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

Briefing note 5 – Decision

Notes to the Commission

Our terms of reference ask us to have regard to:

- the role of statutory criteria in, among other things, deciding contested applications for MLs and associated EAs
- the role of an entity (such as an advisory panel or a court) in the process to decide applications
- practices and procedures for the conduct of hearings or proceedings to decide applications that would enhance the fairness, efficiency and effectiveness of the objections process.

This briefing note sets out issues and options for reforms for decisions about whether to grant, grant with conditions or refuse applications for MLs and associated EAs.

Overview of current law

- The final decision about whether to grant, grant with conditions or refuse an application for an MLis made by the Minister for Resources.[1]
- The final decision about whether to approve, approve with conditions or refuse an application for an EA (and associated progressive rehabilitation and closure plan (PRCP) and schedule) is made by the chief executive of the Department of Environment, Science and Innovation.[2]
- The decisions about the ML and associated EA are connected as an ML can only be granted if the miner has obtained the relevant EA.[3]
- The process for reaching the final decision-making stage, and the material before the final decision-maker, differs depending on whether there has been a Land Court hearing. A Land Court hearing must be held if an objection is made to the ML application, the EA application, or both applications or if the final decision-maker decides to send the matter to the Land Court for hearing.[4]
- Where there has been a Land Court hearing, the final decision-maker can also ask the Land Court to reconvene the hearing if further material is received following the hearing but prior to the making of the final decision.[5]
- If there is no objections hearing, the final decision-makers can decide the relevant application without referring it to the Land Court.[6]
- The Mineral Resources Act 1989 (MR Act) and the Environmental Protection Act 1994 (EP Act) set out matters that must be considered by the decision-maker in deciding whether to grant the relevant authority. The criteria for the decision on an ML include:[7]
    - 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)
- any Land Court recommendation.

- The criteria for the final decision-maker deciding an application for an EA associated with an ML are:[8]
  - any Land Court recommendation
  - 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

    (Note that where a draft EA exists these factors have previously been considered by the Department in making the original decision on the EA application)
- These are administrative decisions. This has the implications that they can be subject to judicial review proceedings in the Supreme Court of Queensland and the decision-makers have to give proper consideration to human rights in making their decisions and make decisions in a way that is compatible with human rights.[9] There is no right of internal review and there is no right to appeal to a court for a review of the merits of these decisions.

Issues identified

The overarching issue identified with the decision-making process is that it does not fully align with 'best practice' administrative decision-making or with other development approval processes in its sequence (these models have a final government decision followed by post-approval merits appeal) and that aspects of the process could be reformed to be more fair, efficient, effective and contemporary.

The options set out below are designed to reform the current process to achieve this alignment.

Issue	Details for consideration	Stakeholder	Commissioner notes
The nature and timing of decisions	**Length and complexity of the decision-making process:** • The decision-making process for contested applications for MLs and associated EAs is complex and multi-staged, with a Land Court recommendation (non-binding and administrative in nature) followed by a final decision by a Departmental chief executive and, if that decision approves the EA, by a Government Minister. • While the significant work (and therefore time) required to assess and decide applications for mining projects is acknowledged, the length and complexity of the process is noted as a key issue by a diversity of stakeholders, which can be compounded where there are changes of law or policy that impact a project during the approvals process (for example, to water laws).	Academics, Government, Industry, Environmental organisations, Community, Legal professionals	
	The sequence of the decision-making process: • If objections are made, the Land Court hearing occurs before the relevant decision-maker decides the application and must be taken into account by the decision-maker (see also briefing note 4). • While merits assessment by an independent body is generally considered a positive feature of the Queensland process, a range	Government, Industry, Environmental organisations, Legal professionals	

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	of stakeholders consider the timing of the merits assessment within the decision-making process to be problematic. • The sequence of the decision-making process in Queensland is unusual compared with comparative jurisdictions (no other jurisdictions have pre-decision merits assessment by a court). Processes in other jurisdictions include public hearings or forums (eg NSW, Northern Territory, British Columbia, South Africa).		
	The inter-relationship of decisions: • Industry stakeholders raise concerns about the requirement that an EA must be obtained before a decision is made on the ML application, as it requires a protracted, costly process to be completed before a decision on tenure is made. • Environmental organisations have noted the tacit pressure placed on decision-makers on the ML and associated EA when the project has already been approved by the Coordinator-General and the Commonwealth Environment Minister. • South Africa and NSW are the only comparative jurisdictions that requires the EA (or their equivalent) to be granted before the ML. In Western Australia, the Northern Territory and British Columbia, the authorities are granted separately (though both are required to commence mining).	Industry, Environmental organisations	
	The discretion of decision-makers: • The significant discretion for decision-makers at multiple stages of the process creates uncertainty and increases risks, costs and time. This includes multiple options for decisions (including interim decisions) to be challenged by judicial review, with multiple and parallel reviews possible (see the Alpha Coal mine example). In the absence of timeframes for key approvals, judicial review proceedings may be commenced to preserve rights while awaiting	Academics, Industry, Environmental organisations, Legal professionals	

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	the final decision, or may be delayed pending consideration of joinder. • This level of discretion is not uncommon. Other jurisdictions, for example, British Columbia, vest the decision-makers with greater discretion, both procedurally and substantively.		
	The variability of the process: • The decision-making process is substantially impacted by whether an objection is made and an objections hearing held, creating a lack of certainty and consistency to the process. • Industry stakeholders raise concerns that the objections process can be misused to advance particular (often private) interests and that the current objections process discourages best practice developments throughout the life cycle of mining, particularly as regards the major/minor amendment threshold.	Government, Industry	
	The lack of timeframes for key decisions or the ability to extend time frames indefinitely creates uncertainty and delay: • While there is a time limit for final decisions on EA applications, the availability of unlimited extensions (for reasons which include pending advice from the Minister for Resources or the State Development Minister) creates uncertainty and delay. There is no time frame for the Minister for Resources to decide ML applications. • The Government notes difficulties flowing from the dependence of their decision-making timeframes on key decision points in the EA application process. • Protracted time frames are raised as an issue by industry, landholder and environmental stakeholders. Industry stakeholders speak of 'delay' in the 'approvals' process and express the view that, in practice, protracted timeframes and resulting uncertainty	Academics, Industry, Landholders, Environmental organisations, Government, Legal professionals	

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	have a significant impact on investment appetite. They contend that the current approvals process lacks efficiency and creates delay. Landholders raise concerns with unlimited extensions for deciding applications. • In contrast, environmental stakeholders do not support the characterisation of an environmental assessment process as a delayed approvals process and contend that as the State owns the resources, there is no presumption of a right to develop and that fair and judicial processes necessarily involve uncertainty. However, they raise separate concerns about expansive timeframes for decisions as it can make information dated and unreliable.		
	The fragmentation of decision-making and the decision-maker for the EA: • Stakeholders raise concerns that the decision-making functions are fragmented across different agencies and bodies, which limits the ability for a holistic consideration of relevant issues, as well as for matters to be efficiently case managed and streamlined. • The increasing development of renewable energy projects in regional areas where there are multiple and competing interests in land (including environmental, agricultural and First Nations interests) is anticipated to require increased opportunities for community input into Government decision-making for mining projects, with collaborative, cross-government planning and decision-making about mining projects also increasingly important. • The final decision-maker on the EA application is the chief executive of Department of Environment, Science and Innovation, rather than by the Minister for Environment. Ministers are elected officials accountable to the public for the decisions they make (and public interest is a statutory criteria for both decisions).	Academics, Environmental organisations, Industry	

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	• British Columbia requires decisions to be made by 2 Ministers together (who hold the resources and environmental portfolios respectively). • In Western Australia, if an environmental impact assessment is required for a proposal, the Minister for Environment must decide whether (and if so, how) the proposal should proceed in consultation with other key decision-making authorities (e.g., the Minister for Mines). • In South Africa, if there are objections to a mining right, it is referred to an internal government committee that consists of representatives from relevant agencies, chaired by a Regional Manager. The committee advises the decision-maker on the application.		
The criteria for decisions	**Duplication in statutory criteria:** • There is some duplication in the statutory criteria for decision-making on the ML and associated EA. The EP Act requires consideration of a mining company's environmental record and the MR Act requires consideration of the applicant's past performance; both Acts require consideration of the public interest, although this is differently framed (see below). The concerns about procedural redundancies created by these overlapping criteria increase when the requirements of other laws within the broader regulatory framework for mining projects are overlaid. • Where there is a Land Court hearing about an application, the ultimate decision-maker is required to consider the Land Court's recommendation in addition to the same statutory criteria that was considered by the Land Court. All stakeholders raise concerns about this duplication. For Government, the different response required depending on whether an objections hearing is held is considered problematic, from a certainty and resourcing	Academics, Government, Industry, Environmental organisations	

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	perspective. Industry considers there to be procedural redundancies associated with this process and call for greater simplicity and streamlining of processes. Environmental stakeholders have raised concerns about the inefficiencies associated with the requirement for submissions to be made on the same matters following a Land Court hearing. • This duplication is different to some other jurisdictions, where there is a clear distinction between the matters considered for the ML and the EA (e.g, British Columbia).		
	Concerns with the consideration of the public interest: • Under the MR Act, the Minister must consider whether the granting of the ML will prejudice the public right and interest and has a discretion to refuse the grant of the ML in the public interest, but does not have discretion to grant in the public interest, although conditions of grant can be determined having regard to the public interest (the exception to this is for decisions on MLs for overlapping tenures, where the public interest is a statutory criteria for the Minister's decision). Under the EP Act, public interest is considered both within the environmental impact statement (EIS) and EA process; there is also provision for public interest evaluations. • Tensions arise as the objectives of the Acts are different and the criteria are differently framed. • Concerns are raised about limitations in the Government's ability to properly discharge this requirement, for a range of reasons including information available and resourcing constraints. This includes challenges with applying the public interest criteria in the MR Act, which arise from the lack of a framework for understanding and applying the public interest criterion (the legislative framework is unhelpful; the MR Act only defines what is in the public interest in the context of coal seam gas), lack of	Academics, Industry, Government	

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	guidance about when, how and from whom information about the public interest can be obtained, limited input from other agencies and a lack of information about the public interest. • Concerns are raised with how the requirement to consider 'public interest' in the decision-making process sits within the broader objectives of the legislation and the scope and basis for decisions about this criterion.		
	The issues that can be raised and the burden of raising relevant issues to inform decisions: • The legislation prescribes criteria for decisions but does not prescribe grounds for objections. This can create challenges in ensuring appropriate matters are raised and supported by evidence. The burden of providing appropriate evidence and the points within the process when it is to be provided are contested issues. There are related concerns with the integrity of information (noted below). • Environmental and community stakeholders raise concerns that the burden of raising and proving particular matters (for example, the impacts of coal mining on climate change and the public interest) inappropriately rest with environmental organisations and community members, notwithstanding Government commitments based on scientific evidence, and that clearer guidelines would prevent proposed projects proceeding beyond the initial application stage, thus saving community time and resources. • Industry raise concerns that the criteria (and therefore the evidence before decision-makers) does not properly reflect the broader positive benefits of mining for communities and the economy.	Environmental organisations, Community, First Nations, Legal professionals, Industry	

Issue	Details for consideration	Stakeholder	Commissioner notes
Information available to decision-makers	**Differences in evidence at different decision-making stages:** • There can be substantial differences in the evidence before the court and before the final Government decision-makers. There can also be significant changes to the draft EA following its initial approval by the Department, as a result of the Land Court hearing, which has the effect that the evidence before the Court does not address the likely implications of the mining based on the updated conditions proposed.[10] • There are challenges in ensuring the provision of complete, quality, contemporaneous information to Government decision-makers to inform their final decisions and avoid 'gaming' of applications (with quality material selectively prepared and introduced significantly after a miner has reserved exclusive rights to the land through the application). • There can be a significant time lapse between the planning and approval stages, with the risk of the technical and financial information being out of date by the time the matter is before the Minister for final decision.[11] This can result in the need for information requests, with associated costs and delay. Industry stakeholders assert that the process would be much more efficient if the Government was properly resourced to assess applications without relying on frequent information requests throughout the process. The Department of Environment, Science and Innovation have noted the difficulties that arise when there is a significant passage of time between the Coordinator-General's environmental impact assessment and their environmental assessment, with the conditions imposed by the Coordinator-General being dated (yet not open to challenge) by the time of the final decision. • Environmental organisations raise concerns about the lack of a right of response to this information, unless the Minister decides to refer the matter back to the Land Court to reopen the mining	Government, Industry, Environmental organisations	

Issue	Details for consideration	Stakeholder	Commissioner notes
	objections hearing to consider new evidence before reaching a final decision (which can create inefficiencies and delay).[12] They also propose an expanded and better resourced role for Government in the initial stages of the assessment process. • Landholders similarly point to the need for a coordinated approach from Government that reduces the burden on industry, communities and other stakeholders. • The Government's proposal to expedite the approval process for critical minerals increases the importance of an efficient process that is as simple and streamlined as possible.		
	The integrity of evidence: • Environmental and community stakeholders raise concerns that information in support of the application is primarily obtained and provided by the mining company, which can reduce the integrity of information. • First Nations communities raise concerns about how information is sourced and who provides information and on what authority from community.	Environmental organisations, Community, First Nations	
	The statutory parties to a mining objection hearings: • The current process requires that the Department of Environment, Science and Innovation is a party to any mining objection hearing. Other relevant Government entities – notably the Department of Resources and the Coordinator-General – are not statutory parties, although they may apply to be a party. • This is distinct from the processes for other large projects and can create challenges in ensuring that all relevant information is appropriately shared, all relevant evidence is available and all relevant views and competing interests are properly understood and considered by the decision-makers.	Legal professionals, Environmental organisations	

Issue	Details for consideration	Stakeholder	Commissioner notes
	Rules governing evidence in mining objection hearings: • There are also concerns raised about a lack of fairness associated with introducing evidence in a mining objection hearing. Environmental organisations note that mining companies can introduce further information in relation to an issue raised during the hearing however objectors are limited to the matters raised in their objection.	Government, Environmental organisations, Community, Industry, Landholders	
Compliance with natural justice	**Lack of transparency and accountability at key points in the process:** • Stakeholders have raised concerns about the closed nature of considerations of applications for MLs and associated EAs at key stages of the process (for example, in response to submissions). The limited access to timely information on applications is a concern raised by environmental and community stakeholders, with the inadequacy of the right to information model noted in the context of the mining project assessment framework. The high level of decision-making discretion has also been noted by stakeholders, as well as in independent reports.[13] • The Government has also noted challenges in ensuring the decision on the ML is based on up-to-date information, particularly as relates to the development plan and financial and technical information. • The Government has recognised that there is a lack of visibility to the work undertaken by the Department to mitigate the potential impacts of mines and create visibility of the impact of submissions to the Department on an EIS or EA. It is recognised that increased transparency could increase stakeholder confidence in the process.	Academics, Environmental organisations, Community, Industry, Government	

Issue	Details for consideration	Stakeholder	Commissioner notes
	• Industry stakeholders have noted that the complexity of the process creates a lack of transparency and consistency in decision-making processes.		
	Lack of transparency of final decisions: • The Land Court merits assessment process has transparency and offers affected parties a hearing, but the nature of the Land Court's decision (a recommendation rather than a binding decision) weakens the impact of the Land Court' process. • There is a lack of transparency to the final decision-making process and affected parties may not be given an opportunity to express their views to the decision-maker. There can also be a change in evidence that is before the Land Court and before the final decision-maker and there may be no opportunity to respond to this evidence.	Academics, Environmental organisations	
	Concerns with the impact of decisions of the Coordinator-General on other decision-makers and the decision-making process: • The common law rule against the fettering of discretion prohibits a government or public authority from fettering the future exercise of discretionary powers reposed in the executive or a public authority.[14] The free exercise of executive discretion is particularly important given the public interest criterion for both approvals. • Environmental, community, academic and Government stakeholders raise concerns that there is a lack of transparency and accountability for projects coordinated by the Coordinator-General that impacts the final decisions (see briefing note 7 for a further discussion of these issues). This is attributed to: ○ limitations on the ultimate decision-maker's authority, where mandatory conditions are imposed by the Coordinator-	Academics, Environmental organisations, Community, Government	

Issue	Details for consideration	Stakeholder	Commissioner notes
	General. Concerns with the 'inconsistency test' have also been noted by the Land Court.[15] ○ a lack of rigour and independence under the Coordinator-General process that impacts the evidence on which decisions are based ○ legislative restrictions on judicial review of decisions by the Coordinator-General under the State Development and Public Works Organisation Act 1971, with limited judicial review impacting the quality of primary decision-making. It is noted that in this way, the legislation is inconsistent with fundamental legislative principles as defined in the Legislative Standards Act 1992.		

Options

Over-arching reform option:

An overarching option outlined in briefing note 1 is to change the order and nature of the assessment process to replace merits assessment by the Land Court before the decision with merits review by a court post-decision (with related changes to review of decisions discussed in a briefing note 4). Associated with this is the option of an enhanced participatory model through the EA process, with processes and mechanisms to ensure relevant, credible and up-to-date information is available for decision-makers (discussed in briefing note 2).

Reform options for decision-making about MLs and associated EAs:

1. Consider if there is unnecessary duplication in the statutory criteria for decisions about MLs and associated EAs that can be removed and if so, whether this can be done by demarcating public and private interests. Key issues for further consideration include:
    - the public interest: which decision-maker(s) should have responsibility for deciding the public interest? By whom, when and how should it be raised? Should ESG criteria or considerations should be part of public interest considerations? How much discretion should decision-makers have?
    - reducing the potential for an abuse of process by a landowner using an objections process to further compensation negotiations (note that in Western Australia, this is addressed by restricting a landowner from objecting on the basis of the impact on their agricultural activities, which is a matter dealt with by the compensation regime)
    - consideration of competing land uses.
2. Introduce measures to promote the provision of complete, independent, contemporaneous information by applicants so that Government decision-makers have necessary information to make final decisions on MLs and associated EAs, without the requirement for decision-makers to actively request this information, which can result in delay. Options include:
    - allowing Departments to reject applications on the basis that they are not properly made if they do not have the necessary information. There is a practice of filing a premature application for an ML to retain exclusive rights well before the miner is in a position to define their mine plan and other relevant matters (applications lie dormant while further work is undertaken in readiness and explains the significant delay from application to notification that can occur). This practice undermines the purpose of the prequalifying tenures (exploration permit and mineral development licence), which allow the miner exclusive access to investigate the resource and develop the mining proposal.
    - an enhanced role for the Government in managing and assessing applications at the start of the application process and streamlining the attainment of relevant information, with integration and information-sharing between relevant Departments and transparency of information about the proposed project and its impact. Industry stakeholders have noted that they consider there to be benefit in a 'resource project facilitation office' within the Queensland Government, providing a 'one stop shop' approach to mining approvals. While differently framed, environmental stakeholders also call for an increased role for Government in managing and assessing applications
    - the introduction of mandatory minimum terms of reference for EISs, to ensure the adequacy and breadth of information available for decision-making about applications
    - increased engagement with relevant stakeholders by Government (note the place-based approach proposed to be undertaken for projects co-located in critical minerals zones.[16]

- establishment of an online portal to maintain and develop an information database for each mining project. Environmental stakeholders have suggested that the best practice model, reflected in the Preamble to the Right to Information Act 2009, is a 'push' model, by which key documents are proactively published on a publicly accessible website. They propose establishing a central database where all impact assessment data is stored by the Government (not restricted to project-specific information, but for use across all mining projects). This baseline information would be supplemented in real time with further, project-specific information as it becomes available.

3. Designate the Minister for the Environment, rather than the chief executive of the Department of Environment, Science and Innovation, as the decision-maker for EA applications, to reflect the principle that decisions on public interest matters should be vested in Ministerial decision-makers.
4. Impose a time limit for decisions by the Minister on the EA.
5. Where an application for review of the EA application is made, suspend the power of the Minister for Resources to decide the ML application until the review of the decision on the EA is finally determined.
6. Vest responsibility for review in a Court or Tribunal with jurisdiction to case manage matters, to streamline procedures and reduce fragmented challenges to decisions (see also briefing note 7).
7. Require the merits review to be determined on the same material that was before the Minister, to ensure all relevant information is provided to inform the decision-making stage (rather than withheld and introduced at the merits review stage) (see also briefing note 7).

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1 *Mineral Resources Act 1989* (Qld) s 271A.
2 *Environmental Protection Act 1994* (Qld) s 194A.
3 *Mineral Resources Act 1989* (Qld) s 391A.
4 *Mineral Resources Act 1989* (Qld) s 265; *Environmental Protection Act 1994* (Qld) s 185.
5 *Mineral Resources Act 1989* (Qld) s 272.
6 *Mineral Resources Act 1989* (Qld) ss 271, 271A; *Environmental Protection Act 1994* (Qld) ss 194A, 194B.
7 *Mineral Resources Act 1989* (Qld) s 271A.
8 *Environmental Protection Act 1994* (Qld) s 194B.
9 Under the *Judicial Review Act 1991* (Qld) or common law. Judicial review is briefing note 6. *Human Rights Act 2019* (Qld) ss 9, 58(1).
10 See for example *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 from [350].
11 For an example involving an extended timeframe, see *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184 from [9]. In that case, the Coordinator-General declared the proposed mine a 'coordinated project' in May 2007. A draft EIS was initially produced in 2009, but the proposal was subsequently modified and a modified draft EIS was released for public comment in early 2014. The Coordinator-General invited public comment in August 2014 and published his report in December 2014. The applications for the mining lease and associated EA were referred to the Land Court in October 2015. The Land Court hearing commenced in March 2016. The Land Court hearing was reopened in February 2017 following an application from New Acland to tender further evidence and further evidence was received in April 2017. Judgment was given in May 2017 recommending that the Minister reject the mining lease application. New Acland

applied for judicial review of this decision and the judicial review application was heard in May 2018. It was appealed to the Court of Appeal and heard in February and March 2019.

12 See *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184 at [28].

13 See for example Transparency International Australia. *Corruption Risks in Mining Approvals: Australian Snapshot: Mining for sustainable development.* October 2017.

14 See *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 74 – 75. See also *Searle v Commonwealth of Australia* [2019] NSWCA 127.

15 See for example *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24 at [191], cited in *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 at [319].

16 Queensland Government (Department of Resources) (2003) *Queensland Critical Minerals Strategy* at 12.