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

Briefing paper 4 – Merits Assessment

Notes to the Commission

This briefing note sets out issues and options for reform for the merits assessment of contested applications for MLs and associated EAs.

The options identified in this briefing note seek to address issues with the current objections process through the lens of the guiding principles for our review. Our guiding principles necessitate that the process we recommend should include 'rigorous merits assessment' and 'appropriate review mechanisms'.

Our review's terms of reference require the Commission to have regard to, among other things:

- maintaining the ability for a court to consider the relative merits of ML applications and associated EAs and
- at what stage or stages in the process, an entity, such as an advisory panel or a court, should consider an objection to an application, and what role that entity should play in the process to decide an application or review a decision on the application.

An overarching reform option we have identified is to change the timing of the assessment by a court from a merits assessment that occurs prior to, and can inform, the Government's decision, to a merits review of the decision after it is made. A key matter for the Commission's consideration is whether we should consult on a model of this nature and if so, whether we should propose a model similar to the model for development assessments (a simplified version of this model is set out in **Attachment 1**).

Key considerations associated with this option are:

- what court will be the most appropriate to perform the merits review, requiring a speciality, while also being able to conduct a judicial review of the same application
- implications for the Government's assessment of the application
- the scope of the merits assessment (one identified option is to follow the recommendation of Prof. Samuel AC on the independent review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) by introducing a 'limited' merits review, to be conducted on the material provided with the original application)
- whether there should be merits review of both the ML and EA applications or whether merits assessment should be limited to the EA application and if so, required reforms to the scope, function and statutory criteria for each authority.

Overview of current law

- In deciding whether to grant, grant with conditions, or reject applications for MLs and associated EAs, the Government assesses the merits of each application. The relevant decision-makers are:
  - Minister for Resources and Critical Minerals for ML applications under the Mineral Resources Act 1989 (MR Act)
  - chief executive of the Department of Environment, Science and Innovation for the EA application under the Environmental Protect Act 1994 (EP Act).
- If an objection is made to an application for an ML, an EA, or both, the matter is referred to the Land Court, which will hold an objections hearing to assess the application and objections. If there are objections to both applications, the Land Court will hear them in a combined hearing if practicable.
- The MR Act and the EP Act set out matters that must be considered by the Land Court to assess and determine an application ('statutory criteria'). In making a recommendation about a ML application, the statutory criteria for the Land Court include:[1]
  - if there will be an acceptable level of development and use of the mineral resources
  - the resource company's financial and technical capability to carry out the project
  - the past performance of the resource company
  - if the activities to be carried out under the ML will conform with sound land use management
  - if there will be any adverse environmental impact caused by the project (and, if so, its extent)
  - if the public right and interest will be prejudiced by the grant of the ML
  - if the proposed mining project is an appropriate land use (taking into consideration the current and prospective uses of the land).
- In making a recommendation about an EA application, the statutory criteria for the Land Court include:[2]
  - advice given by the relevant Minister
  - any draft EA and conditions or, if there is none, the EA application, standard conditions, responses to information requests and the 'standard criteria', which includes:
    - principles of environmental policy
    - any relevant Commonwealth or State government plans, standards, agreements or requirements about environmental protection or ecologically sustainable development

    - the character, resilience and values of the environment.

- The Land Court makes a recommendation to the relevant decision-maker on each application,[3] which must be taken into account in deciding the application. The statutory criteria for decisions by the Land Court and by the final Government decision-makers are the same, except that the final decision-makers are also required to consider any Land Court recommendation.
- While the general position is that each party bear their own costs, the Land Court has discretion to award costs if it considers it appropriate in specified circumstances.[4]
- The Land Court's recommendation is an administrative decision that may be subject to judicial review proceedings in the Supreme Court of Queensland.[5]

Terminology

- In this briefing note, we use 'merits assessment' to refer to the pre-decision assessment of the merits of the application by a court and 'merits review' to refer to an assessment of the merits post-decision by a court.

Issues identified

Issue	Details for consideration	Stakeholder	Commissioner notes
The scope of and evidence for the merits assessment	**Quality of evidence:** • Multiple stakeholders, including environmental and community organisations and legal professionals, note that a key benefit of the Land Court merits assessment is that it brings rigour to the decision-making process, by rigorously and transparently testing evidence and cross-examining witnesses. The Government also recognises the value of this merits assessment and its role in assisting the final decision-maker.	Government, Environmental organisations, Legal professionals, Landholders	
	Conflict between legislative objectives: • There is conflict between the primary objectives of different Acts that bind the Land Court in making its recommendations following a mining objections hearing. For example, the objectives of the MR Act include encouraging and facilitating mining of minerals, while the EP Act's objectives include protecting Queensland's environment. • As the Land Court is required to consider the statutory criteria and objectives of each Act in making its recommendations, often heard and delivered together, this conflict in the criteria creates a tension for the Land Court in conducting the hearing and its assessment. However, it is also recognised by stakeholders that the Land Court is appropriately placed to balance and reconcile these competing objectives in making its recommendations.	Industry, Legal professionals	
	Lack of fairness in rights of parties to introduce evidence: • Stakeholders raise concerns about the lack of fairness in the process, insofar as an applicant may submit additional	Legal professionals,	

Issue	Details for consideration	Stakeholder	Commissioner notes
	evidence not originally provided with their application, yet objectors are limited to the grounds raised in their objection. This limits their ability to respond to fresh evidence and appears to unfairly fetter the ability of objectors to participate in the hearing.[6] • While the Land Court can inform itself in a manner it considers appropriate to determine the matter,[7] the scope of hearings are restricted to the grounds set out in the objections.[8] • Legal professionals raise concerns that this requires objectors to raise a broad range of objections to an application across all available statutory grounds to ensure each possible application criteria is addressed and within the scope of the Land Court's hearing. This unnecessarily expands the scope of the hearing and can introduce increased complexity.	Environmental organisations	
	Mandatory statutory parties: • Stakeholders raise concerns that the only mandatory statutory party to a Land Court hearing is the Department of Environment, Science and Innovation.[9] • Stakeholders consider that the Department's involvement in the proceeding is beneficial and can guide the Land Court on Department-specific knowledge and issues in relation to the EA application.[10] • They raise concerns that the Department of Resource and Critical Minerals and the C-G (where relevant) are not also mandatory statutory parties. The absence of these parties is considered to reduce the expertise and evidence available to the Land Court in reaching their decision, also ultimately impacting the quality of the final decision.	Legal professionals, Environmental organisations, Landholders, Industry	

Issue	Details for consideration	Stakeholder	Commissioner notes
	Standing to participate: • The current framework, by which any person who has made an objection to either application can participate in the Land Court proceedings (see also briefing note 2 – participation) is a contentious issue. Industry has raised concerns that standing is too broad and consider that it should be limited to those with a direct interest. Environmental and community stakeholders have argued in favour of broad standing due to the potential public interest and environmental implications of the applications.	Industry, Environmental organisations, Community	
The nature and timing of the merits assessment	**Recommendation is non-binding:** • Stakeholders also raise concerns that the Land Court can only make a recommendation. • Environmental and landholder stakeholders point to the independence and rigour of the Land Court's hearing and frame it as a missed opportunity for the outcome to be a non-binding recommendation, rather than a binding judicial decision.	Landholders, Environmental organisations, Legal professionals	
	Current process creates an additional avenue for judicial review: • As the Land Court's function is administrative, and not judicial, the recommendation is subject to the Judicial Review Act 1991, in addition to the decisions by the final decision-makers on the ML and EA (see briefing notes 5 and 7).	Environmental organisations, Landholders	
Barriers and access to justice	**Burden on parties:** • As the main form of participation in decisions about ML and EA applications is a Land Court hearing, the process shapes participation as an adversarial contest before the decision	Industry	

Issue	Details for consideration	Stakeholder	Commissioner notes
	on the application is made. In many cases, participants may not wish to bear the responsibility of becoming a party to a court hearing, but to have their views taken into account by the relevant decision-maker. • The current merits assessment process is intensive in terms of time and resources for all parties and can be particularly complex for self-represented parties. • The proceedings can add a further delay to a project's commencement, as well as incur significant costs for represented parties and time from work or other commitments for self-represented parties. • While not bound by the rules of evidence,[11] and notwithstanding measures introduced by the Land Court to reduce formality and assist self-represented parties, the forum for the merits assessment is a court that must operate in accordance with the criteria set out within its establishing and enabling Acts, regulations, rules and practice directions.		
	Impacts of the discretion to award costs: • Environmental stakeholders have raised concerns that the Land Court's discretion to award costs gives rise to uncertainty and risk for objectors, which can deter active participation in the Land Court's hearing.	Environmental organisations, Legal professionals	
	The lack of a threshold for Land Court hearings: • Industry have raised concerns with the lack of a threshold for mining objections hearings, which means that all ML and EA applications, even those with one objection, are referred to the Land Court for hearing and recommendation.	Industry	

Issue	Details for consideration	Stakeholder	Commissioner notes
	• The lack of thresholds or pre-hearing processes are noted as being of concern, as they permit minor matters that could easily be resolved without a court hearing to proceed to a full hearing. This is raised as a significant issue not only for fresh applications but in the context of considering the nature and scope of amendments to mining projects, with industry stakeholders noting that the threshold for re-notification (triggered by a major but not a minor amendment) is a substantial consideration. This is noted to have the effect that at times amendments that are assessed by the miner to have the likely effect of improving environmental and community impacts from the mine are not progressed, out of concern to open up the application to a further objections hearing, disrupting the progress of the project.		
Compliance with natural justice	**Limitations on the Court's powers:** • Where an ML is for a 'coordinated project', under the State Development and Public Works Organisation Act 1971, the Land Court's recommendation on an EA application must include the C-G's conditions to the EA and cannot be inconsistent with those conditions.[12] • This limits the scope of the Court's power in making its recommendation to the chief executive on the EA application (see also briefing notes 5 and 7).	Landholders, Environmental organisations	
Broader issues	**The appropriate decision-maker:** Industry stakeholders have expressed the view that decisions related to the granting of MLs are not questions of law, but of an elected official's ability to balance the merits of a range of competing factors in assessing an application. They argue that the current process allows an unelected entity to have input in the decision of elected officials and permits use of the judiciary	Industry, Environmental organisations, Community	

Issue	Details for consideration	Stakeholder	Commissioner notes
	to pursue a particular policy agenda. However, environmental and community stakeholders have argued that, as resources are held for the benefit of the community, the community should be able to participate in these decisions. Other stakeholders, including legal professionals, have argued that due to the very political nature of these decisions, an independent body like the Land Court is best placed to resolve any disputes about how applications are assessed and granted.		
	Lack of consistency with other resource assessment processes: Stakeholders raise concerns that the timing of the merits assessment processes under the MR Act and EP Act are inconsistent with other similar resource tenure processes, creating inconsistency and complexity. They note that other resource production tenures, such as petroleum and gas, have avenues for review following the original decision on the application. However, these avenues for review are much more limited and most review opportunities in relation to other resource production tenures occur through the associated EA application. This can be compared, however, the full merits review avenue conducted by the Planning and Environment Court for decisions under the planning framework (see Table 1 below).	Environmental organisations	

Strengths of the current process

1. Environmental, Government and legal professional stakeholders have recognised significant value in maintaining a merits assessment process with the independence and rigour of the current merits assessment process. They note the strength of the merits assessment process enhances decision-making quality, fosters the development of environmental jurisprudence and clarifies the legislation's meaning. It is also considered to assist in establishing the Queensland system's credibility and building a social licence to operate.

2. Environmental organisations have noted that they consider the current merits assessment process to encourage greater public debate on land-use and public resource decisions.

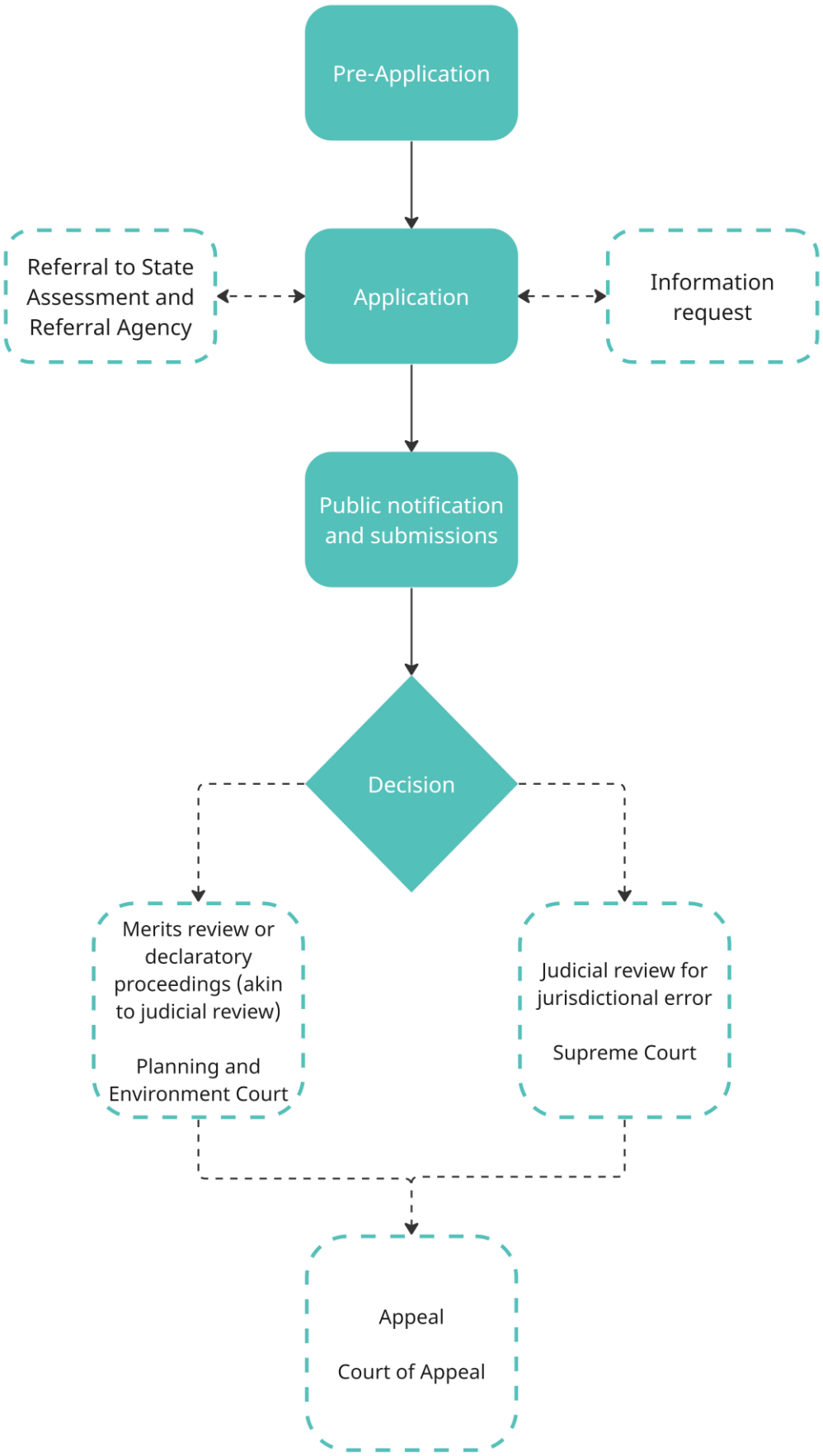
Reform options

1. Change the timing of merits assessment by a court in the Government's administrative decision-making process from pre-decision to post-decision by:
   - removing the Land Court's mining objections hearing prior to the final decision on ML applications and associated EAs (Note: the merits of the application will continue to be assessed by the relevant Government decision-maker/agency, with input provided through an enhanced participatory model) and
   - introducing merits review by a court of the Government decision.
2. Streamline and clarify court processes by vesting responsibility in a court with specialist expertise and with jurisdiction to conduct merits and judicial reviews (see also briefing note 6). The Land Court currently possesses the necessary powers and jurisdiction of the Supreme Court in granting any relief or remedy or making any order in proceedings, as well as established appeal structures. The Planning and Environment Court in Queensland provides a model of combining merits review and declaratory proceedings (akin to judicial review) in the same forum (see **Attachment 1** for a simplified overview of the development assessment process in Queensland). The Land and Environment Court of New South Wales offers another example of this combined review model. (Note: it is recognised that there is a constitutional issue that may arise in the implementation of this option. Both administrative decision-makers and inferior courts or tribunals must be amenable to the supervisory jurisdiction of the Queensland Supreme Court. Accordingly, if a specialist court or tribunal was formed to conduct both merits review and judicial review, this would not exclude the original decision being amenable to judicial review by the Supreme Court, where jurisdictional error has occurred. If such a forum is created, it should be clear that there is no intent to oust the supervisory jurisdiction of the Queensland Supreme Court, particularly for jurisdictional error.)
3. Vest the court with jurisdiction to case manage and integrate applications for interlocutory matters (eg whether to notify, whether to require an EIS), to support a holistic and efficient process. The Land and Environment Court of New South Wales offers an example of a model for case management and integration.
4. Only enable merits review of EA applications. This is similar to the processes in British Columbia and New South Wales where the ability to challenge the ML application is restricted (for example, to landholders on particular grounds).
5. Require the merits review to be determined on the same material that was before the Minister, compared to a hearing de novo that allows for the introduction of new and additional information. This is intended to encourage applicants to provide the best possible information to support their application at the time of making their application. This will also place the applicant/reviewer in a similar position as the objectors under the current system (i.e., limited to the grounds of objections originally made). This is a form of merits review as proposed by the independent

review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (copies of the relevant extracted section of the independent review discussing the scope of a limited merits review are included as an attachment).

6. Key issues for further consideration include:
    a. Standing (eg should standing be open or contingent on participation in an earlier process)
    b. Costs
    c. Practices and procedures
    d. The scope, functions and statutory criteria of each authority
    e. The application of the Human Rights Act 2019 to the court conducting a post-decision review.

Table 1: A simplified overview of the development assessment process in Queensland for impact assessable development under planning laws



[1] *Mineral Resources Act 1989* (Qld) s 269(4).
[2] *Environmental Protection Act 1994* (Qld) s 191.
[3] *Environmental Protection Act 1994* (Qld) s 190; *Mineral Resource Act 1989* (Qld) s 269.
[4] *Land Court Act 2000* (Qld) s 52C.
[5] *Land Court Act 2000* (Qld) Schedule 2, Dictionary (definition of 'administrative function').
[6] *Mineral Resources Act 1989* s 268(3) and *Environmental Protection Act 1994* s 191.
[7] *ACI Operations P/L v Quandamooka Lands Council Aboriginal Corporation & Ors* [2001] QCA 119 and *Byerwen Coal Pty Ltd v Colinta Holdings Pty Ltd & Anor* [2015] QLC 44.
[8] *Mineral Resources Act 1989* (Qld) s 268(3); *Environmental Protection Act 1994* (Qld) s 191(1)(e).
[9] *Environmental Protection Act 1994* (Qld) s 186(a); Land Court' Practice Direction 4 of 2018, Procedure for Mining Objection Hearings (which defines 'administering authority' as 'the chief executive' of the Department of Environment, Science and Innovation.
[10] It includes assisting the Court to identify and draft conditions on the draft EA: Land Court' Practice Direction 4 of 2018, Procedure for Mining Objection Hearings.
[11] *Land Court Act 2000* (Qld) s 7.
[12] *Environmental Protection Act 1994* s 190(3).