144. Linking cultural heritage rights to native title status can be problematic and may perpetuate the difficulties and divisions associated with native title status. While many have been successful in obtaining a positive determination of native title, we understand the native title determination process has challenges for Aboriginal peoples and Torres Strait Islander peoples and their communities, and some people cannot meet the Act's high evidentiary burden. Native title claims may also combine otherwise unconnected families into a single claim to overcome this issue.

145. We cannot make recommendations to change the Native Title Act 1993 (Cth), but we can consider ways to ensure the rights and interests of Aboriginal peoples and Torres Strait Islander peoples and their communities are appropriately recognised and protected in the process under review.

146. Aboriginal peoples' and Torres Strait Islander peoples' rights and interests in water have been formalised by the Water Act 2000, which authorises the taking of, or interference with, water that would otherwise be prohibited if it is done for traditional activities or cultural purposes.[123] While traditional or cultural rights may not be directly inhibited by the grant of water to miners, they may be practically impeded by access issues associated with the mining lease or flow-on effects to water caused by miners taking or interfering with water.

147. In the mining context, there are 2 types of water:

- 'Associated water' is underground water which is unavoidably taken or interfered with due to mining activities. A miner can take or interfere with associated water when they obtain a mining lease, subject to some obligations.
- 'Non-associated water' is any water (surface or groundwater) that is not associated water. A miner needs a water authorisation to take or interfere with water that is not associated water. There are a range of authorisations and which one is suitable will depend upon the specific water resource and location. The most common are water allocations and water licences.

148. The process for obtaining these authorisations is prescribed by the Water Act 2000. However, water plans developed for the relevant area may change how the water authorisations are granted. Some water plan areas allow for unallocated water to be held as an Indigenous reserve. These water resources may be held by Aboriginal peoples and Torres Strait Islander peoples. They can be sold to other water users, including miners. The purpose of Indigenous reserves is to provide economic and social benefits to Aboriginal peoples and Torres Strait Islander peoples. In the unique water plan area of the Cape York Peninsula Heritage Area, a similar scheme operates.

149. There are 3 questions about this issue.

150. **Question 15** is about the proposal to require decision-makers to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage. We welcome your views, including about what may be required to achieve this and how the rights and interests of relevant people and communities may be identified, heard and considered.

151. **Questions 16 and 17** are about other reforms that may be made to the statutory criteria, including reforms to address overlapping criteria for mining leases and environmental authorities. We welcome your views.

Accessible review of decisions

152. We are interested in exploring ways to ensure that the process provides a means for members of the public to access justice, including Aboriginal peoples and Torres Strait Islander peoples and their communities. We are committed to ensuring that review of decisions is available to improve Government decision-making and to foster trust and confidence in decisions about mining projects.

153. We are proposing to introduce merits review by the Land Court after the Government has decided both the mining lease and associated environmental authority applications. Merits review is a comprehensive review of a Government decision, involving a reconsideration of the facts, law and policy of the original decision to determine the 'correct and preferable' decision.

154. Our proposal is to combine merits review with judicial review, which considers whether Government decisions are made according to law. Land Court reviews would be conducted on the evidence that was before the decision-makers and existing Land Court practices and procedures would apply. Decisions of the Land Court would be appealable directly to the Court of Appeal.

155. Our aim is to maintain the consideration of the merits of applications in an accessible forum with a fair and effective process and specialist expertise.

156. We know that some Aboriginal peoples and Torres Strait Islander peoples and their communities have been prevented from participating in certain processes for lands and waters with which they have a connection based on their native title status. We recognise that the Native Title Act 1993 (Cth) does not determine all Aboriginal peoples' and Torres Strait Islander peoples' interests in land.

157. We also know there are barriers to participation in legal processes. One barrier is that in the Land Court, the ordinary rule is that each party pays their own costs.[124] This is in addition to other costs incurred in a court hearing, including the cost of obtaining technical reports, expert evidence and legal advice and representation.

158. Other barriers include:

- human resourcing, including the time required to participate in the processes
- personal, including the burden on individuals and communities. This is particularly noted as a challenge in communities with legacy issues associated with mining, other related processes requiring energy and attention, or experiences of intersectional disadvantage
- lost opportunity, when the actual, potential or perceived requirements of the current processes may be a disincentive to investment or support for a proposed project. This was noted as a particular challenge in the context of the anticipated growth and increasing diversity of the Queensland resources industry associated with the energy transition.

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

basis. Whether a party may be able to recover costs could affect their ability to secure legal representation.

160. The appropriate approach to the award of costs in litigation with public interest and human rights considerations has been the subject of recent focus.[125] Potential models include:

- Costs follow the event: this is the model used in Queensland for most civil litigation.[126] It requires the unsuccessful party to pay the costs of the successful party at the conclusion of litigation.
- 'Soft' costs neutrality: requires each party to bear their own costs, irrespective of the outcome of the litigation, although the court has a discretion to order otherwise.
- 'Hard' costs neutrality: requires each party to bear their own costs, irrespective of the outcome of the litigation. The court can only make a different order if there has been conduct on behalf of a party considered to warrant it.
- 'Asymmetrical' costs model: a blended model. If the applicant is successful, they may recover costs from the respondent. If the respondent is successful, each party bears their own costs.

161. We recognise the importance of considering circumstances that uniquely affect Aboriginal peoples and Torres Strait Islander peoples, including the relevance of cultural obligations for decisions about land, water and resources, as well as considerations of equity and access to justice. This includes concerns about the collection, use and disclosure of information, which has historically been linked with systemic injustice.[127]

162. There are 4 questions about this issue.

163. **Questions 18 to 21** seek views about review of decisions, including the proposal for the Land Court to conduct post-decision merits review in combination with judicial review, preconditions for review, powers of the court and who should pay the costs of reviewing decisions. We welcome your views.

Other matters

164. In this paper, we have discussed and asked questions about specific issues for consultation for Aboriginal peoples and Torres Strait Islander peoples. We also invite feedback on all our consultation proposals and questions, as well as any other matters you wish to raise.

165. **Questions 22 and 23** are about issues arising from interactions with other laws and opportunities to integrate these laws with the processes we are reviewing. These laws are discussed throughout this consultation paper.

Pre-lodgement

166. The Department of Resources and the Department of Environment, Science and Innovation recommend that miners attend a pre-lodgement meeting with the Department before submitting a mining proposal.[128] The Coordinator-General also encourages pre-lodgement meetings.[129] Pre-lodgement meetings are provided as an opportunity to discuss early concepts (pre-design) to determine the feasibility of the mining proposal or seek direction and advice on whether it will meet legislative requirements.

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

168. To encourage the use and improve the effectiveness of pre-lodgement processes, the Department of Environment, Science and Innovation has developed a detailed checklist specifically for resource projects. It includes guidance for various applications, including major amendment applications and applications requiring an EIS.[130]

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

170. Pre-lodgement processes could play a role in the participation processes for a mining proposal, by encouraging early engagement and discussing the scope and form of consultation. For example, in British Columbia, major projects are required to undergo an extensive formal pre-application process as part of the environmental assessment process. This includes an early engagement phase that gives all participants the opportunity to better understand the project and allows Indigenous nations to become involved in the assessment process.[131]

171. **Question 24** is about whether there should be a formalised process that happens before applications are lodged and if so, what matters it should consider.

172. **Questions 25 and 26** invite views on anything else you would like to tell us about the current processes or any additional options for reform you would like us to consider.

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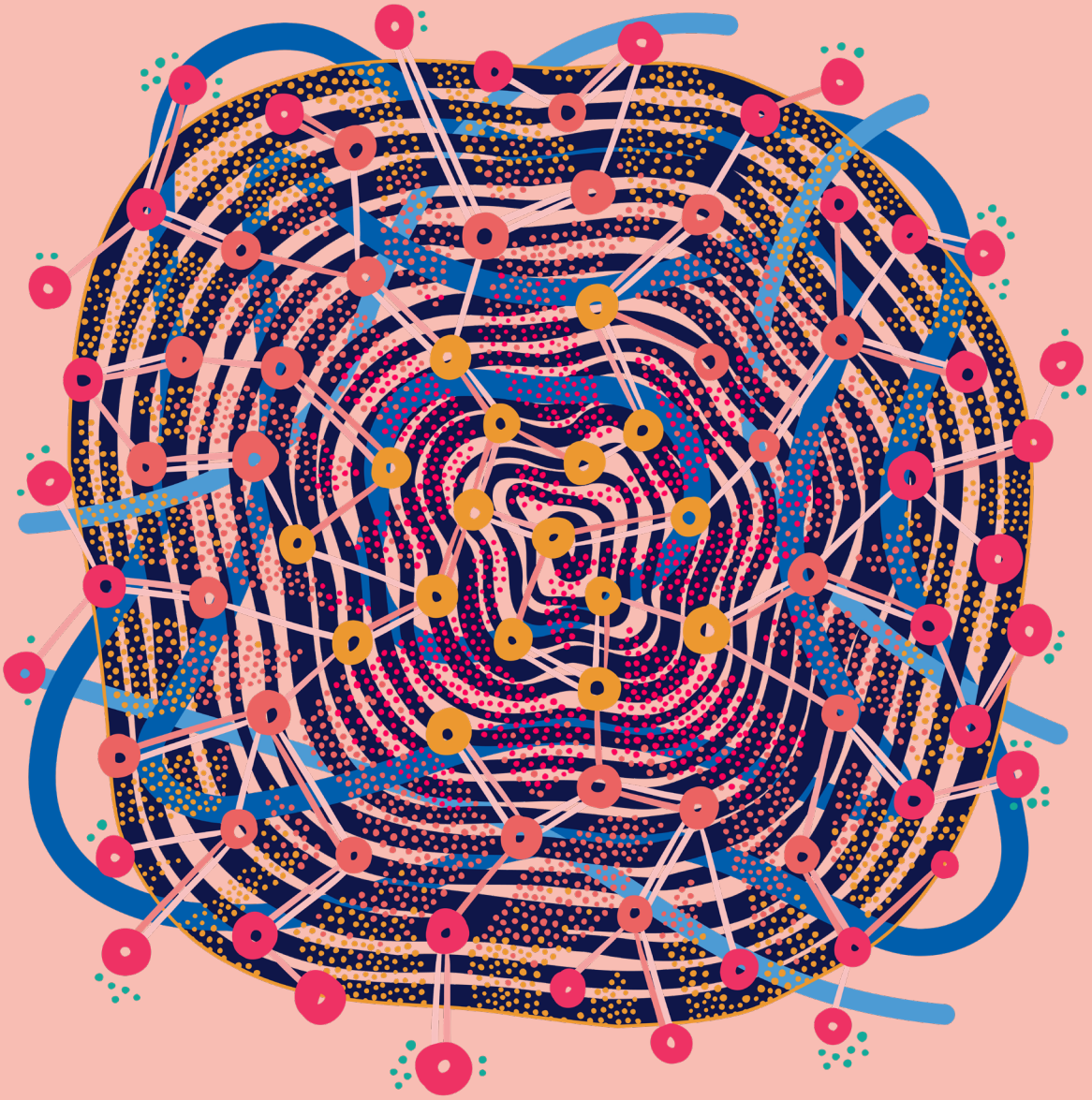

Genuine, meaningful and effective collaboration can be created once trust is established. Trust is built by listening humbly, collaborating openly and communicating respectfully; represented by 3 individual line elements creating an interwoven pattern.

Connecting lines and dots branch out throughout the artwork, symbolising the Queensland Law Reform Commission reaching out with openness and inclusivity to diverse Aboriginal and Torres Strait Islander communities all over Queensland. The straight, connecting lines represent the enduring and rigourous nature of the Commission, staying strong and never wavering.

The top layer's vibrant colours represent the positive outcomes that can be achieved in the long-term. Colours changing from yellow to peach to pink represent the changes and impacts that are made.

The 'Building Trust, Crafting Connections' artwork concept and narrative was developed by Navada Currie. Navada is a proud Mununjali and Kabi Kabi artist at Gilimbaa.