Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

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Secretariat – Mining Lease Objections Review
Queensland Law Reform Commission
PO Box 13312
George Street Post Shop
BRISBANE QLD 4003

By email: qlrc-miningobjections@justice.qld.gov.au

Dear Secretariat

Queensland Law Reform Commission – Review of mining lease objections processes

Thank you for the opportunity to provide comments in response to the consultation papers released by the Queensland Law Reform Commission titled '*Reimagining decision-making processes for Queensland mining*' (**Consultation Paper 1**) and '*Valuing the perspectives of Aboriginal peoples and Torres Strait Islander peoples*' (**Consultation Paper 2**) (together, **Consultation Papers**).

Queensland Law Society (**the Society**) appreciates the opportunity to participate in this important process. Thank you also for the additional time to provide our response.

The Society's First Nations Legal Policy Committee, Energy and Resources Law Committee and the Planning & Environmental Law Committee have assisted in the preparation of this response.

Executive summary

- The Society welcomes this review and in principle, supports the proposals in the Consultation Papers, subject to the comments outlined below.
- The Society also supports the focus on improving consultation with Aboriginal peoples and Torres Strait Islander peoples and affected communities throughout the mining lease process.
- There are some concerns that the reforms have the potential to introduce duplication of processes. It will be critical that as the reforms are further developed, there is a careful analysis and 'mapping' exercise of process, to reduce the risk of duplication and inconsistency, as far as practical and appropriate. This analysis must occur in relation to both State and relevant Commonwealth legislation.
- The Society commends the Commission for its consultation to date and we look forward to continuing our involvement in the review.

Guiding principles

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

The Society broadly supports the guiding principles of 'fair, efficient, effective and contemporary' outlined in the Consultation Papers.

The Society also supports specific recognition and focus on Aboriginal peoples and Torres Strait Islander peoples' rights and interests in the design and implementation of policy and legislation, including rights of self-determination and of Free, Prior and Informed Consent (**FPIC**) as established in the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**).

Consistent with Australia's endorsement of UNDRIP, its objectives and principles should be at the forefront of the way in which indigenous stakeholders are engaged in developing changes to the objections process for mining lease and environmental authority applications.

While members of the Society's First Nations Legal Policy Committee agree that the mining industry's engagement with Aboriginal and Torres Strait Islander people has evolved, there is further work to be done. A key issue that must be elevated in the reform process is the need to work towards obtaining FPIC when mining is proposed to occur on lands traditionally owned or customarily used by Aboriginal and Torres Strait Islander peoples.

The Society's Energy and Resources Law Committee agrees that there is a discussion to be had about the extent to which the principles of FPIC are incorporated in Australian domestic law, but also highlights that such a discussion has consequences for many related statutory frameworks such as the *Native Title Act 1993* (Cth) (**NTA (Cth)**). We note there is currently a review of the 'future act' regime contained in the NTA (Cth) being undertaken, and the terms of that review specifically include consideration of whether FPIC principles should be incorporated in that Act.

FPIC related reforms need to be considered in a wider context than only the mining lease objection review process. As noted throughout our submission, it will be critical that in progressing any of the proposals in the Consultation Papers, there is a further detailed analysis to assess any potential duplication or inconsistency of process which might arise, given the many inter-related statutory frameworks in this area.

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?

Members of the Society's First Nations Legal Policy committee have previously raised concerns with the lack of proper consultation undertaken as part of the current mining lease objections processes. It is the Society's strong view that First Nations traditional law and custom needs to be at the forefront of reform options to address problems with the existing approach to contested mining lease applications.

We also consider that it is crucial for any new approach to strike the right balance between the necessity for meaningful consultation and the need for a clear and transparent process to enable mining industry stakeholders to comply effectively. Put another way, while proper consultation is a vital component to fostering respectful relationships and ensuring the concerns of First Nation communities are addressed, consideration must also be given to responding to the operational needs of the mining sector.

The proposed participation model in the Consultation Papers is welcomed as this focus will help to address the underlying problems with the current process. This significant shift is a step in the right direction, however, it is imperative that careful attention is paid to the potential for duplication of existing

processes and procedures. QLS notes Consultation Paper 1 has already recognised the potential challenges of interactions with other laws.[1]

The Society strongly supports the need for a detailed analysis as the reforms progress to reduce, as far as possible and appropriate, any duplication or inconsistency of processes. This is particularly critical given the Queensland context of the Crown owning the resources and the reform of statutory processes for mining lease approvals, decision making and dispute resolution processes. Also relevant to this analysis are the existing statutory frameworks for native title and cultural heritage protection which a mining lease applicant must comply with, which give standing to certain First Nations People and groups in respect of those matters, and contain mandatory negotiation and dispute resolution processes that a mining lease applicant must comply with. There is clear potential for duplication, complexity and conflict if the mining lease objection process requires engagement with different First Nations groups via a different process.

Participating in the Government's decision-making process

Proposal 1

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.

Participation in the current processes should be reframed by:

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

Broadly, the Society supports the proposal to remove the Land Court objections hearing pre-decision step on the basis that it better aligns with other jurisdictions. Involving the Land Court at a later stage will assist in streamlining and simplifying its role in contested applications.

As noted earlier, the Society cautions that there is a risk of duplication of statutory processes and highlights the need for a detailed analysis of how the proposal would interact with other laws, as foreshadowed in Consultation Paper 1.

We also raise the following for consideration if the proposal proceeds:

- Terminology to be applied to the Land Court 'review' – given the intent is for a full merits review process, consideration should be given to describing the Land Court process as being an 'appeal' from the government decision.
- Whether an automatic stay should be issued when an application or appeal is lodged with the Land Court, and/or whether the approval does not take effect until the appeal period has ended.

[1] Consultation Paper at page 46

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

In principle, the Society supports a model which encourages early participation by all affected stakeholders and community members, provided there is certainty and clarity about the process, participants and timeframes. While we acknowledge the early stages of this process, the development and integration of proposals of the kind contemplated will require ongoing and detailed consultation about final details of the process.

First Nations Legal Policy Committee members submit that the new participation model should not be limited to groups who have formally recognised rights under the NTA (Cth). Instead, culturally appropriate approaches to establishing new or reframed relationships with First Nations peoples and other relevant stakeholders should be adopted.

As submitted above, members of the Society's First Nations Legal Policy Committee hold the strong view that the revised approach to participation and company-community engagement and negotiation must be based on the principles of FPIC.

The Society suggests the participation process ultimately needs to consider the following.

- Ensuring the process facilitates efficient, genuine and defined opportunities for impacted community participation, including definitions for participants and clear timeframes.
- Requirements for participation in the process – for example, will written submissions be required and do they need to be 'properly made' submissions responding to particular criteria in legislation? Written submissions can have the benefit of clearly articulating concerns and enabling applicants to respond appropriately.
- Whether there is an opportunity to align the submissions and substantial compliance requirements under the *Mineral Resources Act 1989* (**MRA**) and the *Environmental Protection Act 1994* (**EP Act**), including environmental impact statement (**EIS**) processes, to reduce confusion about how to participate in one or both processes.
- Whether there is also an opportunity to align aspects of the mining lease and environmental authority processes in some or most cases, including to provide that submissions to one process are taken to be submissions / objections in the other process.
- The relationship between participants in the participation process and whether this will be connected to eligibility for standing for a subsequent Land Court 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.

The Society submits that due and careful consideration will need to be given to how the role of an Aboriginal and Torres Strait Islander Advisory Committee interacts with other roles and rights of Aboriginal and Torres Strait Islander people and groups.

As the reforms develop further, it will also be critical to clarify how the role of the proposed Committee interacts with the current statutory frameworks for native title and cultural heritage protection, to assess and manage any potential duplication of process.

Proposal 2:

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?

The Society is generally supportive of initiatives that allow greater and easier access to information and transparency, including the items outlined in Proposal 2.

Subject to policy decisions made in relation to technical information, the portal could also be used to publish other evidence or reports relied upon by the Department in making decisions on mining leases. This could reduce disclosure requirements at a later stage.

The portal could also be used to publish submissions from the participation stage, subject to any privacy or confidentiality issues.

Deciding each application

Proposal 3

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?

The Society is cautiously supportive of establishing an Independent Expert Advisory Panel (**Panel**).

We agree there are significant benefits to implementing a Panel if it results in savings in time, greater focus on the issues in question, disputed issues of fact and greater opportunity for experts to communicate their opinions more effectively. This, in turn, increases the capacity for evidence-based decision-making, which the Society supports.

However, there are some challenges with establishing and implementing a statutory expert panel.

The Panel's role will need to be transparent to ensure that stakeholders, the public and government have confidence in the process.

It is also important to ensure:

- the legislation defines the Panel's purpose, scope and timeframes for undertaking its work
- the introduction of the Panel leads to efficiencies in process, rather than duplication of work or analysis
- its role is clear, as distinct from the internal technical expertise of Departmental officers, and how it participates in the decision making process, particularly in relation to the technical documentation prepared by applicants

Membership of the Panel

Consultation Paper 1 proposes the Panel be comprised of people with recognised expertise in matters relevant to the assessment of environmental authority applications. In order for the Panel to fulfil this purpose, it will be required to incorporate diverse community and stakeholder views into its deliberations.

In this context, identifying and appointing appropriate Panel members is critical.

We consider the members of an Expert Panel should be independent of government. Applications should be invited by a public expression of interest process.

At this stage, the suggested criteria in Consultation Paper 1 for establishing a Panel seem appropriate,[2] although as the proposals develop further, it may be that additional factors are identified.

However, the Society holds reservations about the use of the term 'expert' and the potential for this to limit the range to those with formal qualifications. This approach may make it more difficult to obtain advice in relation to Aboriginal and Torres Strait Islander cultural issues. We consider that the term 'expert' should include individuals who are considered experts with the community.

We also understand that in some areas of expertise, limited experts might be available. Therefore, a further issue which might arise is managing limited expert resources, in circumstances where an expert might be engaged in the Panel process and might then be conflicted from involvement in later stages of the project, eg in a Land Court matter.

Processes

Once experts have been engaged, a decision has to be made as to the best approach for eliciting their opinion on the subject of the contested application.

Consideration needs to be given to:

- how the Panel will gather evidence
- whether the Panel will consider and comment on submissions received from the public or whether it will engage / consult directly with stakeholders
- how disagreements between members will be resolved
- what policies, procedures and training will be provided, if any
- whether the expert advice of the Panel will be published publicly or only provided to Government decision makers
- who will fund the costs of the Panel.

[2] Consultation Paper 1 page 33

Role in decision-making and stage of involvement

The proposals in the Consultation Papers are underpinned by a foundational change to the existing procedure for objecting to a ML and/or EA application. Figure 1 in Consultation Paper 1 indicates the Independent Expert Advisory Panel becomes involved in the new process at the end point of executive decision-making. [3]

Consultation Paper 1 also acknowledges that removing the Land Court objection hearing pre-decision may reduce the independent expert evidence base for decision-makers.[4] The Panel proposal may help to alleviate this issue.

However, if the Land Court is to be shifted to a later stage, there may be benefits in the Panel having an earlier role in the participation process, including:

- an earlier detailed analysis of the material facts and issues, before significant project decisions or recommendations are made
- publishing initial expert findings of the Panel, for public consideration and submission
- providing an opportunity for earlier expert consultation with relevant stakeholders in response to any initial conclusions or recommendations.

Adapting Proposal 3 in this way could provide the opportunity for public consideration of expert findings early in the process, improving transparency and potentially providing an early response to proponent materials.

Proposal 4

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.

Proposal 5

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.

In the context of introducing the participation process and the Panel process, QLS considers Proposals 4 and 5 are broadly appropriate.

However, given the likely breadth of the participation process, we caution that these proposals need more detailed consideration and need to be 'mapped', given the consequences of this approach potentially extend beyond the MRA and EPA.

We also highlight again the need to minimise potential duplication of process.

[3] Figure 1: Current and proposed processes on page 9 Consultation Paper 2

[4] Consultation Paper at page 33

For example, the decision-making criteria for mining leases (within the MRA) includes consideration of environmental impacts. This leads to duplication with the EPA process.

A further example to be considered arises under the current NTA process. For example, if the mining lease applicant and the native title holder for the area of the mining lease had reached agreement on an indigenous land use agreement, or the National Native Title Tribunal had considered and made a decision on whether a mining lease should or should not be granted under the NTA having regard to its impacts on native title, how is this taken into account if the Land Court is to conduct its own enquiry on the same issues? If the Land Court is to consider such matters, in doing so the Land Court should have regard to corresponding outcomes of other processes dealing with largely the same subject matter.

We understand Proposal 4 to mean (and would support) that all submissions made during the participation process will form part of the materials considered by the decision-maker.

The Society also supports the proposal that Aboriginal and Torres Strait Islander rights and interests should be considered as part of the mining lease process, provided the concept of interests is not given a narrow view so as to exclude relevant views or opinions. However, as noted earlier, there remains a concern that this results in duplication of process and these issues will need to be worked through.

Proposal 6

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.

The Society is in principle supportive of Proposal 6, as it better aligns with other jurisdictions and court processes. Involving the Land Court at a later stage should help streamline and simplify the court's role.

The Society also supports the approach outlined in paragraph 214 of Consultation Paper 1, being that merits review would be conducted on the same material that was before the original decision-makers, with discretion for the Land Court to admit new evidence any party may wish to lead in exceptional circumstances, provided those circumstances have an appropriate connection to the decision being appealed.

In response to the question of the Court's powers, if 'combined review' is implemented, the Society recognises that in other contexts, such a review power is usually accompanied with the broad powers set out in paragraph 235 of Consultation Paper 1, including the power of the Court to substitute its own decision.

However, members of the Society's Energy and Resources Law Committee have highlighted that the decision to grant a mining lease is one which balances the potential benefits of the proposed mine against any potential adverse impacts. The decision is one which is considered to be in the public interest after weighing all of those factors. There is a view that this is a decision that should be made by the government

of the day which is elected by the public and support for the option outlined in paragraph 237 of Consultation Paper 1.

The Society would be pleased to discuss this issue further with QLRC as the reform discussions progress.

Standing

The Society acknowledges the current process has open standing. If the proposal proceeds, we suggest standing to appeal to the Land Court should be open to anyone who has properly engaged in the participation process. The legislation should clearly prescribe what factors are to be considered as meeting standing requirements, for example, a person who has made a submission to the participation process has standing.

However, some limitations to standing might be appropriate to manage the risk of objections by parties seeking to delay projects out of self-interest, rather than on a bona fide basis. This could potentially be managed through a discretion held by the Court.

We also suggest it would be appropriate for the Court to have a clear discretion to extend standing to a party with an appropriate connection to the decision, even if they did not engage in the participation process, when exercising the discretion would be in the public interest and/or if there was some reasonable excuse for not engaging in the participation. The legislation will need to be clear as to what constitutes an appropriate connection to the decision.

Such a discretion should be exercised carefully, as it has the potential to undermine the proposed benefits of the early engagement model of the proposed QLRC process, which is stated to have the objective of making the consultation process less adversarial. Otherwise, an opponent of the mine could avoid participation in the early consultation stage and bring an objection, for the first time, after the Minister's decision has been made. In addition to reducing the benefit of the early engagement process, it may also mean that the mining lease applicant may be hearing of a ground of objection for the first time at the Land Court stage and may not have sought to address those objections in the materials that were before the Minister when the decision was made.

Costs

Consultation Paper 1 outlines a number of the relevant issues that should be considered when legislating if and how costs are to be awarded, including noting that in the Land Court, each party typically bears their own costs.

The Society considers that ultimately, the approach to be taken on costs is a policy decision for the government to determine, particularly in a context where the Land Court proceeding might involve public interest and human rights considerations.

QLS also considers it will be important that there is discretion conferred on the Court to take into account the circumstances of the particular proceedings and parties when making a decision as to costs.

Given the early stage of the proposed reforms, it is difficult at this time to comment on an appropriate model for costs. Until the model is settled, it is unclear what costs might be incurred by parties. For example, whether or not the Land Court is the final decision maker and how expert evidence is to be generated and introduced will influence the costs incurred.

Costs considerations are important to all parties to a proceeding, and are often a determinative factor in whether an action is brought, and how and when it is resolved. Speculative and pro bono work is often contemplated based on costs recoverability, in addition to merits and public interest considerations.

If a new process is being designed to better allow participation in the process, including by Aboriginal and Torres Strait Islander Peoples, then consideration needs to be given to whether the costs rules will impact this participation.

Consideration of the costs assessment process (including scales of costs) in the Land Court should also be undertaken to ensure it is fit for purpose.

The Society provides the following further information to assist when considering the potential approach.

Examples in other jurisdictions

Cost issues are frequently considered in other analogous jurisdictions, for example, in the Planning and Environment Court.[5]

Cost reforms have also recently occurred in jurisdictions dealing with discrimination and harassment.

On 19 September 2024, the federal parliament passed the *Australian Human Rights Commission (Costs Protection) Bill 2023* (Cth) (**AHRC costs bill**) which amended the way costs are awarded in certain unlawful discrimination matters so that a respondent will pay the applicant's costs if the applicant is successful, unless the court is satisfied that the applicant's unreasonable act caused them to incur costs. The applicant may be ordered to pay the costs if the court is satisfied that:

a. the proceedings were vexatious or without reasonable cause;

b. the applicant's unreasonable act or omission caused the other party to incur the costs;

c. or if:

   (i) the other party is a respondent who was successful in the proceedings; and

   (ii) the respondent does not have a significant power advantage over the applicant; and

   (iii) the respondent does not have significant financial or other resources relative to the applicant.

However, in the case of a representative application, the provisions relating to when the applicant will be ordered to pay costs only relates to the person who made the application.

This approach differs from the current approach in section 570 of the *Fair Work Act 2009* which provides that a party may be ordered to pay costs only if:

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

   (i) the party unreasonably refused to participate in a matter before the FWC;

   (ii) the matter arose from the same facts as the proceedings.

This model of each party essentially bearing their own costs with some exceptions had been touted as a way to not discourage applicants from engaging in the process and many of our members have said it has worked well in this regard. In fact, it was endorsed in 2020 by the Australian Human Rights Commission in the Respect@Work report. However, more recently, as is evidenced by the AHRC costs bill, an approach which aims to provide better protections for applicants in these types of matters have

[5] *Planning and Environment Court Act 2016*, Part 6 Costs

been favoured by many stakeholders, including by some of our members on the basis that any potential exposure to an adverse costs order means that some applicant will never seek to remedy a breach of a human right.

There are some in the legal profession who consider neither the approach of each party bearing their own costs nor the one adopted in the AHRC amended bill to be appropriate, preferring instead a model that gives full discretion to the court to decide costs, which would allow the court to consider a number of factors including which party was successful. Proponents of this approach note the aforementioned alternatives can:

- lead to unfairness for less well-resourced respondents;
- encourage more unmeritorious applications, leading to delays for all applicants;
- interfere with settlement negotiations; and
- lead to calls for the well-established common law position that 'costs follow the event' to be overturned by legislation in other areas of litigation.

Other options to consider include the process in the Federal Circuit and Family Court of Australia which, unlike in the Federal Court, provide a staged approach to costs for general federal law matters under the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth). This means that at each point of the proceedings, each party has a good idea of the costs which they may be asked to bear if unsuccessful.

Other issues

Consultation Paper 1 invites comments on interaction with other laws. QLS agrees the ultimate reform will need to be carefully tested against other legislation to reduce the risk of duplication or inconsistency as much as possible. Once the proposal is further developed, the analysis against other legislation can be undertaken. QLS would be pleased to participate in this stage.

Comments re *Regional Planning Interests Act 2014* and *Strong and Sustainable Resource Communities Act 2017*

This legislation regulates impact of proposed resources activities on designated areas of regional interest.

QLS agrees with the comments in Consultation Paper 1 that the proposed reforms could result in potential duplication of processes with the *Regional Planning Interests Act 2014* (RPI Act). If the RPI Act is enlivened, then it will be necessary to consider how the RPI Act process would work if the Panel was also undertaking its process.

If the Panel process is implemented, then we query whether the RPI Act process and the assessment of the most appropriate land use should be done as part of the Panel process. Further consideration will also be needed as to when the ML process is carried out in this timeline to avoid further duplication.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via email at [redacted] or by phone on (07) [redacted].

[redacted]