QUEENSLAND LAW REFORM COMMISSION

MEMORANDUM

To: **QLRC Commissioners**

From: **Secretariat (Mining lease objections review team)**

Date: **21 February 2025**

Subject: **Further notes as to what may be an appropriate costs model for statutory appeal in the Land Court**

Overview

1. This memorandum augments the options paper on costs considered in the Commission meeting on 20 February 2025. It provides further information on 'Option 2: Soft costs model'. It covers information shared orally at the meeting, including insights from a meeting with Preston CJ of the Land and Environment Court of NSW on 19 February 2025 (post-preparation of the options paper).
2. This memorandum includes information on
   - the soft costs model generally, including its features and examples
   - how a soft costs provision may be an appropriate approach for statutory appeal in the Land Court, including what we heard from submissions, potential circumstances that could be included (including public interest as an access to justice matter), and how a costs provision could support a 'combined' statutory appeal in the Land Court,
   - a hypothetical soft costs provision for the Land Court Act.
3. Appendix 1 attaches all relevant provisions.
4. Appendix 2 attaches the options table on costs.

Terminology

'Costs neutral' or 'costs protective'	Parties bear their own costs thereby enabling parties to be 'protected' from an adverse costs order.
'Soft costs' model	The default rule is for parties to bear their own costs, however the court may order costs differently depending on a range of factors. Sometimes described as 'costs neutral with discretion'. Cf 'Hard costs' model which also has the default rule that parties bear their own costs, but the discretion of the court to order otherwise is much more restricted.

The soft costs model

5. A soft costs provision provides a default rule that parties bear their own costs but allows the court some discretion to decide on costs otherwise.

6. The Land Court and the NSW Land and Environment Court are examples of courts that have adopted soft costs provisions for certain types of proceedings.

7. Other Queensland court and tribunals operate as soft costs jurisdictions, for example the Planning and Environment Court[1] and QCAT.[2]

8. In the Land Court Act, a soft costs provision applies when the Court is acting in its recommendatory function:

> **52C Costs in relation to performing functions and exercising powers under recommendatory provisions**
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> ...
>
> (2) Each party to the performance of the function must bear the party's own costs in relation to the performance of the function.
>
> (3) However, the Land Court may make an order for costs as it considers appropriate if a party has incurred costs in 1 or more of the following circumstances—
>
> (a) for the performance of a function in relation to a relevant objection made by a party—the Land Court considers that all or part of the objection—
>
> (i) is outside the Land Court's jurisdiction; or
>
> (ii) is frivolous or vexatious; or
>
> (iii) is an abuse of the Land Court's process;
>
> (b) a party has not been given reasonable notice of an intention to apply for an adjournment of the performance of the function;
>
> (c) a party is required to apply for an adjournment of the performance of the function because of the conduct of another party;
>
> (d) without limiting paragraph (c), a party has introduced, or sought to introduce, new material;
>
> (e) a party has defaulted in the Land Court's procedural requirements;
>
> (f) for a hearing under the Mineral Resources Act 1989, section 78 or 268 in relation to an application for the grant of a mining claim or mining lease under that Act—
>
> (i) the applicant abandons the application or does not pursue the application at the hearing; or
>
> (ii) a party who made an objection to the application under section 71 or 260 of that Act withdraws the objection or does not pursue the objection at the hearing.

[1] Planning and Environment Court Act 2016 (Qld) ss 59, 60.

[2] Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 100, 102.

9. In the NSW Land and Environment Court Rules, a soft costs rule applies to merit appeals:

> **3.7 Costs in certain proceedings**
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> ...
>
> (2) The Court is not to make an order for the payment of costs unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances.
>
> (3) Circumstances in which the Court might consider the making of a costs order to be fair and reasonable include (without limitation) the following—
>
> (a) that the proceedings involve, as a central issue, a question of law, a question of fact or a question of mixed fact and law, and the determination of such question—
>
> (i) in one way was, or was potentially, determinative of the proceedings, and
>
> (ii) was preliminary to, or otherwise has not involved, an evaluation of the merits of any application the subject of the proceedings,
>
> (b) that a party has failed to provide, or has unreasonably delayed in providing, information or documents—
>
> (i) that are required by law to be provided in relation to any application the subject of the proceedings, or
>
> (ii) that are necessary to enable a consent authority to gain a proper understanding of, and give proper consideration to, the application,
>
> (c) that a party has acted unreasonably in circumstances leading up to the commencement of the proceedings,
>
> (d) that a party has acted unreasonably in the conduct of the proceedings,
>
> (e) that a party has commenced or defended the proceedings for an improper purpose,
>
> (f) that a party has commenced or continued a claim in the proceedings, or maintained a defence to the proceedings, where—
>
> (i) the claim or defence (as appropriate) did not have reasonable prospects of success, or
>
> (ii) to commence or continue the claim, or to maintain the defence, was otherwise unreasonable.

A soft costs provision in the Land Court

10. Reform to change the Land Court's role from a recommendatory function in the objections process, to a post-decision statutory appeal function would disengage mining lease and environment authorities proceedings from the costs rule set out in s 52C of the Land Court Act.

11. Without further reform, the relevant costs provision would become s 27A of the Land Court Act. An issue with s 27A is that it 'suggests' the jurisdiction of the Court may be costs neutral,[3] but ultimately preserves the discretion of the court (subject to any modifying provisions). Consequently, the cost protective features in s 27A cannot be relied upon.

[3] See, s 27A(2).

What we heard

12. Some submissions and consultations raised general costs concern as presenting barriers to justice in the Land Court.[4] Deterrence because of apprehension of an adverse costs order was specifically identified in submissions by the QHRC and EDO.

13. There was across the board support for a costs neutral provision in the Land Court (in the form of either a hard costs or soft costs model).[5]

14. A large number also expressed support for the court to be allowed to decide costs differently having regard to a statutory list of considerations.[6]

15. Public interest was the most suggested consideration that could feature in a statutory list.[7]

Potential considerations when exercising discretion

16. In determining what the considerations could be for a soft costs provision for statutory appeals in the Land Court, it is helpful to look to current statutory considerations. It is also helpful to consider the objectives of those considerations.

17. Statutory considerations could include those set out above in s 52C of the Land Court Act, and r 3.7 of the Land and Environment Court Rules. These considerations largely address the conduct of the parties in the proceedings (noting, both rules allow some consideration of questions of law to be a relevant factor).[8] The objective of conduct-focused costs rules allows for a party to be compensated for costs incurred because of unacceptable conduct by the other party.

18. Including public interest would encourage the Court to think beyond party conduct to consider the nature of the application and characteristics of the applicant. The objective of including public interest would be to facilitate certain types of public interest applicants who experience barriers to justice.

19. Research in this area indicates that courts tend to exercise their discretion to deviate from a given costs rule when the conduct of the party enlivens concerns of fairness and just compensation. Yet the qualities of a public interest applicant are less likely to give the courts sufficient reason to deviate from the given costs rule.[9] This may point to the benefit of an express reference to public interest in a statutory list of consideration.

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[4] See for example, Bruce Currie, Submission 23; Queensland Human Rights Commission, Submission 27; Lock the Gate, Submission 30; Queensland Law Society, Submission 38.

[5] Bar Association of Queensland, Submission 1; AgForce, Submission 8; Darling Downs Environment Council, Submission 17; Mackay Conservation Group, Submission 18; Steve MacDonald, Submission 19; Koala Action Inc, Submission 20; Gecko Environment Council, Submission 22; Dale Forrester, Submission 29; Lock the Gate, Submission 30; Australian Marine Conservation Society, Submission 31; Queensland Conservation Council, Submission 32; Environmental Defenders Office, Submission 33; Queensland Resources Council, Submission 36; Glencore, Submission 37.

[6] Bar Association of Queensland, Submission 1; Darling Downs Environment Council, Submission 17; Mackay Conservation Group, Submission 18; Steve MacDonald, Submission 19; Gecko Environment Council, Submission 22; Lock the Gate, Submission 30; Environmental Defenders Office, Submission 33; Glencore, Submission 37.

[7] Darling Downs Environment, Submission 17; Mackay Conservation, Submission 18; Steve MacDonald, Submission 19; Koala Action Inc, Submission 20; Gecko Environment Council, Submission 22; Lock the Gate, Submission 30; Australian Marine Conservation Society, Submission 31; Queensland Conservation Council, Submission 32; Environmental Defenders Office, 33; Queensland Resources Council, Submission 36; Queensland Law Society, Submission 38.

[8] Land Court Act, s 52C(3)(a)(i); Land and Environment Court Rules, r 3.7(3)(a).

[9] See, GE Dal Pont, Law of Costs (LexisNexis Australia, 5th ed, 2021) [8.66].

Provisions that address 'public interest barriers' and public interest indicia

20. In Queensland, examples of where public interest are a consideration include when deciding:

- whether to order each party bears their own costs, or if another party should indemnify the applicant for judicial review[10]
- whether to order security for costs.[11]

21. In the NSW Land and Environment Court, r 4.2 of the Land and Environment Court rules make public interest a key consideration for decisions on costs, undertakings for damages, and security for costs for judicial review.

> **4.2 Proceedings brought in the public interest**
>
> (1) The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.
>
> (2) The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.
>
> (3) In any proceedings on an application for an interlocutory injunction or interlocutory order, the Court may decide not to require the applicant to give any undertaking as to damages in relation to—
>
> (a) the injunction or order sought by the applicant, or
>
> (b) an undertaking offered by the respondent in response to the application,
>
> if it is satisfied that the proceedings have been brought in the public interest.

22. Discussions with Preston CJ revealed that the origins of r 4.2 is to improve access to justice in certain 'unrepresented public interest' matters. This is taken to exclude public interest matters that are well represented by parties who may not experience access to justice concerns, for example, economic or development aspects of public interest advanced by a party that is a resource company.[12]

23. Framing public interest as serving the objectives of improving access to justice can guide the courts on how to evaluate public interest factors. Case law around public interest and costs has also culminated in recognised, non-exhaustive indicia. These include:

- the extent to which the plaintiff and defendant were successful in the action
- where the plaintiff is an individual — whether they had any personal, private or financial gain to make from the litigation
- where the plaintiff is an association — whether its objects have a public character, and whether the litigation was pursued in accordance with those objects and for the purpose of fulfilling them
- whether there was widespread public interest in the litigation and its outcome, or the case was otherwise designed to effectuate important public policies
- whether, had the plaintiff succeeded, numerous people would have benefited from the action, through a clarification of the law or otherwise

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[10] Judicial Review Act 1991 (Qld) s 49(2)(b).

[11] Uniform Civil Procedure Rules 1999 (Qld) r 672(i).

[12] See also Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3) (2010) 173 LGERA 280 [26]-[36] per Preston CJ.

- whether the plaintiff would have had sufficient economic incentive to file suit even had the action involved only narrow issues lacking general importance.[13]

24. Discussions with Preston CJ revealed that a list of considerations of what may constitute public interest was intended to be added to r 4.2, but the experience of the Land and Environment Court is that case law is clear and is being consistently referred to, lessening the need for specification in the rule.

A costs provision for a 'combined' statutory appeal

25. The QLRC's draft recommendation to establish a combined statutory appeal to the Land Court has costs considerations. This is because traditionally, merits review costs provisions are ordinarily that parties bear their own costs. For judicial review, costs orders are, usually, that costs follow the event (however, see focus box below).

26. The approach adopted in r 3.7(3)(a) of the Land and Environment Court recognises the practical reality that there will be merit appeals that are intertwined with questions of law.

27. The rule also takes into consideration the compensation principle. For example, where an appeal is ultimately disposed of – either partly or wholly – by a question of law, there are arguments that it would be reasonable to depart from the costs neutral rule to compensate the party that has incurred costs:

> **3.7 Costs in certain proceedings**
>
> ...
>
> (3) Circumstances in which the Court might consider the making of a costs order to be fair and reasonable include (without limitation) the following—
>
> (a) that the proceedings involve, as a central issue, a question of law, a question of fact or a question of mixed fact and law, and the determination of such question—
>
> (i) in one way was, or was potentially, determinative of the proceedings, and
>
> (ii) was preliminary to, or otherwise has not involved, an evaluation of the merits of any application the subject of the proceedings

Focus: The traditional JR costs approach altered in the Judicial Review Act

While the ordinary rule for judicial review is that costs follow the event. It is important to recognise the innovative approach in the Judicial Review Act. Section 49(1) provides a costs provision introduced to address access to justice concerns.

This allows parties to make an application that the court should prospectively order either that

- another party indemnifies the applicant on a party-party basis for costs incurred from the time of the application, or
- parties are to bear their own costs.[14]

Under the Judicial Review Act, should parties not make a s 49(1) application costs order, the rule that costs follow the event applies.[15]

[13] GE Dal Pont, Law of Costs (LexisNexis Australia, 5th ed, 2021) [9.2].

[14] Judicial Review Act 1991 (Qld) s 49(1)(d)-(e).

[15] Judicial Review Act 1991 (Qld) s 49(4).

A proposal to implement a soft costs model for statutory appeals from decisions on a mining lease or associated environmental authority

28. A proposed implementation is to repeal the subsections of s 52C that refer to mining lease and associated environmental authority recommendations to create a new provision in the Land Court Act for statutory appeals that provides:

    - a default costs neutral rule for statutory appeal (each party to bear their own costs), and
    - an exception to the costs neutral rule that grants the Court discretion to consider awarding costs differently, having regard to a list of considerations.

29. Those considerations could include

    - where questions of law (or mixed questions of fact and law) have central or determinative impact with the result that the appeal is determined without an evaluation of the merits,
    - the conduct of the parties in proceedings, and
    - whether the appeal is brought in the public interest (conceptualised as an access to justice consideration).

30. This would not displace s 27A applying to all other proceedings in the Land Court.

Appendix 1: Provisions

Land Court Act 2000 (Qld)

27A Costs

(1) Subject to the provisions of this or another Act to the contrary, the Land Court may order costs for a proceeding in the court as it considers appropriate.

(2) If the court does not make an order under subsection (1), each party to the proceeding must bear the party's own costs for the proceeding.

52C Costs in relation to performing functions and exercising powers under recommendatory provisions

...

(2) Each party to the performance of the function must bear the party's own costs in relation to the performance of the function.

(3) However, the Land Court may make an order for costs as it considers appropriate if a party has incurred costs in 1 or more of the following circumstances—

(a) for the performance of a function in relation to a relevant objection made by a party—the Land Court considers that all or part of the objection—

(i) is outside the Land Court's jurisdiction; or

(ii) is frivolous or vexatious; or

(iii) is an abuse of the Land Court's process;

(b) a party has not been given reasonable notice of an intention to apply for an adjournment of the performance of the function;

(c) a party is required to apply for an adjournment of the performance of the function because of the conduct of another party;

(d) without limiting paragraph (c), a party has introduced, or sought to introduce, new material;

(e) a party has defaulted in the Land Court's procedural requirements;

(f) for a hearing under the Mineral Resources Act 1989, section 78 or 268 in relation to an application for the grant of a mining claim or mining lease under that Act—

(i) the applicant abandons the application or does not pursue the application at the hearing; or

(ii) a party who made an objection to the application under section 71 or 260 of that Act withdraws the objection or does not pursue the objection at the hearing.

Land and Environment Court Rules 2007 (NSW)

3.7 Costs in certain proceedings

(1) This rule applies to the following proceedings (except for appeals under section 56A of the Act)—

...

(2) The Court is not to make an order for the payment of costs unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances.

(3) Circumstances in which the Court might consider the making of a costs order to be fair and reasonable include (without limitation) the following—

(a) that the proceedings involve, as a central issue, a question of law, a question of fact or a question of mixed fact and law, and the determination of such question—

(i) in one way was, or was potentially, determinative of the proceedings, and

(ii) was preliminary to, or otherwise has not involved, an evaluation of the merits of any application the subject of the proceedings,

(b) that a party has failed to provide, or has unreasonably delayed in providing, information or documents—

(i) that are required by law to be provided in relation to any application the subject of the proceedings, or

(ii) that are necessary to enable a consent authority to gain a proper understanding of, and give proper consideration to, the application,

(c) that a party has acted unreasonably in circumstances leading up to the commencement of the proceedings,

(d) that a party has acted unreasonably in the conduct of the proceedings,

(e) that a party has commenced or defended the proceedings for an improper purpose,

(f) that a party has commenced or continued a claim in the proceedings, or maintained a defence to the proceedings, where—

(i) the claim or defence (as appropriate) did not have reasonable prospects of success, or

(ii) to commence or continue the claim, or to maintain the defence, was otherwise unreasonable.

4.2 Proceedings brought in the public interest

(1) The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.

(2) The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.

(3) In any proceedings on an application for an interlocutory injunction or interlocutory order, the Court may decide not to require the applicant to give any undertaking as to damages in relation to—

(a) the injunction or order sought by the applicant, or

(b) an undertaking offered by the respondent in response to the application,

if it is satisfied that the proceedings have been brought in the public interest.

Judicial Review Act 1991 (Qld)

49 Costs—review application

(1) If an application (the costs application) is made to the court by a person (the relevant applicant) who—

(a) has made a review application; or

(b) has been made a party to a review application under section 28; or

(c) is otherwise a party to a review application and is not the person whose decision, conduct, or failure to make a decision or perform a duty according to law, is the subject of the application;

the court may make an order—

(d) that another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party basis, from the time the costs application was made; or

(e) that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.

(2) In considering the costs application, the court is to have regard to—

(a) the financial resources of—

(i) the relevant applicant; or

(ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and

(b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and

(c) if the relevant applicant is a person mentioned in subsection (1)(a)—whether the proceeding discloses a reasonable basis for the review application; and

(d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c)—whether the case in the review application of the relevant applicant can be supported on a reasonable basis.

(3) The court may, at any time, of its own motion or on the application of a party, having regard to—

(a) any conduct of the relevant applicant (including, if the relevant applicant is the applicant in the review application, any failure to prosecute the proceeding with due diligence); or

(b) any significant change affecting the matters mentioned in subsection (2);

revoke or vary, or suspend the operation of, an order made by it under this section.

(4) Subject to this section, the rules of court made in relation to the awarding of costs apply to a proceeding arising out of a review application.

(5) An appeal may be brought from an order under this section only with the leave of the Court of Appeal

Appendix 2: Options table on costs

Key considerations (and relevant implications) for all options

Issue of costs in a combined statutory appeal

- The issue of costs in a combined statutory appeal to the Land Court may need to be addressed explicitly in the Land Court Act 2000, noting that different rules traditionally apply to the awarding of costs in merits and judicial reviews.
    - Traditionally, in a **merits review** proceeding, each party bears their own costs (see, for example, s 100 of the QCAT Act 2009). This rule is currently a default rule if the Land Court, or Land Appeals Court does not order costs for a proceeding as it considers appropriate (see s 27A of the LC Act below).
    - In **judicial review** proceedings, costs typically follow the event (see, for example, where an application for costs is not made under s 49(1) of the JRA the costs rule set out in the Civil Proceedings Act and the UCPR apply, which is that costs follow the event s 49(4) of the Judicial Review Act 1991; Alpine Pty Ltd v Brisbane City Council [2024] QSC 93 [4]; Attorney-General (Qld) v Barnes [2014] QCA 152 [44]–[47] (Atkinson J); Anghel v Minister for Transport (No 2) [1994] QCA 232; [1995] 2 Qd R 454 (McPherson JA).). The Judicial Review Act 1991, however, is singular across all judicial review statute in having costs provisions, particularly for specific matters.
- In correspondence with the QLRC, Ms Bedford advised that it may be preferrable that if each party is to bear their own costs following a Land Court statutory appeal, the Land Court Act 2000 should contain an explicit provision applying this rule. She advised that it may also be preferable that legislation contains a power for the Land Court to order otherwise in certain circumstances, including in the interests of justice, or in frivolous/vexatious proceedings.
- Complexities with the combined statutory appeal will need to be considered when deciding the most preferrable option to progress to a recommendation.

Land Court's discretion as to costs

- The Land Court exercises discretion to make orders as to costs, both under its recommendatory and judicial functions and powers.
- In relation to Land Court objections hearings, each party must bear its own costs (s 52C of the Land Court Act 2000). The Court may, however, make an order for costs if a party has incurred costs in one or more prescribed circumstances (s 52C(3) of the Land Court Act 2000). If Land Court objections hearings are removed, s 52C would, by consequence, require repeal. The prescribed circumstances in s 52C(3) may be of utility in the implementation of Option 2 (see below).
- In other Land Court proceedings, pursuant to s 27A of the Land Court Act 2000, the Land Court holds a broader discretion as to costs. It may order costs for a proceeding as it considers appropriate. This includes by way of costs following the event, which is the general rule about costs in civil procedure (see s 681 of the Civil Procedure Rules 1999) and judicial review (s 46(4) of the Judicial Review Act 1991; Alpine Pty Ltd v Brisbane City Council [2024] QSC 93 [4]; Attorney-General (Qld) v Barnes [2014] QCA 152 [44]–[47] (Atkinson J); Anghel v Minister for Transport (No 2) [1994] QCA 232; [1995] 2 Qd R 454 (McPherson JA).). If the Land Court does not make such order, each party to a proceeding must bear their own costs. In MacMines Austasia Pty Ltd v Chief Executive, Department of Environment, Science and Innovation (No 3) [2024] QLC 21 ('MacMines'), Member McNamara defended the broad discretion conferred upon the Court under s 27A. He observed a default rule emerging in case law before the Land Court; parties were bearing their own costs. McNamara M stated that where a costs application is made, 'the Court must exercise its discretion without caprice, having regard to relevant considerations and established principles. Section 27A does not establish a "general rule" that each party should bear its own costs'.

Option 1: Court retains discretion as to costs – Rely on s 27A, Land Court Act 2000

Key considerations (and relevant implications)

- Option 1 proposes to rely on s 27A of the Land Court Act 2000 for post-decision statutory appeals. The scope of the discretion afforded to the Land Court to award costs in s 27A is mirrored in s 57A of the Land Court Act 2000 which applies to appeal proceedings and gives the Land Appeal Court power and discretion to award costs. Pursuant to s 57A, the Land Appeal Court may order costs from an appeal to the Court as it considers appropriate. If the Land Appeal Court does not make such order, each party to a proceeding must bear their own costs.
- Under Option 1, which would apply s 27A to a statutory appeal jurisdiction, the Land Court would have discretion and flexibility to apply different cost rules, as it considers appropriate. There would be scope for the Court to consider whether it is in the interests of justice for parties to bear their own costs. It would also have the power and discretion to order, perhaps in limited circumstances, for the successful party to pay the unsuccessful litigant's costs.

Arguments in support	Counter arguments
• Promotes consistency in how costs would be approached (for example, power and discretion to apply different cost rules) by the Land Court. This includes consistency between a Land Court statutory appeal and ordinary proceedings and appeal proceeding before the Land Appeal Court. • Provides flexibility in which cost rules could be applied. For instance, permits the possibility of costs following the event which could support applicants, with some reasonable prospect of success, to obtain legal representation. • The Land Court's discretion is not limited more than is already the case. • Preserves jurisprudence and guidance. • Does not require reform, but for the repeal of s 52C.	• Where there is a broad discretion as to costs, this can be deterrent for parties that are not well resourced and are apprehensive of an adverse costs order. • Most submissions prefer a form of costs protection (protection from adverse cost orders) and certainty at the outset. • Option 1 is inconsistent with approaches taken in other Acts: - Judicial Review Act 1991: gives the possibility of prospective costs protective orders - Planning and Environment Court Act 2016 and QCAT Act 2009: adopt a 'soft cost' protective model (see Option 2) - Land and Environment Court Act 1979: affords express discretion to not awards costs against an unsuccessful public interest applicant. • The power and discretion afforded to the Land Court in s 27A to apply different cost rules presents some confusion. While McNamara in MacMines affirmed that there is no general rule that party bears their own costs, he observed that case law may suggest that the Land Court tends to favour that party bears their own costs. An applicant cannot, however, rely on the application of this rule. • There is no list of express factors that the Land Court may (or must) consider when awarding costs. For example, the Land Court is not required to consider (but may consider of its own volition) the position of the parties, public interest motivations of the applicant, or if the applicant is an Aboriginal or Torres Strait Islander person/landholder (these factors have been identified in submissions). • Case law about a court's discretion as to costs, and when to depart from the ordinary rule, already recognises established principles and factors. For example, the

	position of the parties, public interest features of the applicant, who may benefit from the applicant's success, or if the applicant is an Aboriginal or Torres Strait Islander person/landholder. These could be codified without much controversy.

Option 2: 'Soft costs' model – Each party bears their own costs. The Land Court retains discretion to award costs differently where circumstances warrant deviation from this rule

Key considerations (and relevant implications)

'Soft costs' model

- In the 'soft costs' model proposed, each party would bear their own costs for Land Court statutory appeal proceedings. The Land Court would, however, retain a discretion to award costs differently where circumstances warrant deviation from this rule. This model reflects, to some extent, the costs model in s 52C of the Land Court Act 2000 (see, Key considerations for all options) which applies to the Land Court's recommendatory jurisdiction.
- This model is adopted in the Planning and Environment Court Act 2016 in relation to merit reviews. Section 59 of the Act establishes a rule that parties bear their own costs for proceedings. Pursuant to s 60 of the Act, the Planning and Environment Court has the power and discretion to make an order for costs as it considers appropriate if a party has incurred costs in one or more circumstances which are listed under s 60(1).
- The Land and Environment Court (NSW) follows a soft costs approach for administrative review matters (reg 3.7, Land and Environment Court Rules 2007). This approach is guided by the principles of fairness and reasonableness in the circumstances. A range of soft cost provisions also exist in tribunal Acts (see, for example, ss 100 and 102, QCAT Act 2009).

Factors to be considered when exercising discretion and deviating from parties bearing their own costs

- Soft cost provisions tend to be accompanied by a list of (exhaustive and non-exhaustive) statutory factors a court/tribunal must consider when exercising its discretion in awarding costs. These factors can include:
  - conduct during proceedings
  - the nature and complexity of the dispute
  - relative financial position of the parties
  - case management principles.
- The prescribed circumstances listed under s 52C(3) Land Court Act 2000 may have utility in a soft cost model. These factors include that an objection is outside the Court's jurisdiction, frivolous or vexatious, or an abuse of the Court's process. Land Court Practice Direction 4 of 2018, which applies to procedure for mining objections hearings, also sets out, at [84], matters that the Court will take into account in deciding whether to make a costs order. These matters could also inform the factors considered by the Court in a statutory appeal (with modification) as part of a soft costs model and include:
  - whether the application or an objection was made primarily for an improper purpose
  - whether the application or an objection was frivolous or vexatious
  - whether a party has introduced, or sought to introduce, new material at the hearing
  - whether a party has defaulted in the Court's procedural requirements

- whether the applicant for a mining claim, mining lease, or environmental authority did not give all the information reasonably required to assess the application
- whether the applicant or an objector abandoned or did not pursue their application or objection at the hearing
- any other relevant factor.

- Factors codified under s 60(1) of the Planning and Environment Act 2016 are similar and may also have utility.
- In certain matters (which includes judicial review of administrative decisions), the Land and Environment Court may exercise discretion to not order costs against an unsuccessful applicant, if satisfied the proceedings were bought in the public interest (reg 4.2 of the Land and Environment Court Rules 2007). In decisions where a court's discretion as to costs is unfettered, they have expressed that public interest applicants ought not to be granted a 'free kick at litigation' (Oshlack v Richmond River Council [1998] HCA 11, [6] (Kirby J)).

Implementation

- The soft costs model could be implemented by:
  - **Relying upon and amending s 27A**: unless the soft costs model to be applied to statutory appeals was inserted as a separate/discrete sub-section, this reform would affect the cost model applied to all Land Court general proceedings, which would in turn, curtail the discretion of the Court which enables it to order costs for a proceeding as it considers appropriate as the default rule. The amendment could include a list of exhaustive or non-exhaustive factors the Land Court must consider when it exercises its discretion to deviate from the general rule that each party bears their own costs.
  - **Introducing a new provision**: this would apply to statutory appeals only. It could include a list of exhaustive or non-exhaustive factors the Land Court must consider when it exercises its discretion to deviate from the general rule that each party bears their own costs.
- Including public interest as a factor to consider could be achieved by:
  - Listing a range of factors that may feature in a public interest application for example: 'whether the applicant will make a personal, or financial gain from a successful outcome'; 'where the applicant is an association, whether its objects have a public character and the application was pursued in accordance with those objectives'; 'whether numerous people would benefit from the applicant's success' or
  - Referring simply to 'whether the proceedings are brought in the public interest' and allow the Land Court to decide if it is a public interest application.

Arguments in support	**Counter arguments**

• Consistency with current cost provisions in the Land Court Act 2000:
  - s 52C (the current costs provision for recommendatory matters) is a soft costs provision with factors the court may consider
  - s 27A(1)(b) refers to a soft costs approach albeit the costs discretion of the court is the default rule (i.e. s 27A is 'almost' costs protective).
• A soft costs approach appears to be favoured by stakeholders in submissions, particularly if it allows the Court to consider public interest factors.
• There is some precedence for a soft costs approach in other legislation (Planning and Environment Court Act 2016; Land and Environment Court Rules 2007; QCAT Act 2009).
	• While Option 2 aligns with a traditional cost model for merit reviews, it does not reflect the traditional approach to costs for judicial review. The discretion afforded to the Land Court to award costs differently where circumstances warrant deviation might, however, create enough flexibility to apply a different cost rule where the statutory appeal is, in effect, judicial in nature. This may need to be accounted for expressly in the list of factors to be considered by the Court when exercising its discretion.
	• Fetters the Land Court's discretion when compared to Option 1.
	• Does not 'go as far' as an asymmetrical approach (see Option 3). Some submissions supported an asymmetrical model, particularly when the applicant is an Aboriginal or Torres Strait Islander person or landholder.

• Could better support certain applicants to access a statutory appeal, for example Aboriginal or Torres Strait Islander applicants or public interest applicants. • The possibility of costs being ordered in the applicant's favour remains open at the Court's discretion, as exercisable under a statutory list of considerations. • A soft costs provision with listed factors can include a range of relevant considerations already identified in case law or reflected in comparative provisions.	• Bearing one's own legal costs still presents access issue for some applicant groups. • A soft costs approach may prevent accessing legal representation. • Costs protective provisions are designed assuming the applicant experiences access to justice barriers, this is not the case for some applicants.

Option 3: Limited discretion model – Land Court has discretion to order applicant's costs paid by another party, or parties bear their own costs

Key considerations (and relevant implications)

- This limited discretion model is modelled on s 49 of the Judicial Review Act 1991, which applies to judicial reviews, and follows substantive equity principles.
- Option 3 would introduce a new provision to the Land Court Act 2000 that enables an applicant, or other party in a statutory appeal proceeding to the Land Court, to make an application as to costs.
- Under Option 3, the Land Court's discretion would be limited to making an order that:
  - an applicant's costs be paid by another party (for example, the respondent) or
  - each party bear its own costs.
- This approach would require a prospective decision as to costs, potentially at a directions hearing.
- In considering a cost application, the Land Court would have regard to a list of factors, either those factors provided in sub-ss (2) and (3) of s 49 of the Judicial Review Act 1991, or alternative factors (see above). As is the case with s 49(2)(b) of the Judicial Review Act 1991, public interest could be listed as a factor to be considered. If this is done, it would be beneficial to define 'public interest' in the Land Court Act 2000 or in a practice direction.
- If an application as to costs is not made, the ordinary costs rule of 'costs follow the event' would apply. This rule is traditionally applied in judicial review proceedings; it is not typically applied to merit review proceedings. This would have bearing on a combined statutory appeal that, in effect, is a merits review.
- A new provision modelled on s 49 of the Judicial Review Act 1991 would be inconsistent with the power and discretion afforded to the Land Court in s 27A of the Land Court Act 2000 and the Land Appeal Court in s 57A. This inconsistency would need to be justified with clear policy.

Arguments in support	**Counter arguments**
• The Judicial Review Act 1991 is the only judicial review statute with a costs provision that directs/limits the court's discretion. The costs provision in the Judicial Review Act 1991 is historically linked to access to justice and improving government accountability (see, Fitzgerald Inquiry; Narelle Bedford, 'The Winner Takes It All: Legal Costs as a Mechanism of Control in Public Law' (2018) 30(1) *Bond Law Review* 128).	• Fetters the Land Court's discretion when compared to Options 1 and 2. • In exercising discretion to decide on the appropriate costs model, previous decisions have drawn on public interest cases jurisprudence which establishes it is exceptionally rare for courts to decide favourably on costs because of the circumstances of a public interest applicant. Consequently, courts have not tended to utilise s 49(1)(d) of the Judicial Review Act 1991, despite cases with arguably strong public interest features.

• Follows a costs protective approach (favoured by most submissions) but enables the Land Court to decide costs orders based on the nature of the proceeding and the characteristics of the applicant (for example, a proponent applicant or an individual applicant). • Retains some (albeit limited) discretion of the Land Court to vary the original costs decision. • Already in effect. The Land Court may be able to draw on jurisprudence and guidance notes. • Section 49(1)(d) of the Judicial Review Act 1991 is reflected in reg 4.2, Land and Environment Court Rules 2007 with deals with review proceedings bought in the public interest.	• While s 49(1)(d) of the Judicial Review Act 1991 follows substantive equity principles, well-resourced proponent applicants would argue a formal equality approach (same rules for all) is fairer. • Requires the applicant to make an application as to costs. This may disadvantage any self-represented applicants.