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

Briefing note 6 – Judicial Review

Notes to the Commission

This briefing note considers the implications of the Judicial Review Act 1991 (JR Act) for our recommended process, as required by our terms of reference. It also considers judicial review under the supervisory jurisdiction of the Supreme Court, on the basis that this remains an option available to challenge administrative decisions (including those subject to privative clauses) on the basis of jurisdictional error.

This briefing note does not consider Commonwealth law, although it is recognised that Queensland mining projects requiring federal approval[1] may be subject to the federal judicial review regime.[2]

This briefing note has been developed on the basis that recommending reform to the JR Act is outside the scope of this review.

Overview of current law

- The process for determining applications for mining leases (MLs) and associated environmental authorities (EAs) involves several administrative decisions. Generally, these decisions are judicially reviewable.
- Judicial review is concerned with decision-makers acting according to law.[3] It does not engage with the factual merits of the original decision-making or allow a court to substitute their decision in place of the decision by the original decision-maker.
- For our review, the primary decisions subject to judicial review are the:
  - recommendation of the Land Court
  - decision on the ML by the Minister for Resources and Critical Minerals
  - decision on the EA by the chief executive of the Department of Environment, Science and Innovation.
- Under the JR Act, a person can bring an application for a statutory order of review[4] or an application for review.[5] Judicial review applications can also be brought pursuant to the supervisory jurisdiction of the Supreme Court.

Standing

- To apply for a statutory order of review, the applicant must be 'a person aggrieved' by the decision.[6] This requirement is defined as a person whose interests are adversely affected by the decision.[7] Generally, the applicant must demonstrate a special interest beyond that of the general public, which is adversely affected in a practical way by the decision.[8] Recently, meeting this threshold test has proved difficult for some environmental groups.[9]
- Applications for review have essentially the same standing requirements as statutory orders of review.[10]

- Standing requirements for judicial review applications brought pursuant to the supervisory jurisdiction of the Supreme Court are dictated by the common law and may vary depending on the remedy sought.[11] In general terms, an applicant must establish a special interest in the proceedings.[12]

Scope of Review

- Not every governmental action is susceptible to judicial review and there are jurisdictional requirements that must be met.
- A statutory order of review may only be sought for decisions, conduct relating to decisions, or failures to make a decision.[13] A 'decision' is defined as: 'a decision of administrative character made, or proposed to be made, under an enactment (whether or not in the exercise of discretion)'.[14] While this definition does incorporate recommendations and reports,[15] it has otherwise been narrowly interpreted and the JR Act also establishes specific exclusions.[16] To be reviewable, the decision:
  - must be final or operative and determinative, with preliminary steps generally excluded[17]
  - must be administrative in character[18]
  - must be made under an enactment.[19]
- The test for applications for review is that they are determined to be justiciable by the Supreme Court,[20] which allows for a wider breadth of government actions to be reviewed.
- The test of justiciability also applies to applications brought within the supervisory jurisdiction of the Supreme Court.[21] In contrast to applications under the JR Act, statutory clauses limiting review will be ineffective to oust the supervisory jurisdiction, where jurisdictional error is shown.[22]

Grounds of Review

- While the grounds for statutory orders of review are partially codified in the JR Act,[23] they largely reflect the common law. Common grounds include a breach of natural justice, improper exercises of power and failure to observe procedures required by law.

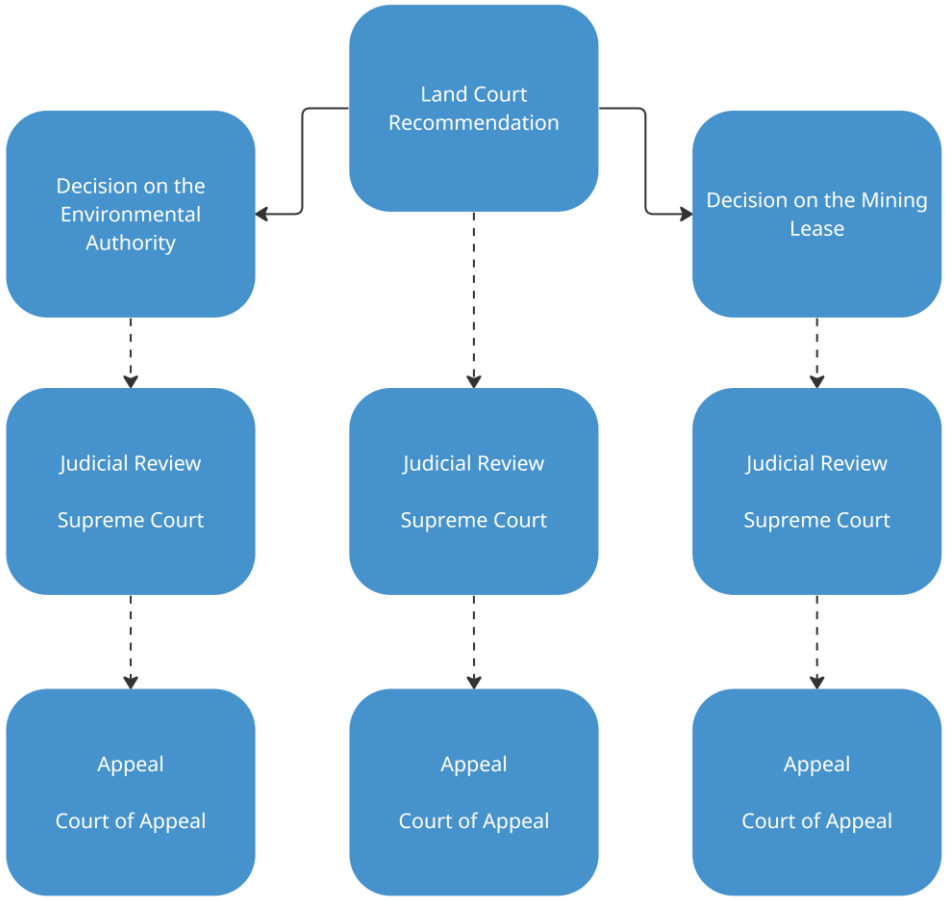
Remedies

- The remedies available for judicial review remain consistent with the traditional remedies developed through common law:[24]
  - mandamus (compelling a lawful exercise of power)
  - certiorari (quashing a decision made contrary to law)
  - prohibition (forbidding a decision-maker from commencing or continuing the performance of an unlawful act)
  - injunction (enjoining a person from unlawful activity or compelling a restoration of the lawful status quo)
  - declaration (pronouncing legal rights or duties of the parties).

Procedure, costs and reasons for decision

- The JR Act gives the Supreme Court a wide discretion to dismiss proceedings where other review avenues exist.[25] It also establishes the right for a person to request a statement of reasons explaining how a decision has been made.[26]
- An application for a protective costs order may be made at any time.[27] In making an order, the court must consider:[28]
  - the financial resources of the applicant
  - whether the proceedings affect the public interest and
  - if there is a reasonable basis for the proceedings.
- All judicial review proceedings are subject to appeals to the Court of Appeal.[29]

Table 1: The opportunities for parallel and overlapping judicial review proceedings



Issues identified

Issue	Details for consideration	Stakeholder	Commissioner's Notes
Standing	**Uncertainty:** A common issue is the uncertainty associated with standing. While the JR Act has simplified the rules of standing,[30] challenges and uncertainties remain, particularly in public interest litigation,[31] which impact all parties. As standing is typically dealt with as a preliminary issue,[32] there is great expense at an early stage before the substantive case is heard.	Academics, Industry, Environmental organisations	
Multiplicity of reviewable decisions	**Multiple administrative decisions are susceptible to judicial review, including parallel reviews:** The process for approving ML and associated EA currently involves making multiple administrative decisions that are susceptible to review. A mine situated in Queensland may also be required to obtain federal approval, which will be subject to the federal judicial review regime. Some stakeholders hold concerns that the multiplicity of decisions which can be reviewed has the potential to unnecessarily delay approval process, which comes with undesirable consequences.	Industry	
Access to justice	**Costs:** Judicial review applications are civil proceedings that often involve expert evidence and legal representation. Consequently, they often come at great financial cost to the parties. Environmental stakeholders note as a key issue the costs associated with judicial review proceedings, including their own legal costs (with the associated challenges in engaging pro bono counsel noted) as well as the risk of an adverse costs.	Environmental organisations	

Issue	Details for consideration	Stakeholder	Commissioner's Notes
	In Queensland, the general rule in civil proceedings is that 'costs follow the event', so the unsuccessful party compensates the successful party.[33] However, courts are reposed with a wide discretion to order costs as they consider appropriate. While there is a protective costs provision available under the JR Act, it has been rarely used.		

Options

1. Extend standing for judicial review on EA applications, through:
    - an expanded model that clarifies what groups of persons will have standing[34] or
    - an open model that allows any person to institute proceedings.[35]
2. Introduce cost protection provisions into the EP Act and MR Act for matters brought on public interest grounds.
3. Where an application for judicial review of the EA application is made, suspend the power of the Minister for Resources to decide the ML application until the judicial review application of the decision on the EA is finally determined (see briefing note 5 – decision).

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1 If the mining project is deemed a 'controlled action', it will require approval granted by the Minister for Environment and Water: Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 133(1).

2 Judicial review at the federal level may be conducted under the:
Australian Constitution ss 75(iii), (v) by the High Court;
Judiciary Act 1903 (Cth) ss 39B(1)–(1A) by the Federal Court; and/or
Administrative Decisions (Judicial Review) Act 1977 (Cth) s 5 by the Federal Court.

3 See e.g. *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–36; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, 291–292; *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 153–154 [43]–[45]. For commentary on the distinction, see e.g. James Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724 at 730–736.

4 *Judicial Review Act 1991* (Qld) Part 3.

5 *Judicial Review Act 1991* (Qld) Part 5.

6 Judicial Review Act 1991 (Qld) ss 20(1), 21(1), 22(1).

7 Judicial Review Act 1991 (Qld) s 7.
8 *Argos v Corbell* (2014) 254 CLR 394 at 409 [43], 414 [61], 417 [76].
9 See the decision in *Lock the Gate Alliance Ltd v Minister for Natural Resources and Mines* [2019] 1 Qd R 1 at 18–31 [40]–[85] and the issue table below under 'standing'.
10 Judicial Review Act 1991 (Qld) s 44. The wording is the same of the definition of a 'person aggrieved' in s 7.
11 However, there has been substantial convergence of the disparate tests of standing for the traditional remedies, see e.g. Brian Preston, Standing to Sue at Common Law in Australia, 2006.
12 *Australian Conservation Fund Inc v Commonwealth* (1980) 146 CLR 493 at 530–531, 537, 547–548; *Onus v Alcoa* (1981) 140 CLR 27 at 35–36, 44, 53, 63. This has been held to be more than a mere intellectual or emotional concern.
13 Judicial Review Act 1991 (Qld) ss 20–22. See also: ss 3 (definition of 'reviewable matter'), 4–6, 8.
14 Judicial Review Act 1991 (Qld) s 4.
15 Judicial Review Act 1991 (Qld) s 6.
16 Judicial Review Act 1991 (Qld) s 18(2), schs 1–2.
17 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 327. Applied by the Queensland Court of Appeal in, among others: *Palmer v Chief Executive, Corrective Services (Qld)* [2010] QCA 316 at [21].
18 See for e.g. *Evans v Firemann* (1981) 53 FLR 229 at 235; *Resort Management Services Ltd v Noosa Shire Council* [1995] 1 Qd R 311 at 317.
19 *Griffith University v Tang* (2005) 221 CLR 99 at 115 [89]. Applied by the Queensland Court of Appeal in, among others: *Flori v Queensland Police Service* [2016] QCA 239 at [44]–[45].
20 *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 351 [27]. This judgement was commenting on the federal jurisdiction but this applies equally to State Supreme Courts: Mark Aronson, Matthew Groves and Greg Weeks, Judicial Review of Administrative Action and Government Liability (Seventh Edition), 2021, p 26 [2.230]. See also: Anthony Mason, 'The High Court as Gatekeeper' (2000) 24(3) *Melbourne University Law Review* 784.
21 The Supreme Court adopts the process of the common law, rather than statutory orders of review pursuant to the Judicial Review Act 1991 (Qld).
22 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580–581 [96]–[100]. Applied by the Queensland Court of Appeal in, among others: *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at 537–538 [6], 540 [20], 543 [33], 555–556 [78].
23 Judicial Review Act 1991 (Qld) ss 20(2), 21(2), 23, 24. See also: Queensland Electoral and Administrative Review Commission, Report on Judicial Review of Administrative Decisions and Actions, 1990, p 42 [5.69].
24 Mark Aronson, Matthew Groves and Greg Weeks, Judicial Review of Administrative Action and Government Liability (Seventh Edition), 2021, pp 913 [15.10], 951 [16.10], 995 [17.10], p 1051 [18.10], 1093 [19.10]. This list is notably missing habeas corpus and quo warranto, which have been omitted for their lack of relevance in this briefing note. The prerogative writs have been replaced by orders: Judicial Review Act 1991 (Qld) s 41. However, the remedies available mirror the traditional prerogative writs and equitable remedies: Judicial Review Act 1991 (Qld) ss 30, 43.
25 Judicial Review Act 1991 (Qld) ss 11–14, 48.
26 Judicial Review Act 1991 (Qld) Part 4.
27 Either for an order that one party indemnifies another on a party-to-party basis or that each party bears their own costs: Judicial Review Act 1991 (Qld) s 49(1). Indemnification orders are prospective only: *Attorney-General (Qld) v Barnes* [2014] QCA 152 at [44]. In contrast, orders that the parties are to bear their own costs include previously incurred and future costs: *Foster v Shaddock* [2016] QCA 162 at [2], [16], [21].
28 Judicial Review Act 1991 (Qld) s 49(2).
29 Uniform Civil Procedure Rules 1999 (Qld) ch 18.

30 Judicial Review Act 1991 (Qld) ss 7, 20–22, 44. Historically, the rules of standing developed in relation to the prerogative writs and equitable remedies that were being sought. The introduction of the JR Act modified this by establishing a new test. Now, a person aggrieved, meaning someone whose interests are adversely affected, may apply for judicial review, irrespective of the remedy sought.

31 In Lock the Gate Alliance, Bowskill J (as she then was) rejected that Lock the Gate Alliance were a person aggrieved by the indicative approval of a transfer of a mining tenement for the Blair Athol Mine. Her Honour drew this conclusion from findings that the applicant had not demonstrated that it was affected in a legal or practical way beyond that of the public; the interests of the applicant were equivalent to that of the public, not beyond it; and the applicant had not demonstrated that judicial review would confer a benefit or relieve it of a detriment, greater than that of an ordinary member of the public: *Lock the Gate Alliance Ltd v Minister for Natural Resources and Mines* [2019] 1 Qd R 1 at 29 [75] – [76].

32 It is not mandatory to treat standing as a preliminary issue but it is usually appropriate: *Australian Conservation Fund Inc v Commonwealth* (1980) 146 CLR 492 at 532–533, 552.

33 Uniform Civil Procedure Rules 1999 (Qld) r 681(1). The purpose of the rule is to compensate the successful party, rather than punish the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 [67].

34 For Australian examples of this, see e.g. Hazardous Waste (Regulation of Exports and Imports) Act 1989 (Cth) s 58A; Environment Protection and Biodiversity Act 1999 (Cth) s 487; Nature Conservation Act 1992 (Qld) s 173O; Marine Parks Act 2004 (Qld) s 140.

35 For Australian examples of this, see e.g. Planning and Environment Court Act 2016 (Qld) s 11; National Parks and Wildlife Act 1974 (NSW) s 193; Heritage Act 1977 (NSW) s 153; Environmental Planning and Assessment Act 1979 (NSW) s 9.45; Wilderness Act 1987 (NSW) s 27; Protection of the Environment Operations Act 1997 (NSW) ss 252–253; Biodiversity Conservation Act 2016 (NSW) s 13.14.