13 September 2024

To whom it may concern
Queensland Law Reform Commission
By email: qridpcommunication@resources.qld.gov.au.

Consultation Paper – July 2024: Review of mining lease objections processes

We refer to the publication of the consultation paper *Reimagining decision-making processes for Queensland Mining* (**Consultation Paper**) published by the Queensland Law Reform Commission (**Commission**).

Energy & Resources Law Association Limited (**E&R Law**), formerly known as AMPLA, was founded by a group of lawyers passionate to bring professionals working across the energy and resources space together; to learn from one another ("experts learning from experts"), share experiences and exchange information. Established over 40 years ago and now with over 1,000 members, ER Law is a not for profit association and is the peak law industry body, providing a forum to network, discuss, debate and provide expert input to the development of the law, policy and practice in the energy and resources sector. E&R Law does not undertake lobbying or advocacy, but does contribute, at both the national and state level, to reviews of legislation and regulations, as well as government guidelines and practice notes.

Below is outlined the Queensland branch of E&R Law's submission and feedback on the Consultation Paper. This submission does not address all of the questions raised in the Consultation Paper and is intended to outline legal and practical issues that may arise if the proposals outlined in the Consultation Paper are adopted.

Guiding Principles
The guiding principles, namely a 'fair, efficient, effective and contemporary' mining lease objections process, are supported by E&R Law. However, our concern is that a number of the proposals contained in the consultation paper do not meet these principles and will, in fact, result in an inefficient process that duplicates other processes that are required to be followed in order to develop a mining project in Queensland.

Proposal 1((a)-(b): Removal of Land Court pre-decision and inclusion of integrated non-adversarial participation process
The concept of the introduction of an integrated, non-adversarial participation process is supported including the removal of the Land Court objections hearing pre-decision.

Proposal 1(c): Proposed Aboriginal and Torres Strait Islander Advisory Committee
The Commission has proposed that when a project may impact the rights of Aboriginal peoples and Torres Strait Islander peoples, an Aboriginal and Torres Strait Islander Advisory Committee would be established, to consult with community and identify relevant interests and gather and share community input with decision-makers.

E&R Law emphasises the importance of effective consultation and respect for the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in the mining lease and environmental authority application processes. However, our members are concerned that the proposed Aboriginal and Torres Strait Islander Advisory Committee could duplicate, and not operate cohesively with, the current processes under the *Native Title Act 1993* (Cth) (**Native Title Act**) and the *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (**Cultural Heritage Acts**).

As the Commission recognises, under the current processes certain native title and cultural heritage requirements must be met before a mining lease and associated environmental authority are approved. Generally, a proponent will:

1. enter into a native title agreement with the appropriate native title party under the Native Title Act to provide for the relevant future act consents (ie, an agreement entered into following the Right to Negotiate process, or an Indigenous Land Use Agreement); and
2. enter into a cultural heritage agreement with the relevant Aboriginal or Torres Strait Islander party under the Cultural Heritage Acts (ie, a Cultural Heritage Management Agreement or approved Cultural Heritage Management Plan (**CHMP**) noting the mandatory nature of an approved CHMP for projects requiring an EIS).

Entering into these agreements requires significant consultation with the Aboriginal or Torres Strait Islander people who speak for the relevant country.

Establishing an Aboriginal and Torres Strait Islander Advisory Committee to consult with community and provide advice to decision-makers would duplicate these consultation processes, could contribute to project delay, and could result in situations where the Committee provides the decision-makers with advice which is at odds with the native title and cultural heritage processes already carried out. E&R Law is also concerned that the proposal does not provide enough detail about the membership of the Aboriginal and Torres Strait Islander Advisory Committee. Our initial concerns include that:

1. the Commission notes the need to consider how to ensure the most appropriate people are appointed from the relevant community, but does not provide detail around proposals about how to identify and appoint these people. There is risk that the Committee membership diverges from those individuals who have standing as a native title party under the Native Title Act or Aboriginal/Torres Strait Islander Party under the Cultural Heritage Acts;
2. the membership of the Aboriginal and Torres Strait Islander Advisory Committee is likely to be contentious, and questions may arise about the legitimacy of any decisions made by this entity, ie:
    a. will they be accepted by Aboriginal or Torres Strait Islander people where the Aboriginal and Torres Strait Islander Advisory Committee is not compromised of people who speak for country; and
    b. how will conflicts between potentially divergent positions of the relevant Aboriginal or Torres Strait Islander party under the Cultural Heritage Acts and native title party under the Native Title Act, and the Aboriginal and Torres Strait Islander Advisory Committee be resolved?
3. the consultation papers indicate that a new Aboriginal and Torres Strait Islander Advisory Committee would be established for each mining proposal that may affect the rights and interests of Aboriginal peoples and Torres Strait Islander peoples. The process for identifying the appropriate members for each advisory committee is likely to be contentious and time and resource intensive;
4. it is proposed that an Aboriginal and Torres Strait Islander Advisory Committee would give advice on broader issues about the proposed mine as well as on specific issues such as cultural heritage. It is not clear how members would be selected to ensure the Advisory Committee would have the expertise to comment on broader issues about the proposed mine, or what these broader issues would be;
5. concern about the potential for significant conflicts of interest for persons involved in the Aboriginal and Torres Strait Islander Advisory Committee; and
6. questions around the resourcing (including appropriate remuneration) and size of the Aboriginal and Torres Strait Islander Advisory Committee.

Proposal 2: Central online government portal

E&R Law supports the establishment of a new online portal for notifying mining leases and associated environmental authorities. The current notification process is outdated and involves significant duplication. Providing a ‘one stop shop’ for notices and documentation associated with the mining lease application and the associated environmental authority will increase the efficiency and effectiveness of the process.

It will though be important that the online portal notification process delivers the necessary certainty for the process. For example, there still will need to be clear dates for giving of notices calling for submissions/objections and clear deadlines for when those may be made, so applicants have a clear understanding of the timeframe for the application process and what submissions/objections they are responding to.

Proposal 3: Independent Expert Advisory Committee

The Commission has proposed implementing an Independent Expert Advisory Panel (**Panel**), that would provide technical advice to the decision maker for environmental authority applications that meet specific criteria.

Common criticisms of advisory panel processes in other jurisdictions include a lack of transparency, particularly with respect to how the panel interacts with the decision-making process. Ideally, any final advice of the Panel would be made available to the proponent and other interested parties (for instance, via the Portal proposed pursuant to Proposal 2), and could perceivably amalgamate easily with existing statutory provisions regarding provision of information notices (or "reasons") following the making of any relevant decision.

The implementation of the Panel would also likely add an additional layer of uncertainty to the mining lease approval process. Whilst the proponent may address the concerns or requests of the government decision-maker during pre-lodgement conferences and during the application process (for instance, when responding to the relevant department's requests for further information), the interaction of the Panel when a decision is ultimately made does give rise to a risk the decision maker's position may alter at a late stage, potentially with respect to the decision to grant, but also with respect to what conditions it may impose. It is unclear how early the Panel is intended to be formed to allow the proponent to understand its position and, if necessary, amend its proposal accordingly.

If this proposal is implemented, the Panel members should each be required to have a minimum amount of practical, commercial experience in their field of expertise. This approach has previously been implemented in Queensland in other statutory processes. For instance, the *Water Act 2000* (Qld) (**Water Act**) allows the chief executive administering the Water Act to publish guidelines outlining the minimum qualifications required for hydrogeologists undertaking baseline assessments and bore assessments pursuant to Chapter 3 of the Water Act. These guidelines stipulate the types of practical experience required, and the minimum amount of time the person must have practiced in those areas.[1] However, the introduction of the Panel comprised of technical specialists does limit the availability of those experts to advise project proponents.

Ultimately, E&R Law does not support the establishment of a new Independent Expert Advisory Panel. Such a panel would derogate from the authority of the relevant government departments whose statutory role is to assess and determine the relevant application, in circumstances where the relevant government departments have likely already engaged with the project proponents and provided feedback. Further, the establishment of such a panel would effectively disqualify the experts that are on that panel from otherwise advising either the proponent of the mining project or any of the other relevant stakeholders.

Proposal 4: Amended statutory criteria

Whilst E&R Law does not oppose the additional statutory criteria, the composition of those statutory criteria should be:

1. consequential to whatever changes are made to the participation process and should ensure that whatever participation process has been provided for is included in the relevant statutory criteria; and

[1] Guideline for Bore Assessments (ESR/2016/2005) (https://www.des.qld.gov.au/policies?a=272936:policy_registry/rs-gl-bore-assessment.pdf), section 2.1.

2. should not duplicate processes provided for under other statutory enactments, both state and federal.

Proposal 5: Proposed statutory criterion requiring decision-makers to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples
E&R Law notes the proposal to require decision-makers for mining leases and environmental authorities to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage.

The Commission suggests that this consideration could be informed by the advice of the proposed Aboriginal and Torres Strait Islander Advisory Committee and by advice on Aboriginal and Torres Strait Islander rights and interests by a member of the proposed Independent Expert Advisory Committee with this expertise.

For the reasons outlined above in relation to Proposal 1(c), E&R Law is concerned that requiring decision-makers to consider the advice of the Aboriginal and Torres Strait Islander Advisory Committee or the Independent Expert Advisory Committee with respect to land, culture and cultural heritage could result in situations where the Committee/s provide the decision-makers with advice which is at odds with the native title and cultural heritage processes already carried out.

Proposal P6(a)-(b): Merits Review by Land Court following Decision
E&R Law has concerns with the proposal to have the Land Court, subject to any appeal rights, as the final arbiter of the mining lease objections process. E&R Law supports the Court maintaining a role in the mining lease approval process, as the Court has an important function in providing an independent forum for opponents of a mining project to have their objections ventilated. Unlike development approvals in the planning context, mining leases are granted by the Crown, not a statutory authority (comprised by the relevant local government), involves the exercise of ministerial discretion and is ultimately a political decision based on what is considered to be in the overall public interest by the government of the day. It is a decision by a Minister in relation to the best use of the State's mineral resources, taking into account the consequences (both positive and negative) of the project proceeding. A decision to exploit or sterilise a particular mineral resource, or decide what is best for the 'public interest' of the people of Queensland, should not be made by the courts, as that is ultimately not a legal question. It should be made by an elected government/Minister who will be answerable for such decisions at State elections.

As such, if the Land Court is to provide a merits and judicial review, the outcome of the merits review should be either to approve the decision of the Minister or to set aside the original decision and return it to the decision maker to remake with recommendations or directions.

Proposal P6(c): Post-Decision Review to be on the evidence before primary decision maker, unless exceptional circumstances are established
If the Land Court is to be the final arbiter on a decision to grant a mining lease and associated environmental authority, the Commission's proposal for the merits review by the Land Court is that such a review will be undertaken on the evidence that was before the primary decision maker unless exceptional circumstances are established. It is unclear what might constitute exceptional circumstances.

The approach is arguably justified, as a de novo hearing with the ability to introduce new evidence would permit a Land Court hearing of evidence that may not have been subject to the non-adversarial participation process. However, there are circumstances where further evidence would indeed be warranted.

For instance, the chief executive administering the *Environmental Protection Act 1994* (Qld) and the Minister for Resources may impose conditions on the environmental authority or mining lease respectively where such conditions were not previously available for consideration by the proponent (for example, they may be included within any draft environmental authority circulated). Imposition

of conditions can, at times, require the proponent to amend their project, or require additional evidence to support a review of the decision to impose such conditions. A merits review process, if adopted, must contemplate a review initiated by a proponent opposing conditions and seeking to introduce new evidence to support its application for review.

Furthermore, it is often the case that public submissions from community members opposed to mining (being, predominantly, landholders and environmental activists) are not developed to a degree of specificity that permits the proponent to have certainty that its application material addresses the issues underpinning the objector's submission. At times, the concerns of the objector are only fully understood (or developed) within the objections hearing. In such circumstances, the proponent is prejudiced in being limited to only that evidence that was before the primary decision-maker.

Other matters for consideration

Standing

In relation to standing, given the intention to have a comprehensive and inclusive participation process, E&R Law suggests standing should be limited to those who have participated in that process or any other party whose interests will be adversely affected by the project. To be fair, effective and efficient, the process should not allow a third party without a legal or proprietary interest that will be adversely affected by the decision to intervene at a late stage of the process.

Interactions with other laws

Cultural Heritage Acts

E&R Law is of the view the relevant decision maker should be entitled to rely on the relevant Cultural Heritage Acts as sufficient consideration of Aboriginal or Torres Strait Islander interests in relation to Cultural Heritage. We agree there is widespread dissatisfaction of all stakeholders in relation to the outcomes under the Cultural Heritage Acts, but the process for addressing that dissatisfaction is the current review of the Cultural Heritage Acts and not this process.

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

It is E&R Law's view that the *Regional Planning Interests Act 2014* (Qld) and the *Strong and Sustainable Resource Communities Act 2017* (Qld) should be repealed. If, as proposed, a fair, efficient, effective and contemporary mining lease objections process is introduced as a part of this review, those two acts will essentially be redundant. It is our view those two acts are duplicative of the mining lease application and environmental authority process and an integrated, non-adversarial participation process should address the issues that are sought to be addressed by these Acts.

Pre-lodgement

E&R Law does not support a legislated pre-lodgement process. We do not consider that such a process would contribute to the efficient and effective operation of the process. The legislation already provides an early-stage assessment of whether an application is 'properly made'. To include an additional step in the process would be duplication.

If the Commission would like to discuss how we can assist or has any other queries, please do not hesitate to contact me.

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President
Energy and Resources Law Association – Queensland Committee
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