Environmental Defenders Office

Submission to the Queensland Law Reform Commission Consultation Paper on the Review of Mining Lease Objection Process

30 September 2024

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Queensland Law Reform Commission
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Acknowledgement of Country

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

A note on language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term 'First Nations'. We acknowledge that not all First Nations will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.

The Role of the EDO

EDO is a non-Indigenous community legal centre that works alongside First Nations peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction.

EDO has and continues to work with First Nations clients who have interacted with western laws, including litigation and engaging in western law reform processes.

Out of respect for First Nations self-determination, EDO has provided high-level key recommendations for western law reform to empower First Nations to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

Executive Summary

The Environmental Defenders Office Ltd (**EDO**) welcomes the opportunity to contribute to the inquiry by the Queensland Law Reform Commission (**QLRC**) into the mining objection hearing process in Queensland. Thank you for accepting this submission, and for the work of the QLRC in preparing the recommendations in the Consultation Paper.

EDO has been working within the mining objection process for decades, assisting many clients to understand, to self-represent and to participate with our representation in this process. Through this experience we have found that the current process for the Land Court merits objection hearing generally provides for a procedurally fair and appropriate assessment of the application put forward by a proponent for some of the largest environmentally impactful projects proposed in Queensland. However, there are various changes that could be made to the framework providing for the process which would greatly enhance clarity, fairness, efficiency and effectiveness of the objection processes. Many of these changes have been captured by the recommendations of the QLRC in the Consultation Paper. We offer support for most changes and recommendations on particular areas to address some issues we have become aware of through our work with communities.

From our experience assisting many members of the public, First Nations, individuals, and public interest organisations engaging with the mining objection hearing process, we consider that these recommendations would greatly improve the ability for all stakeholders in the community to participate in this important process.

Below we have provided a summary of our responses to the recommendations that are formed from our experience, followed by a more detailed discussion of these recommendations. Should any element be unclear or should further information or discussion be desired with respect to any of these recommendations, please do let us know and we will gladly assist.

In this submission, we make the following recommendations in response to the discussion questions in the following QLRC Consultation Paper released in July 2024 'Reimagining Decision-making Processes for Queensland Mining'. We note that we have not responded to all questions due to constraints on our capacity.

Summary of EDO Recommendations

1. **Overall, the EDO supports many of the recommendations made by the QLRC and considers that they will provide for effective solutions to address some of the issues with the current mining objection hearing process.**

2. **We note the following key recommendations to ensure the new proposed process achieves the aim of a fair, efficient, effective and contemporary process:**

a) **We support the change to a post-decision review process by a Court, incorporating the right to seek review on the merits or via judicial review.** We agree this will provide for increased accountability in government decision-making, and ensure that the Court is performing its appropriate role in the balance of powers.

b) **However, we note that a stay on the applicant acting on any approval must be legislated to automatically apply until the appeal period is finished, whether that is the Court proceeding being decided or just until the appeal period ceases if no appeals occur.** This will ensure there is no need for objectors to waste resources fighting for the stay to apply, to ensure the review process isn't nugatory.

c) **We encourage greater public participation options, to improve community understanding and input opportunities early on in a proponent's consideration of their application.** We note particularly:

   i. There is great benefit particularly in providing for community information sessions/ open house/ public meeting options to allow anyone to attend.

   ii. We raise concern about community reference group options where these may entrench any community politics, causing some members of the community to not be heard.

   iii. We do not support the tailored participation options – each application should be subject to the same requirements so that there is certainty and clarity for all on the process that will be applied to a project.

   iv. We suggest longer time periods for submissions may lead to more helpful submissions and less stress in communities to get across significant application materials in a short time.

d) **We support the expert advisory and First Nations advisory bodies to assist in the best decision being made on the best evidence and fulsome participation by any First Nations peoples impacted, regardless of native title status.**

   i. We recommend incorporating clear requirements for avoiding conflicts of interest in both bodies – whereby any expert or First Nations person who may have a conflict of interest with a particular project or area of Country or heritage should be required to declare those conflicts and stand down from being involved in those areas.

   ii. The experts appointed to the Independent Expert Advisory Committee (**IEAC**) must be suitably qualified to evaluate and comment on mining applications. To this effect, there must be transparency for the public around the processes of appointment, tenures and expertise of the experts.

   iii. The areas of focus of the IEAC should be broad enough to encompass any issue that may arise through an application, even unforeseen areas, to ensure the decision makers are able to provide a well-informed assessment and decision on each application.

iv. The criteria for involvement of the IEAC should be low, where the Department can call on their advice no matter the application should it be of assistance to them.

v. The advice of the IEAC should be publicly available, including also any information requests and responses to the Department or the proponent.

e) **We strongly support open standing for submissions, and both merits and judicial review.** Given this is a public interest matter it is appropriate that there then be no limitation on who can then have their say on the application.

f) **To ensure First Nations peoples can have their say on applications which impact or concern them and/or their Countries, in a culturally safe way,** we recommend that the QLRC provides a recommendation for:

i. the removal of the power to insert gag clauses in native title agreements which limit the rights of First Nations peoples to be heard on applications that impact their Countries and the conditions which the regulator may place on the project;

ii. the implementation of a Cultural Protocol for appropriately receiving evidence from First Nations people, as was adopted in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 3.

g) **We strongly support the information portal.** This is an excellent tool which will ideally provide a central place for all information before the decision maker to be transparently accessible to all. This will assist in providing certainty and clarity as to where information can be found in the one place – not across multiple different websites of the government or proponent/s.

h) **We encourage further improvements to public notification, including making any submission to an Environmental Authority (EA) application or an Environmental Impact Statement (EIS) process give rise to standing to then appeal the decision on the EA,** rather than the current confusion created by only one of these processes leading to a right to be heard in the Land Court. We encourage the mining lease (**ML**) and EA to be notified at the same time. We further encourage:

i. The application notification process for the EA and ML be combined to reduce confusion in the community and to ensure deadlines for submissions are not missed.

ii. Options to subscribe to email notifications for areas or types of mining of concern to community members, to avoid needing to scroll through the internet or newspaper every day to see if something has been notified.

iii. Continuation of notification of regional projects in locally circulating newspaper, and in the Koori mail as many community members (especially

those without access to the internet/IT) continue to access information about forthcoming decisions from these locations, rather than from government websites and portals.

iv. Notification requirements directly to any person who may have an interest or may be impacted by the application, including any First Nations peoples claiming interests in the land, conservation organisations, landholders who may be impacted in any way by the mining proposal etc.

i) **We support the applicant being limited to the evidence of its application.** We trust that this may mean applicants improve the quality of their environmental impact assessment and other elements of their application, and that applications cannot change mid-review, post-assessment. Poor quality applications should be sent back to the start of the application process to commence again with improved applications.

j) **We do not support objectors being limited to the content of their objection/ submission.** Submission periods are typically very short compared to the voluminous documents that must be revised. There is very little time to draft the submission, let alone to engage an expert on their behalf. Further, the application can change up until the decision point and the conditions are a key factor in addressing or raising issues the community may have. Community members should not be limited in the matters they seek review of to their submissions, just as community members are not limited when appealing a planning decision under the *Planning Act 2016* (Qld).

k) **We support the rule that each party pays their own costs as provided for currently, and encourage a new criteria being added to the current costs rules for recommendatory provisions to ensure the 'public interest' is a factor that is considered with any potential cost order.** This should help ensure that the public interest in the litigation or the impact of the costs order on future public interest litigation is a factor that is considered in any costs order.

l) **We encourage certainty that the Coordinator-General's conditions are no longer imposed on all decision makers and do not in any way constrain the Court from considering and providing for changes to conditions from the Coordinator-General where the Court is likely informed by more up to date and fulsome information on appeal.** The limitation on the final decision-makers and the Court currently in not acting inconsistently with Coordinator-General conditions is inefficient and means that final conditions are imposed on information which may have subsequently been found to be incorrect or that has become out of date.

m) **We support the *Mineral Resources Act 1989* (Qld) (MR Act) and *Environmental Protection Act 1994* (Qld) (EP Act) criteria being amended to require consideration of the following in deciding applications:**

i. **The advice of the IEAC;**

ii. **The rights, interests <u>and views</u> of Aboriginal and Torres Strait Islander peoples –** where just 'rights and interests' does not require the decision maker to actually consider the views of First Nations peoples as expressed by them, as opposed to assuming the interests they may hold.

iii. **The public interest –** as defined by departmental guidelines to ensure clarity of what is to be considered, where this definition should be sufficiently broad to be consistent at least with the current common law interpretations. Further, guidelines should not be too prescriptive where the 'public interest' can change in response to changes in societal values. We do not consider the local and/or state governments are appropriate to determine what the public interest is.

iv. **Adverse environmental impacts –** this is an essential consideration, and should expressly also include reference to 'scope 3 emissions' and 'greenhouse gases' to ensure these important considerations are mandated legislatively. Each of the greenhouse gas emissions should be listed as pollutants under the EP Act framework to ensure they are clearly regulated, with a requirement for these emissions to be avoided.

n) **We support the Court holding broad powers, to affirm, vary, substitute or set aside a decision.** There is no sense in limiting the Courts powers, to ensure that it can perform its appropriate function in critiquing government decisions, processes and applications as an independent entity.

o) **We support that merits review not be reliant on internal review, where this has caused more resource expenditure for all stakeholders without proving to be valuable in providing a meaningful critique of the government decision.**

p) **We support the suggestions provided for the mining application process by the QLRC being applied to the regulation of petroleum and gas applications also, where there are substitution applications of this nature still going through in Queensland with great public interest held in the applications.** There is substantial room for improvement in the involvement of community and the transparency and integrity of decision making around petroleum and gas applications.

q) **We support also the following improvements:**

i. **Ensuring fair access to court transcripts such that they are provided in a timely way to all parties, even where a financial hardship waiver has been provided.** The provision of timely, accessible transcripts is a key to ensuring access to justice.

ii. **Setting maximum time periods for EISs with limited extensions and lapsing applications.** Removing the discretions that exist around all forms of EIS processes in Queensland such that there are non-negotiable lapsing dates for EIS materials that are dated.

3. We seek clarification or more information on the following points:

a) Whether the merits review is an 'appeal' as per other post-decision processes, or if there is a reason not to refer to the review process as an appeal.

b) How appeals from the Land Court directly to the Court of Appeal, and not allowing for an appeal to the Land Court of Appeal on broader grounds, "benefits efficiency without removing appeal rights" in circumstances where appeals from the Land Appeals Court would be excluded**.**

Q1 Are the guiding principles of 'fair, efficient, effective and contemporary' appropriate for reform of the current processes?

EDO agrees that the guiding principles of 'fair, efficient, effective and contemporary' are appropriate for reform of the current mining objection hearing processes. Fairness and efficiency in particular are key principles underpinning administrative law, and therefore paramount considerations for the reform. Effectiveness and contemporary considerations are key to ensuring that reform is suitable and beneficial in meeting the objectives of the relevant Acts and addressing concerns of all stakeholders.

Q2 Do you agree these are the strengths and problems of the current processes? Are there others not mentioned here which are appropriate to be considered for reform of the current processes?

EDO agrees with the QLRC's identified strengths and problems with the current mining lease objections process. In addition to the strengths outlined, we note the following strengths which were included in our previous submission to the QLRC, and we consider vital to maintain:

- the rule that each party bear their own costs during an objections hearing, which ensures that public interest litigation is not hindered by fear of an adverse costs order; and
- that there is no discretion to refuse to hear an objection or limit the scope of the objection, as there is in other jurisdictions (e.g. Western Australia).

We also note the following weaknesses which we identified in our previous submission, but were not included in the QLRC's summary:

- different requirements for making a properly made submission or objection under the MR Act and EP Act and which process creates rights to be heard in Court create confusion, and the Land Court is constrained in allowing community members to participate in the process if their submission or objection is not properly made. There is limited discretion held by the

Land Court to excuse any failures to make a 'properly made' submission, meaning rights to refer their submission / objection to the Land Court can easily be lost;

- the Land Court does not have the ability to order proactive disclosure of relevant documents from the applicant and the government;
- there is no requirement for the Land Court to consider the public interest when exercising its discretion to award costs; and
- all parties to a dispute who have requested transcripts are not currently required to have them provided at the same time, for example those obtaining transcripts using a financial hardship waiver of fees have to wait much longer for the transcript even where the other parties have already received it, which hinders procedural fairness.

Furthermore, EDO wishes to emphasise the importance of preventing 'gaming of the system' by the industry, which may occur, for example, by tailoring applications to sit just below a threshold for an EIS which has been given weight by the regulator, being 2MT of coal production per annum per the Guidelines here. This weakness in the current process is not just a weakness of the EIS procedure but has the potential to affect the process as a whole. Ensuring consistency and transparency of process ensures that every application is on the same pathway and prevents applicants from picking a pathway that suits their application. Maintaining consistency of process increases the possibility of community participation, which is particularly important for parties who are self-represented or have limited access to legal resources, for example First Nations peoples or those in rural communities.

Q3 What are our views on proposal 1 (P1) which concerns reframing the participation process, including:

- **removing the Land Court objections hearing pre-decision;**
- **including an integrated non-adversarial participation process; and**
- **establishing an Aboriginal and Torres Strait Islander Advisory Committee (ATSIAC) for relevant mining proposals?**

Overall, we support the QLRC's proposal to remove the Land Court objections hearing pre-decision and introduce an integrated, non-adversarial participation process that would occur in advance of the decision being made by the relevant decision-maker, with the Land Court providing a post-decision review. We also strongly support the implementation of an ATSIAC.

We have set out more detailed submissions below in response to the questions posited by the QLRC in the consultation paper and provide our high-level views in support of the three key proposed initiatives to improve participation.

We also set out our position on the importance of maintaining:

- a high level of public participation in the process; and

- the approach of integrating the participation process for ML and EA applications but emphasise that the public should only be required to make one submission on either or both applications to have standing in respect of any future appeal.

Removing the Land Court objection hearing pre-decision

As outlined in our previous submission dated 26 June 2024 (**enclosed**), while we support the removal of the Land Court objections hearing pre-decision, the Land Court merits review process must be retained post-decision to ensure that the final determination on the applications is made by an independent judiciary, free of political influence and based on robust scientific evidence tested by independent experts.

The QLRC's proposal to remove the Land Court objections hearing pre-decision (P1) and instead propose a new combined review process in the Land Court post government decision (P6) addressed in our submission below in more detail at our answer to Question 18, is appropriate and justified because:

- it simplifies the process;
- achieves consistency with other development approvals processes in the Land Court and Planning and Environment Court's jurisdictions and holding a hearing de novo on an original decision of government is the usual and proper role of merits review; and
- it should allow the parties to fully participate and respond to the material before the Court rather than being constrained by their objections.

However, to ensure procedural fairness and an effectual process, we emphasise the need for the government decisions on the ML and EA applications to be automatically stayed until the appeal period is exhausted or any appeal is decided by the Land Court.

Integration of an automatic stay on government decisions essential

As to removing the Land Court objections hearing pre-decision and introducing merits and judicial review by the Land Court Procedure post-decision, as outlined at proposals 1 and 6, we note, vitally, that the submissions below are only made subject to an automatic stay being applied to prevent a mining proponent acting on an approval decision pre-Land Court determination.

To ensure procedural fairness and an effectual process, the decisions on the EA and ML must be automatically stayed legislatively until the appeal period is exhausted, or if appealed, any appeal is decided by the Land Court.

Failure to implement an automatic stay application may lead to situations whereby certain areas of the statutory criteria for a ML and an EA, such as ecology and groundwater, may already have been interfered with and irreversibly altered before the Land Court hands down its review decision. This drastically reduces the effect and certainty of the Land Court's decision and does not lead to certainty for any party.

A model that requires the stay to be applied for through the appeal court, as seen in the *Water Act 2000* (Qld),[1] places further time and monetary resourcing burdens on members of the public seeking to be involved in the process. In our experience, community members then face the need to indemnify the proponent against any risk of financial loss while the appeal is heard, and the activities are stayed. This either leaves the proponent able to act on their authority while the matter is being heard and determined, rendering the appeal process potentially inconsequential where the impacts in dispute may already have occurred, or forces community members utilising their appeal rights to discontinue the proceeding early.

Rather, the more efficient and appropriate way of ensuring the utility of the appeal process is for the statute to specifically state that the decision does not take effect until any appeal is decided by the Land Court.

Including an integrated non-adversarial participation process

We support enshrining an early integrated non-adversarial participation process into the relevant statutes that places a positive duty on a miner to actively consult and engage with community and impacted stakeholders. Making consultation and engagement a mandatory requirement is a necessary step to ensure a consistent benchmark for all miners, but must be adequately supported by a suitable and consistent procedural framework. Particularly, we caution that the proposal to include an integrated non-adversarial participation process such as written submissions, public meetings or advisory committees should not be a justification for removing or constraining any later appeal before the Land Court.

We address which forms of participation should be included below in response to question 4.

Establishing an ATSIAC for relevant mining proposals

We strongly support the establishment of an ATSIAC that consults with community to identify relevant interests and provide advice to decision-makers about a mining proposal that may affect First Nations peoples' rights and interests.

We noted that any reforms to the objection hearing process must be consistent with the:

- *Human Rights Act 2019* (Qld) (**HR Act**);
- *UN Declaration on the Rights of Indigenous People*; and
- *International Convention on the Elimination of All forms of Racial Discrimination*.

We emphasise that in relation to First Nations cultural heritage:

- First Nations peoples are the experts in First Nations heritage and their position on such matters override positions asserted by Western scientists or consultants.
- Only First Nations peoples can legitimately determine what constitutes First Nations heritage, its significance, and the level of protection it requires.
- The right of First Nations peoples to designate First Nations heritage must be enshrined in the relevant legislation and should be broader than the limited concepts of cultural heritage

[1] ss 865, 879.

currently provided in the *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACH Act**) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (**TSICH Act**).

- There must be a process to ensure that any First Nations people on the Committee ATSIAC who may have conflicts of interest in relation to particular areas of Country or heritage should be required to declare those conflicts and stand down from being involved in those areas.

Maintaining opportunities for public participation at each stage of the process is imperative

Minerals are the property of Queenslanders[2] and should only be exploited if it is in the public interest and not the private interests of a few. Whether a proposal is in the public interest is informed by public participation in the process. That participation must be meaningful. The public should have the opportunity to:

- access all relevant information related to the project that is before the decision-maker, or that is required to understand the potential impacts of the project;
- sufficient time to draft submissions on application materials; and
- appealing and seeking review of the final decision.

We strongly support open standing for submissions, appeal and review. Given this is a public interest matter it is logical that there then be no limitation on who can then have their say on the application for any of the rights of submission or Court application.

Integration of the participation process for the ML and EA applications will greatly clarify community rights

We strongly support the integrating of the participation process for the ML and EA applications, such that they should be open for comment at the same time. Where an EIS is also open for comment, we support ensuring that any submission on the project applications or EIS materials should give right to appeal the decision, however that only one submission on any process is necessary to obtain this standing. This will greatly reduce the confusion held currently in the community as to which notification process gives rise to standing to refer the objection to the Land Court for the mining objection hearing process.

Models of participation

Q4 What forms of participation should be included in the new participation process?
We strongly support increasing opportunities for public participation. We caution that this should be done without losing the right to appeal a decision by the community, as appeal rights are an essential element in the public assisting in ensuring the best decision is made.

We support particularly the introduction/continuation of:

- Information session or open house / public meetings: which will assist in ensuring the community can hear about a proposal in their area of interest and speak to someone early on to understand the impacts of this proposal;

[2] *Mineral Resources Act 1989* (Qld) ss 8, 9.

- Written submissions or comments: as a tried and true way that communities are familiar with in having their voices heard. We do not support strict requirements being placed on submissions as to the type of information or issues they can address – there is no need to restrict submissions, and it will mean that valuable input from the community may not be heard to assist with the decision process. Where there is more than one opportunity to put in submissions, we suggest that all opportunities give rise to appeal rights, to ensure there is not confusion or lose of rights through only one of many opportunities for submissions giving rise to legal rights to appeal. Currently there is substantial confusion in the community when an EA application is notified and an EIS is notified as to which gives rise to the right to be heard in the Land Court. This confusion has resulted in community members losing their rights to be heard and is easily avoidable.

We raise caution with the following options:

- Community advisory committee or reference group: which could work well but could create issues where community perspectives are filtered or not accurately reflected through the work of the group back to the government or mining company. This could possibly be alleviated by ensuring that the committee is made up of experts, such as in social impact assessment, who have no affiliation with mining companies or conflicts of interest. We consider allowing the community to speak for themselves without any filtration of their views is safer.
- Community leader council: this option risks community politics impacting the voices of all community members being heard. We have witnessed this method being trialled through the GasFields Commission (now Co-Existence Queensland) and from the examples we have seen it has not been successful in ensuring that community views are fully heard. Many people who wanted to be heard were left out of the process due to a divide in the community and the representatives.

Q5 How would removing the objections hearing affect private interests?

<u>Native title interests</u>

As noted above, EDO supports the removal of a pre-decision objections hearing process for the grant of MLs and EAs, including when considering impacts to native title processes. However, we recommend that the QLRC suggest the removal of the power to insert gag clauses in native title agreements which limit the rights of First Nations peoples to be heard on applications that impact their Countries and the conditions which the regulator may place on the project.

Summary of right to negotiate process and future act agreements

Future acts, like the grants of resource tenures, must comply with the future act processes set out under the *Native Title Act 1992* (Cth). These obligations arise *prior* to the grant of tenures and must be complied with for any grant to be valid. The rights of native title parties under these provisions are procedural rights, which do not afford native title parties the right to veto projects, but rather,

for acts like the grant of a ML, the right to negotiate in relation to how activities authorised by that act area carried out.[3] This process is known as the right to negotiate process.

As part of the right to negotiate process, both the State party and the proponent are required to negotiate in good faith, however their conduct will be informed by the conduct of the native title party.[4]

If no agreement is able to be reached within a 6 month timeframe, the proponent (or the State) may apply to the National Native Title Tribunal (**NNTT**).[5] Importantly, while the (**NNTT**) is able to place conditions on a determination, it is not able to award compensation or profit sharing.[6] On our research as at September 2024, of the over 3000 future act determination applications which have been made to date, only three have resulted in a determination in favour of native title holders that the future act may not be done absent their consent.

The right to negotiate process as it stands therefore places native title parties in a difficult and unequal bargaining position whereby, they are compelled to enter agreements rather than risk the likely determination that the future act proceed without their consent, and without any financial benefit.

Where agreements are reached, they may contain clauses restricting native title holders/claimants from making public statements about the project or the activities of the proponents (gag clauses) and seeking protection for sites under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) or relevant State or Territory legislation (as was the case with respect to the caves at Juukan Gorge).

Agreements will bind *all* members of the native title claim group, whether or not they were present to authorise the agreement, were supportive of it or aware of the terms of the agreement. This can have flow on consequences for native title holders/claimants who were not supportive of aspects of the agreement or project.

Native title agreements are typically confidential between the native title holders and proponent. The Consultation Paper notes that the 'Government decision-maker will be a party to, or aware of, agreements or determinations made under the native title processes'.[7] However, while it may be the case that the State is aware of the existence of a native title agreement in relation to a future act, the State may not be privy to the specific terms of the agreement, as it is common practice for there to be two separate deeds – one between the native title party and proponent setting out the terms of the agreement and a second between the State, native title party and proponent confirming the existence of that first agreement.

[3] Native Title Act, Part 2, Division 3, Subdivision P.
[4] *Re Minister for Lands, State of Western Australia and Marjorie Strickland & Or* (1997) 3 AILR 260 (at 224-225); and *Western Australia v Taylor* [1996] 134 FLR 211 at 224.
[5] Native Title Act, s 35.
[6] Native Title Act, s 38(2).
[7] Reimagining decision-making processes for Queensland Mining Consultation Paper, [113].

Implications for mining objections hearings

On our understanding, replacing the pre-decision objections hearing process for the grant of MLs and EAs with post approval merits and judicial review processes may assist native title negotiations.

Where the mining objections hearing process takes place in tandem with the right to negotiate process, native title parties can be in a difficult position where they simultaneously must seek to negotiate in good faith to reach an agreement, while also having aspirations to oppose the grant of the mining tenure. Any opposition by native title parties may jeopardise the integrity of negotiations through being construed as bad faith negotiations.

As noted above, the NNTT may make a determination with respect to conditions to be imposed on the grant of a ML. Under the EP Act, an EA or progressive rehabilitation closure plan (**'PRCP'**) may be amended by the administering authority to impose conditions to ensure compliance with conditions included in a determination made by the NNTT.[8] Having the appeal process take place after native title future act processes are finalised will mean it is more likely (subject to the finalisation of any appeals) that a final version of the EA or PRCP is subject to any review by the Land Court, rather than one which may later be amended once the future act process is resolved. This will provide greater certainty for native title holders in negotiating agreements and ensure the nature of the project does not change over the course of negotiations.

We also recommend that gag clauses preventing persons from speaking out about projects, or privity clauses preventing persons from participating in legal processes relating to objecting to resource tenures (and associated authorities) be prohibited. This would assist in in enabling full and fair participation in the processes by native title holders.

Q6 Should there be tailored participation processes depending on the nature of the project? If so:

(a) what criteria should be used to determine different requirements for participation (for example, size, nature of risk, interest or other factors)?

(b) what should be the forms of participation?

We do not support the tailored participation process, and instead encourage a consistent process for all mining proposals. As the Consultation Paper notes, we raise concern that tailoring a participation process can cause applicants to game the system, to apply for a smaller project to be subject to reduced community input or appeal processes but then amending their authorities later in a piecemeal way to continue to avoid scrutiny. We have seen this in the threshold decision for an EIS under the EP Act, where mining companies consistently put in applications for just under the 2MT/y threshold applicable to the decision of whether an EIS is needed. We have also seen this in the gas industry where proponents put in very small applications which never trigger an EIS, or previously wouldn't have triggered public notification, where the applications as a whole form a very large project.

[8] EP Act, s 211.

Further, tailoring participation processes creates more confusion and uncertainty for stakeholders on what the process is that applies. We strongly recommend a clear, consistent process for clarity and certainty for all.

Q7 How can we ensure the new participation process is accessible and responsive to the diverse needs of communities?

Need to ensure all First Nations voices have an opportunity to participate in a culturally safe and appropriate way

For any new participation process to be accessible and responsive to the diverse needs of First Nations communities, it is essential that all First Nations voices are able to be heard. As noted in the Consultation Paper, under the ACH Act and TSICH Act the right to participate in cultural heritage processes is largely premised on native title status.[9] This fails to recognise the diverse range of First Nations interests which may coexist in different regions. These interests may be traditional connections similar to those recognised via the native title process, or more recent, such as the connections First Nations peoples may have to contemporary sites of importance such as missions, massacre sites and other meeting places, including places First Nations peoples were displaced to. Areas may also have differing and competing interests to different groups of people. Any process must be receptive and adaptable to incorporate these many views.

Any new participation process must be cognisant of flaws and tensions in existing legislative frameworks which impact the capacity of First Nations peoples to participate in decision making processes which impact them, their land and cultural heritage.

Native title agreements and cultural heritage management plans for example do not guarantee the protection of cultural heritage, and may in fact, facilitate irreversible damage.

As noted above, for recognised native title holders or registered claimants, native title agreements may exist in relation to projects which could include clauses restricting native title holders from seeking protection under cultural heritage legislation or speaking out against a project, or a proponent's activities. These kinds of clauses can be particularly fraught for minority groups who opposed entering into the agreement, however, are still bound by the terms. The Land Court should therefore be sensitive to issues that may arise as a result of obligations under native title agreements. These include gag clauses described above. Ideally there would be a prohibition on clauses which essentially 'gag' First Nations peoples from raising their concerns upon entering native title agreements with proponents. This may be something the QLRC could consider recommending as part of its work to better support to First Nations peoples seeking to be heard on mining applications.

There are also significant issues with Queensland's current cultural heritage regime. Key issues are helpfully set out in the Juukan Gorge final report.[10] Critique of the duty of care approach to cultural heritage protection includes that it is vague and lacking in investigation and enforcement powers, it does not properly acknowledge intangible heritage, does not require consultation with traditional

[9] Reimagining decision-making processes for Queensland Mining, [128].
[10] 5.61-5.80 Available here.

owners for lower-level impact categories and places decision making power in the hands of proponents. The ACH Act and TSICH Act's 'last claim standing' element is also highly controversial and problematic and can lead to adverse, illogical, and exclusionary outcomes for First Nations peoples.

The Land Court should consider adopting a permanent cultural protocol for receiving evidence from First Nations people, as was adopted in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 5) [2022] QLC 3.

At a minimum such a protocol would include:

a) a recognition that First Nations peoples in Queensland have strong cultural obligations to protect and be custodians of water, and that all water in Queensland and across Australia more broadly is of cultural significance;
b) an acknowledgement that the land and waters in Queensland were violently stolen from First Nations peoples and that this dispossession has ongoing legacies for First Nations peoples to this day;
c) a recognition that decision making processes about water in Queensland must be undertaken with the free, prior and informed consent of First Nations peoples in Queensland;
d) an outline of culturally appropriate ways for the Departments and Land Court to engage with and receive sensitive information from Aboriginal and Torres Strait Islander peoples, including recognition that information shared may need to be agreed upon by multiple knowledge holders. This may result in some information only being revealed to persons of a certain gender, age, and social group; and
e) information about how Indigenous Cultural and Intellectual Property data obtained through the consultation process will be stored and used, including who would have access to that data and information, what purposes it could be used for and any restrictions on access and use, where appropriate.

However, it is ultimately First Nations peoples themselves who should determine how they would like to participate in the objection hearing process, and what that process should involve, in accordance with the right to self-determination.

Q8 What are your views on proposal 2 (P2) namely:

- **a central online government portal being established to facilitate public notice and give up-to-date information about mining proposals by amended the relevant statutes to require material to be published on the online portal including:**
  (a) notice of applications
  (b) notice of opportunities to participate
  (c) outcomes of participation processes
  (d) information requests
  (e) Decisions.

EDO strongly supports a central online government portal being established to facilitate public notice and up to date information. This platform could emulate the 'PD Online' platforms many local government's host for development applications under the *Planning Act 2016* (Qld), where all information relevant to and considered during the decision is up online accessible to all. This is a very useful platform which encourages transparency and accountability for the proponent and the decision makers and would be a great addition to the mining objection hearing process.

Having one portal will also greatly reduce the high level of confusion and lack of clarity as to where information / notifications can be found currently – where it is split between anywhere on the proponent's website, and various government websites.

Undoubtedly one of the most cost-effective ways of reducing delay, duplication and inefficiency is by timely access to relevant information. Improving the ability of the community to access timely information on resource applications will improve the timeliness and quality of submissions and reduce timeframes for preparing for any appeals.

The *Right to Information Act 2009 (*Qld) (**RTI Act**) framework is inadequate for this purpose as it requires considerable time in making specific applications which often do not yield access to documents until 18 months after the request. Clearly unsuitable for responding in the 20-40 day timeframes provided for responding to the terms of reference, EIS, draft approvals etc.

The best practice model, enshrined in the preamble to the RTI Act, is a push model by which key documents are proactively published on a publicly accessible website so that all the community and industry can readily access the information without time wasted in processing RTI requests (i.e. Government 2.0 and the Declaration of Open Government). This means everyone will have the information needed before them for more efficient and informed assessment.

The most effective implementation of this model in Queensland is apparent in the local government's use of PD Online or similar platform to provide the public with real-time information (and documentation) relevant to development applications. A similar platform and obligation for proactive real-time disclosure for information surrounding resource authority applications and related communications would significantly reduce the unnecessary time spent by community and government in seeking and providing relevant application information.

To this end, we recommend a new statutory obligation to maintain public registers under the EP Act, MR Act and *State Development and Public Works Organisation Act 1971* (Qld) (**SDPWO Act**) requiring the public maintenance of all information relevant to the application and that will be before the decision maker on the portal, and then also the decision documents once determined.

Q9 What additional notice and information-sharing requirements should be included in legislation as part of the new participation process?

EDO recommends of notification of regional projects in locally circulating newspapers, and in the Koori mail as many community members (especially those without access to the internet/IT)

continue to access information about forthcoming decisions from these locations, rather than from government websites and portals.

As stated above, we further recommend that all information relevant to and considered by the decision maker should be posted on the new portal in one single place.

Q10 What direct notice requirements should be included for applications for:

(a) **MLs?**

Currently under the MR Act direct notice in mining lease applications must be given to 'affected persons' - owners of the land that will be used for the proposed mining lease, owners of private land directly adjoining, relevant local government and infrastructure providers. Under a recently published policy directive, registered native title claimants or body corporates must also be notified.

EDO recommends that the requirement to directly notify registered native title claimants and body corporates be enshrined in the MR Act as 'affected persons'. Registered native title parties have deep-rooted rights and connection to the land and are therefore clearly affected and deserve to be notified of mining lease applications.

EDO also recommends that the definition of 'affected persons' be broadened to include all landholders who may be affected in any way by the proposed development, not just those of adjoining properties. These landholders may also be impacted by noise, dust and vibrations of the mine, not to mention possible affects to the groundwater reliance.

Finally, EDO also recommends that direct notice should be given to all 'interested persons' that can be identified by the mining proponent, in line with the requirements for direct notice of EAs. This should include local unincorporated communities and local environmental groups.

(b) EAs?

As mentioned, the direct notice requirements are defined more broadly for EAs by the EP Act. 'Affected persons' that must be notified include landholders, registered Native Title claimants and body corporates and relevant local government. 'Interested persons' includes local unincorporated communities or environmental groups.

As above, EDO recommends that the definition of 'affected persons' in the EP Act is extended to all landholders who may be affected in any way by the proposed development, as they may be affected by noise, dust, vibrations and groundwater usage of the development.

Q11 What else is required to notify First Nations peoples who may have an interest in the mining proposal

As noted above, EDO recommends notification of regional projects in locally circulating newspapers, and in the Koori mail as many community members (especially those without access to the internet/IT) continue to access information about forthcoming decisions from these locations, rather than from government websites and portals.

Notification in the Koori Mail would be consistent with the approach for native title future act notices and would therefore be a consistent one stop shop for native title holders and claimants for notices.

Q12 What are your views on proposal 3 (P3), namely establishing an Independent Expert Advisory Panel (IEAC) that is:

(a) comprised of people with recognised expertise in matters relevant to the assessment of environmental authority applications
(b) formed as project-specific committees to give independent expert advice to inform decisions on environmental authority applications that meet specified criteria.

EDO supports the establishment of an Independent Expert Advisory Committee (**IEAC**), which will ensure that the Department of Environment, Science and Innovation (**DESI**) has access to technical expert advice early in the application process and will promote community certainty that the material put forward in mining applications has been reviewed by an independent scientific body, even if there were no objectors to the project.

We emphasise that the experts appointed to the IEAC must be suitably qualified to evaluate and comment on mining applications. To this effect, there must be transparency for the public around the processes of appointment, tenures and expertise of the experts. Further, there must be strictly regulated means of avoiding conflicts of interest arising between the experts and any project they may be asked to provide advice on.

Given the complexity and variation in mining applications, certain projects may require the appointment of specific expertise and when the IEAC is formed, and this should be a key consideration in determining who should be appointed. Where an unforeseen issue arises, it may be highly beneficial for the IEAC experts to have the ability to consult and rely on the advice of experts external to the IEAC, if specific alternative expertise is required. To this end, it is important to ensure that the IEAC can fulfil its functions, it must be adequately resourced and have adequate powers to discharge its obligations, for example, to request information from the Department as well as the proponent where necessary.

We question whether there is a need for the IEAC to address cultural heritage if the QLRC proposes a separate ATSIAC which is to give advice on specific issues, such as cultural heritage and broader issues about the proposed mine's impact on First Nations rights and interests, from First Nations peoples. We are of the view that the ATSIAC is a more appropriate body to consider cultural heritage impacts, in a culturally appropriate manner. There is a potential for duplication in the process and

conflicting views to arise if the ATSIAC is formed which is required to consult broadly, and on the other hand an expert is appoint as part of a separate IEAC process that speaks to their own expertise. If there is support for a cultural heritage expert to be appointed to IEAC, then:

- that position must be an identified appointment
- the individual should either be a representative of ATSIAC; or
- must consider the views of the ATSIAC if it is formed.

Both the Independent Scientific Expert Committee on Unconventional Gas Development and Large Coal Mining Development (**IESC**) and the NSW Independent Expert Advisory Panel (**NSW IEAP**) are good examples of an independent statutory committees that advise government regulators about the impacts of mining on the environment. Although, we recommend:

- the IEAC's panel should not be constrained by specific narrow areas of experts like the IESC, but should be open to expert input on any issue of relevance to an application.;
- that the appointment of the IEAC should not be discretionary, where in our experience due to the discretionary appointment of the NSW IEAP we have in the past had to strongly advocate on behalf of our clients for a panel to be formed; and finally, and most importantly, in the interests of transparency, the advice provided by the IEAC including any material they relied on should be published and available for community access. This includes any information requests and responses to the Department or the proponent.

Q13 What should be the criteria to form an IEAC for an EA application

We do express some concerns around the process and the criteria for determining whether to form the IEAC. We understand that the QLRC's proposal aims to remove government discretion to avoid the experience of the NSW IEAP noted above.

In our experience, strict application of thresholds can also be problematic where a particular threshold is not triggered but the project still likely results in significant environmental impacts, for example the thresholds for requiring an EIS under the EP Act currently. So careful consideration should be given to the drafting of the criteria to ensure that an IEAC is established where it is necessary.

EDO generally supports the criteria suggested by the QLRC for deciding whether an environmental authority application is to be considered by an IEAC, including:

- the scale, risk and impact of the project;
- application type such as standard, variation or site-specific applications;
- EIS triggers; and
- level of community concern.

EDO also emphasises the importance of not having a high threshold established by the above criteria, and thereby ensuring that the majority of EA applications are considered by the IEAC. Only conventional projects with negligible impact should be exempt from IEAC consideration.

Establishing too high a threshold would make redundant the benefits of the IEAC in reviewing applications that may not be objected to by the public and undergo a formal objection hearing.

Q14 What are your views on proposal 4, which sets out that the statutory criteria in the MR Act and the EP Act should be amended to require the relevant decision-maker to consider:

(a) for the decisions about ML and associated EA applications – information generated through the new participation process
(b) for decisions about environmental authority applications – any advice of the IEAC.

We agree that decision makers should be required to consider the information generated through the new participation process, to ensure the decision is as well informed as possible.

EDO supports the inclusion of the requirement for the decision maker to consider advice of the IEAC when making decisions about environmental authority applications.

In reference to proposal 4(b) replacing the requirement for the decision maker to consider any recommendation of the Land Court following an objections hearing, we highlight that this is gives effect to the Department's decision now occurring prior to an objection hearing in the Land Court, but after receiving the IEAC's advice.

Q15 What are your views on proposal 5 and amending the statutory criteria in the MR Act and the EP Act for decisions about ML and associated EA applications, in that they should be amended to require each decision-maker to consider the rights and interests of First Nations peoples in land, culture and cultural heritage.

EDO strongly supports the amendment of the MR Act and EP Act to require decision makers to consider the rights and interests of First Nations peoples in relation to land, culture and cultural heritage when making decisions about ML and EA applications.

EDO agrees that at present, there is significant potential for the rights and interests of First Nations peoples to be overlooked in the decision-making process, and for the final decisions to not be reflective of First Nations perspectives and concerns. Including the express requirement to consider the rights and interests of First Nations people ensures that the impacts of these decisions on First Nations peoples are adequately addressed and considered in the decision-making process.

To this end, EDO further suggests the criterion be extended to require expressly seeking the views of First Nations peoples, in accordance with the principle of free, prior and informed consent enshrined under international law. On the current drafting it may be possible that the rights and interests of First Nations peoples may be considered without direct consultation with First Nations peoples, which would be an illogical and inappropriate outcome. EDO suggests that this consultation could be facilitated by the proposed ATSIAC, and would ensure that any First Nations people who seek to be heard with respect to a project can have their views taken into consideration.

Q16 Should the decision-maker for the ML application be required to consider the decision (and reasons for decision) of the decision-maker for the EA application in reaching their decision on the statutory criteria for:

(a) public interest?

EDO supports the requirement for the public interest to be considered by the Minster when determining the ML application. At common law, the public interest is defined by reference to the purpose and objects of the relevant statute. The MR Act and the EP Act have different purposes and therefore the public interest criterion must be considered with the in the context of the relevant statute. There is still however, the requirement to consider the adverse environment impacts under the MR Act, along with human rights under the HR Act. As such, the findings of the DESI in respect of the public interest are likely to be informative and should be considered by the Minister in considering this limb of the statutory criteria.

Of the two options for providing guidance on how public interest should be assessed, EDO strongly supports the use of departmental guidelines. Community consultation and participation underpins the entire mining application process, and the outsourcing of advice from state or local government through the referral agency process is not consistent with this. Without a requirement to consider the views of the community, public interest cannot be adequately assessed by merely considering legislative and policy goals.

We also emphasise that any definition of public interest provided in guidelines must be broad, in order to be consistent with the common law interpretation. Any examples of activity in or not in the public interest must also be broad and not determinative, to prevent the guidelines from overly restricting the assessment. Guidelines must not be too prescriptive, as the notion of 'public interest' tends to change overtime as societal values change. For example, environmental protection was not generally considered to be in the public interest like it currently is, until mere decades ago.

We are uncertain as to the reason for the proposal that perhaps the state and local government departments would be sought for views on the public interest. This approach assumes more connection and awareness than most departments/governments are likely to hold of the interests of the public and ignores the particular biases that may be held by these government entities in translating the public interest.

(b) adverse environmental impact?

EDO strongly supports the inclusion of adverse environmental impacts as a consideration under the MR Act. If reform to the legislative framework now requires the Department to make its decision prior to an objection hearing in the Land Court, adverse environmental impacts should be considered at the outset. The Minister should be required to consider the DESI's decision and reasons in respect of this statutory criteria, which may may incorporate the advice of the IEAC. This increase efficiency as it may contribute to fewer objections being made further along in the process.

Further, we consider the criteria should expressly reference the requirement to consider 'scope 3' emissions, greenhouse gas emissions and climate change, as key factors in environmental impacts posed by mining. 'Greenhouse gas' emissions should each form part of the pollutants referenced in the *Environmental Protection (Air) Policy 2019* (Qld), which should become more of a mandatory limit

on emissions rather than a guidance document. The Minister should also be expressly required to consider 'scope 3' emissions under the MR Act.

(c) the rights and interests of First Nations peoples in land, culture and cultural heritage (see proposal 5)?

We support the inclusion of this criterion, and suggest it be extended to require expressly considering also the views of First Nations peoples. On the current drafting it may be possible that the rights and interests of First Nations peoples may be considered without seeking the actual views of First Nations people. This would be facilitated by the proposed ATSIAC of course, which will hopefully be greatly beneficial in ensuring any First Nations person who seeks to be heard with respect to a project can have their views integrated.

The Minister in determining the ML applications should be required to consider DESI's decision on the EA application and reasons in relation to this criterion if it is inserted into the EP Act.

Deciding each application

We support maintaining separate decision-making functions and powers under the MR Act and EP Act.

We strongly support the requirement that the Minister for Resources can only approve the ML application if the environmental authority is approved, and this should be expressly stated in the statutory criteria. Furthermore, the Minister for Resources as the original decision-maker on the ML application should be required to consider DESI's decision on the EA application and reasons for the decision in reaching their final decision on the application including in respect of specific statutory criteria where overlapping.

Q17 Are there additional reforms to the statutory criteria under the MR Act and the EP Act you would like us to consider?

Information gathered during the participation process should be required to be considered by the decision maker explicitly, to ensure the views of the community are properly considered in making the final decision.

Further, the views of the IEAC must be required to be considered by the decision maker to ensure that the value of these experts being involved in the process is properly considered.

EDO also propose the following additional statutory criteria to be considered:

- to not act inconsistently with the principles of ecologically sustainable development ('**ESD'**), including:
  - intergenerational equity; and
  - The precautionary principle.

Although this is already apparent in the statutory criteria, it would be beneficial to have a stronger requirement to not act inconsistently with the principles of ESD to ensure they are meaningfully integrated and shape the best decisions in the public interest.

Q18 What are your views on proposal 6, namely the review by the Land Court should be available after the Government has decided the ML and EA applications. Decisions of the Land Court should be appealable to the Court of Appeal on grounds of errors of law or jurisdictional error.

The Land Court should:

(a) Conduct proceedings after decisions on both applications are made
(b) Conduct a combined (merits and judicial) review
(c) Conduct the review on the evidence before the primary decision-makers, unless exceptional circumstances are established
(d) Apply existing practices and procedures

We strongly support the QLRC proposal to shift to a post government decision appeal process.

We suggest there be clarity on whether this process is an 'appeal' of the government decision, at least for the merits review component. The process has not been described as an 'appeal' in the consultation paper specifically, but it appears to be an appeal type process. Clarity on this would be beneficial.

Merits review

We agree that a merits review in the Land Court:

- should occur post government decision;
- should be available in respect of both the ML and EA application decisions, and if both decisions are appealed then the matters should be heard together in a combined review;
- should not require internal review prior to an external appeal commencing; and
- should constrain the mining proponent to the same evidence that was before the original decision-maker.

Although, as set out above in more detail at our answer to Question 3, if moving to a post government decision appeal process then the relevant statutes must automatically stay the government decision until any appeal period lapses or until the appeal is determined by the Land Court.

Should the merits appeal be conducted on the same evidence that was before the original decision-maker?

We agree that applicant should be limited to the content of their application for the evidence in the appeal, to reduce the chances applications will change through litigation, and to improve the likelihood that quality impact assessment materials will be put forward by proponents.

However, objectors should not be limited to the contents of their submission and must be afforded the opportunity to bring expert critique to the application material during the appeal.

In our experience, proponents have significantly changed the scope of the application after the public objection period closes. In practice, this has meant that objectors have been constrained to outdated objections that are no longer responsive to the application during the objection hearing process. For example, a mining proponent changed the mining operation plan from open cut/surface mining to a mixture of open cut/surface mining and underground mining after the objection hearing had commenced. To safeguard against this, there should be amendments to legislation expressly prohibiting amendments to application material once the application is made.

Objectors, however, should not be constrained from leading fresh evidence. The evidence often led by objectors should be characterised as reply evidence, as it responds to the application and the material lodged in support of the application.

During the public submission period, there is often a very limited time for the public to review and respond to the application material, which is voluminous, technically complex and involves many different subject matter experts due to the extent of the impacts associated with mining. Proponents on the other hand have as much time as they need to prepare the relevant supporting material.

The process should ensure procedural fairness to all participants, noting that the resourcing constraints of the community need to be considered in the design and implementation of a new objection process.

It would be substantially unfair to limit the community to what they put in their submissions. Further the Court process benefits significantly from the assistance of expert evidence analysing the application material and being subject to cross-examination to filter through the evidence before the Court.

Should another party be the statutory party such as Coordinator-General or the Miner?

If moving to a post government decision process where the Land Court has combined judicial and merits review powers, the current statutory party, DESI, is likely to be bound by the Hardiman Principle meaning they may take the position that it is no longer appropriate to act as the statutory party to the process particularly if there are powers of the Court to remit the decision. In a post government decision context, DESI's position may come into conflict with the duties and the obligations of the statutory party, for example, if they seek to defend their decision on an environmental authority application.

However, the Coordinator-General should not fulfil the role as the statutory party because it is likely to be counter-productive and set up a different process for projects that have coordinated project status rather than having a streamlined approach for projects that might have progressed through different assessment pathways.

The Coordinator-General has different functions to fulfil under the SDPWO Act compared to the obligations of DESI under the EP Act and the Minister under the MR Act. As such, it is difficult to

understand how the Coordinator-General might be able to assist the Land Court in fulfilling its functions to determine an appeal which is primarily concerned with MR Act and the EP Act.

Instating the Coordinator-General as the statutory party is not a pathway to resolving issues that have arisen to date, for example the consistency of conditioning issue. A more suitable way to resolve these issues, is for the relevant statutes to be amended to bestow the power on the Land Court to impose any additional conditions that it deems necessary in making its determination.

Further, it is inappropriate for the Miner to take the role of statutory party, as there is likely to be a conflict between its private interests and the duties of the statutory party.

Rather, we suggest that it might be more appropriate for other parties such as the:

- IEAC, if it was formed to be automatically required to give evidence for the benefit of the Court, while allowing other parties the opportunity for cross examination; and

ATSIAC and the Queensland Human Right Commission should be able to act as amicus curie to the process and make independent submissions to the Land Court. Further consideration should be given to whether DESI can be compelled to give evidence in the circumstance where they elect to be an active party to the process and defend their decision. Compelling the DESI to give evidence may also be problematic due to the Hardiman principle.

Appeals from a decision of the Land Court directly to the Court of Appeal

Compared to the current process, allowing appeals directly to the Court of the Appeal reduces the time and costs for all parties involved in the process by removing the Supreme Court step. Although this suggested appeal pathway limits the rights of parties to appealing only on jurisdictional error or errors of law. Such an approach may be appropriate in the context of planning decisions, where generally the scale and impact of a development may not be extensive compared to an application for mining lease and associated environmental authority.

In respect of mining lease applications, there should be an opportunity for parties to appeal to either the:

- Land Appeals Court; and/or
- Queensland Court of Appeal.

For example, water licence appeals to the Land Appeals Court are much broader and are by way of rehearing on the material before the Land Court Member at first instance and include errors of fact and are not just constrained to jurisdictional error or errors of law.[11] Constraining the material on appeal to what was before the original decision-maker necessarily makes an appeal more efficient.

Removing appeals to the Land Appeals Court, and only allowing an appeal by way of leave to the Court of Appeal is creating a separate process for applications for a ML and associated EA compared

[11] *Gallo v Chief Executive, Department of Environment & Resource Management* [2013] QLAC 6 [26]-[30];.

to other licences such associated water licences. Significantly constraining the rights of parties on appeal is appropriate for decisions about mining projects.

As such, it would be beneficial for the QLRC to clarify how appeals from the Land Court directly to the Court of Appeal "benefits efficiency without removing appeal rights".

Open standing must be maintained in relation to an appeal process

Open standing must remain; there is no strong or appropriate basis for rolling back the current position.

We recommend that:

- At minimum, open standing for third party appeal rights should remain. This is consistent with the government election commitment to reinstate third party notification and objection rights and the terms of reference for the review.
- Open standing be extended also to judicial review applications.
- To make it procedurally easier for community members to have the opportunity to participate in any appeal, any submission on the ML application, EA application or EIS should give rise to standing to object to a ML application and/or the EA application in the Land Court.
- The Land Court should also have the discretion to grant standing where an objector has not complied with the formal requirements.

In our previous submission enclosed (**Annexure A**) we highlighted some of the key issues that have arisen in practice due to the different procedural requirements under the MR Act and EP Act that give rise to standing.[12] Some of these issues may be remedied by implementing a post government appeal process, although it is important that these defects are not carried over into a new process.

We strongly agree with the QLRC that open standing does not result in increased litigation. Often concerned community members lack the necessary resources to participate in the Land Court objection hearing process, which is an access to justice issue.

As previously stated, minerals are the property of Queenslanders[13] and should only be exploited if it is in the public interest and not the private interests of a few. The scope and purpose of the MR Act and the EP Act are both consistent with the current position of open standing provided the procedural standing pre-requisites have been met.

In respect of the mining of fossil fuels, decisions on these mining applications have been found to engage and limit human rights of broad classes of Queenslanders due to the proposals associated

[12] At pp 9-12.
[13] *Mineral Resources Act 1989* (Qld) ss 8, 9.

greenhouse gas emissions.[14] Due to the nature of these types of decisions, retaining the current position of open standing is imperative and consistent with the purpose of and obligations imposed under the HR Act.

To recommend constraining standing would be inconsistent with the terms of reference for the review which asked the QLRC to have regard to providing opportunities for community participation, including access to justice. The community should have the opportunity to fully participate at each stage of the process. Furthermore, if the Land Court has the power to conduct a combined review, the standing requirements for any declaratory proceedings should be the same as any merits review.

Judicial review

The Land Court should potentially have the flexibility to conduct merits and judicial review proceedings together, if necessary, provided that the open standing provisions apply to any declaratory proceedings. The Queensland Supreme Court has recently taken a very narrow approach to the standing test under the *Judicial Review Act 1991* (Qld), which has prevented environmental groups from accessing a statement of reasons and would have denied any later application for statutory order for review.[15] This limitation has had significant impacts on transparency and accountability of government decisions for civil society on public interest decisions. We strongly recommend open standing for judicial review proceedings for mining applications as decisions of high public interest.

As set out in more detail below at our answer to question 20, the Land Court's powers in declaratory proceedings are fixed by the principles of judicial review and are much more constrained than the Court's broad powers when undertaking a review on the merits. We strongly support the Land Court having broad powers to affirm, vary or set aside the original decision and substitute its own decision, or set aside the original decision and return it to the decision-maker to remake with recommendations or directions. If the Land Court's broad powers to determine the appeal are constrained in any way by conducting a joint merits and judicial review, we do not support combined review. We also do not support any proposal for the Land Court's jurisdiction to be constrained to declaratory proceeding only.

We agree that the current practices and procedures of the Land Court are a strength of the current process. If as a consequence of allowing for combined review requires substantial amendments to the current Land Court processes, then it may be preferrable to keep merits and judicial review functions separate. This may be a different approach to the Planning and Environment Court, but the Land Court is also a specialist Court which has its own unique processes and procedures which have evolved over time to make the process as efficient and effective as possible. The

[14] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21; DESI, "Greenhouse Gas Emissions Guideline" <https://www.desi.qld.gov.au/policies?a=272936:policy_registry/era-gl-greenhouse-gas-emissions.pdf>

[15] *Lock the Gate Alliance Ltd v Minister for Natural Resources and Mines* [2018] QSC 21.

recommendations of the QLRC should build on the strong foundations to inform any future appeal process.

Does this have implications for the HR Act?

If undertaking a combined review, the Land Court member should not be able to consider whether the primary decision-maker's determination was unlawful for the purposes of s 58(1) of the HR Act because, in determining the merits of the applications, the Court would be a public entity for the purposes of the HR Act and therefore, have an independent duty to discharge its obligations under the HR Act. In the circumstances of combined review, it would be more appropriate for the Supreme Court to determine any lawfulness of the decision made under the HR Act.

There is a mechanism under s 49 of the HR Act which allows:

(a) a question of law relating to the application of the HR Act; or
(b) a question regarding the interpretation of a statutory provision in accordance with the HR Act

to be referred to the Supreme Court if a party or the Land Court considers the question is appropriate to be decided by the Supreme Court.

Although, this may become procedurally messy if the usual appeal process is to the Land Appeal Court or the Queensland Court of Appeal. The parties could request the Supreme Court to have the matter referred under s 49 of the HR Act to the Court of Appeal if an appeal is later commenced.

Q20 Should the Land Court have the power to substitute its own decision on the application or should it be required to send it back to the decision-maker?

The Land Court should have the power to substitute its own decision on the application. This is consistent with de novo merits appeal jurisdiction. It is also consistent with other approvals processes such as the powers of the Planning and Environment Court in determining planning appeals and the Land Court's powers to decide other appeals under the EP Act and the *Water Act 2000* (Qld).

We strongly support the Land Court having broad powers to determine the Appeal. The Land Court should have the power to:

(a) affirm the original decision;
(b) vary the original decision;
(c) set aside the original decision and substitute its own; or
(d) set aside the original decision and return it to the decision-maker to remake, with any recommendations or directions it considers appropriate.

The Land Court is a specialist jurisdiction, and the separation of powers doctrine means that the Court can impartially critique government decisions, free of political influence or the risk of corruption.

The Land Court's decision must be the final determination on the applications to ensure certainty and finality. In our experience, for example, where the Land Court has made its recommendation subject to a change application being made to the Coordinator-General under the SDPWO Act, we have witnessed miners lodge new material in support of less stringent conditions despite being the subject of significant independent scrutiny during the objection hearing. There was also no process for an objector to participate or make submissions on the change application, which was procedurally unfair in the circumstances where the miner lodged new material that was not before the Land Court.

If the Land Court only has the powers to affirm or send the matter back to the original decision-maker to determine again, it fails to resolve the current issues with the objection hearing process, in that currently, the Land Court's recommendation on the merits is not binding on DESI or the Minister. Furthermore, limiting the Court's powers in the context of DESI no longer being a mandatory active party to the process as the statutory party may be a step backwards. Historically, DESI has followed the recommendation of the Land Court which may be a consequence of them actively participating in the process including making and responding to submissions where appropriate.

Constraining the Land Court's powers undermines the purpose of conducting a full review on the merits if the Land Court does not have the powers to make the final determination on the applications. It is a much more efficient and effective process for the Land Court to make the final decisions on both applications which is consistent with purpose of shifting to a post government appeal process.

Q21 Should each party pay their own costs of the merits review or should a different rule apply?

Currently, the general rule for mining objection hearings is that each party bears their own costs.[16] EDO supports 'hard costs neutrality', as described in the Consultation Paper, as a key facet of ensuring public interest litigation is not hindered through a fear of an adverse costs order. EDO suggests that the current applicable rule could be enhanced by including the requirement to consider the public interest nature of the process in the exercise of the Court's discretion to award costs. Taking a costs neutrality approach is necessary and appropriate because:

- often individual participants that are objecting to MLs, EAs and other relevant authorities are doing so on the basis of grounds that are in the public interest;
- often community participants do not have significant resources, either as self-represented litigants or where represented, particularly compared to resource proponents and government departments; and

[16] *Land Court Act 2000* (Qld), s 52C.

- specifically providing for a consideration of the public interest nature of the parties' grounds will assist in ensuring this is a facet that is considered with respect to any costs order considered, and any discretion with respect to a costs order that may turn on this fact may be enlivened.

Currently section 52C of the *Land Court Act 2000* (Qld) requires parties to bear their own costs for recommendatory functions. If the Land Court were to move toward a post-decision review process, it is recommended that the section 52C approach, with the inclusion of a public interest consideration, be adopted for the reasons mentioned above.

Q22 Are there any issues arising from interactions with decisions made under other Acts that we should consider?

Cultural Heritage Acts

As noted above, there are also significant issues with Queensland's current cultural heritage regime under the ACH Act and TSICH Act. Specifically, that the duty of care approach to cultural heritage protection is vague and lacking in investigation and enforcement powers, it does not properly acknowledge intangible heritage, does not require consultation with traditional owners for lower-level impact categories and places decision making power in the hands of proponents. Further, the 'last claim standing' element is also highly controversial and problematic. It facilitates the exclusion of many First Nations people from decision making processes regarding cultural heritage and can lead to adverse, illogical, and exclusionary outcomes for First Nations peoples.

On account of these deficiencies, compliance under the cultural heritage acts should not be considered as constituting sufficient consideration of First Nations interests.

State Development Act

As to the State Development Act, we understand that even with the suggested model of post government decision appeal the Land Court's decision, as it pertains to the mining lease and environmental authority, may not be a final and binding judicial decision that is unfettered by executive decision-making in the form of the Coordinator-General's conditions.[17]

Land Court should have the powers to impose any conditions it deems necessary, and that this discretion must not be constrained by needing to be consistent with the CG's conditions, which has resulted in the current process of the Land Court making its final recommendation on a environmental authority application conditional on a miner making a change application to the Coordinator-General under the State Development Act.

This is an inefficient and ineffectual process that wastes time and resources for all parties involved. Not to mention that an objector does not automatically have a right to participate in the change application process and make submissions despite being a party to the objection hearing, which is

[17] *State Development and Public Works Organisation Act 1971* (Qld) ss 46, 54E.

procedurally unfair. In the past, we have had to write to the Office of the Coordinator-General to request that our client be able to make submissions on the change application. Without legal representation, a self-represented litigant might not be aware of how to participate in the change application process.

In our experience, change applications lodged after a mining objection hearing have been much broader than the Land Court's recommendations. This is particularly concerning because the Coordinator-General in making its decision on the change application is not bound by the Land Court, and does not have the benefit of being a party to the process. As previously outlined in the Preliminary Submissions,[18] the Land Court is currently limited in its decision-making to ensure that its recommendations are consistent with the Coordinator-General's conditions. The restrictions on inconsistency with the Coordinator-General's conditions means that there are often significant limitations on the submissions that may be raised by the community. It can become particularly problematic where new evidence arises during the hearing that the Coordinator-General did not consider as part of the evaluation report and for imposing conditions and can require the parties to embark on complex legal arguments as to whether proposed conditioning is inconsistent with the Coordinator-General's conditions.

Transparency International rated the risk of industry influence in the assessment of coordinated projects (by the Coordinator General) as high. Yet currently specialist Departments and even the Land Court cannot provide for conditions that are inconsistent with the Coordinator-General's conditions provided for the EIS evaluation report.

This is highly inappropriate, since the Land Court undertakes a full merits review with expert assistance to analyse the application material before it – often leading to better understanding of the likely impacts - after the Coordinator-General provides these conditions. It also restrains specialist experts in DESI in providing conditions.

This significantly limits the submissions that may be raised by the community, and the applicant's ability to suggest alternative conditions to address objector concerns or unfavourable evidence. It also significantly limits the Court in providing positive solutions through amended conditions as a result of the outcomes of an objection hearing. This is a highly inefficient, inappropriate and ineffective power that should be repealed.

In many respects, the Coordinator-General is not the appropriate entity to provide overriding conditions on mines, particularly where the Department of Resources and DESI both hold relevant expertise in aspects of mining and are able to provide conditioning.

To ensure that the Land Court has unfettered, judicial decision-making, with the support of the knowledge of relevant government departments, the Coordinator-General should only be able to recommend conditions to the Department of Resources and DESI, that will filter into and inform the conditions imposed by any relevant EA and ML. This process would improve the efficiency of the

[18] Environmental Defenders Office, Queensland Law Reform Commission – Mining Lease Objections Review, Preliminary Submission, 26 June 2024, p12, s 5.1.

proposed model for Mining Objection Hearings by removing any complex legal arguments regarding inconsistencies between EAs and/or MLs and imposed Coordinator-General conditions. Furthermore, the removal of the overriding conditions of the Coordinator-General would allow the Land Court to consider community submissions with more depth.

Native Title Act

As noted above, under Q5, the native title framework can create a fraught system for Traditional Owners, particularly where there might be dissent amongst a community and opposition to a proposed project. The Land Court should be sensitive to issues that may arise as a result of obligations under native title agreements and how this may impact native title holders' abilities to freely participate in the objections/review process.

Q23 What opportunities are there, if any, to integrate interacting Queensland Acts with the processes to decide ML and associated EA applications?

We strongly support the integration of the public notification of the EA and ML, to provide more clarity and simplicity to the public's interaction with the applications where they may otherwise miss an opportunity to comment on potentially three separate notifications, between the EA and ML applications and any EIS notification.

As mentioned above, each of the submissions should give rise to standing to appeal the final decision, where currently there is significant confusion in the community as to which notice period provides rights to have their submission/ objection referred to the Land Court in a mining objection hearing.

Q26 Are there any additional options for reform of the current processes you would like us to consider?

Petroleum and gas process could benefit from many of the QLRC recommendations

At present, merits appeal rights only attach to the grant of EAs with respect of petroleum tenures. The proposed reforms to the MR Act and EP Act should apply to other resource approval processes including those under the under the Petroleum and Gas Production Safety Act 2004 (**P&G Act**). We understand a further consultation paper will be release with respect to this issue and will provide further detailed submissions in response to that paper.

Need for transcripts to be timely and affordable and need for public interest exemption

Correct judicial decisions require timely, complete and accurate information. Transcripts form an important part of the information that assists courts in making their decisions, along with the role they play in assisting parties while the litigation is on foot. This timely, easily accessible information is also important for accountability.

Parties to a large Land Court matter in Queensland, involving numerous experts covering complex scientific material, can face a bill of over $2,000 per day to access the transcripts for the proceedings. Over a medium sized matter of four weeks the total cost of transcripts can be $40,000.

Presently, waivers are provided for financial hardship, which is a great step forward, however there are significant delays in the provision of transcripts to those seeking a waiver of fees, even where the transcript has been provided to other parties and therefore would just need to be copied and sent electronically. This is an unnecessary and unfair impediment to access to justice.

We recommend comments be made to suggest that transcripts are required to be provided to all applicants for the transcripts at the same time, regardless of fee status. Ideally courts would be given power to manage the delivery of transcripts. The Court is in the best position to determine when transcripts should be provided free of charge due to hardship or public interest nature of proceedings, as well as to dictate appropriate time periods by which transcripts should be provided.

Set maximum time periods for EIS with limited extensions and lapsing applications

The SDPWO Act provides that a coordinated project declaration lapses if the final EIS is not accepted within 18 months, but the Coordinator General can grant unlimited extensions.

In practice these extensions are regularly granted.

This can lead to the community consultation on the EIS preceding the ML and EA applications by 5-10 years. Accordingly, the information in the EIS can relate to very different social and economic circumstances compared with the time the project is constructed.

It also reduces the ability of the community to raise new issues that arise in the decade that may follow consultation of the EIS, because their ability to object to the ML and EA may be limited to their EIS objections.

For example, the New Acland Coal Mine Stage 3 Project was first applied for in 2007 and was effectively refused in 2012 but allowed to restart the EIS process without fresh application. A further EIS was publicly notified in 2014 with a Coordinator-General Report in December 2014 (seven years after the original application). A Land Court recommended refusal of the EA and ML and the EA was refused by DESI in January 2018. However, due to appeals by the proponent there are now multiple overlapping court appeals. Even if these appeals are resolved in the proponent's favour the construction will be more than 5 years after the community had the opportunity to consider the EIS.

To ensure EIS consultation remains current the Coordinator-General should be limited to extensions up to a maximum of 30 months from the declaration being made.

This limitation should apply also to all EIS processes in Queensland to ensure that only timely impact assessment materials are able to inform decisions.

Environmental Defenders Office

Queensland Law Reform Commission – Mining Lease Objections Review

Preliminary Submission

26 June 2024

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

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Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonization.

Executive Summary

The Environmental Defenders Office Ltd (**EDO**) welcomes the opportunity to contribute to the inquiry by the Queensland Law Reform Commission (**QLRC**) into the mining objection hearing process in Queensland. Thank you for accepting this submission

EDO has been working within the mining objection process for decades, assisting many clients to understand, to self-represent and to participate with our representation in this process. Through this experience we have found that the current process for the Land Court merits objection hearing generally provides for a procedurally fair and appropriate assessment of the application put forward by a proponent for some of the largest environmentally impactful projects proposed in Queensland. However, there are various tweaks that could be made to the framework providing for the process which would greatly enhance clarity, fairness, efficiency and effectiveness of the objection processes, which we have detailed below for the consideration of the QLRC.

From our experience assisting many members of the public, First Nations, individuals, and public interest organisations engaging with the mining objection hearing process, we consider that these recommendations would greatly improve the ability for all stakeholders in the community to participate in this important process.

Below we have provided a summary of our recommendations that are formed from our experience, followed by a more detailed discussion of these recommendations. Should any element be unclear, or should the Commission require further information or discussion with respect to any of these recommendations, please do let us know and we will gladly assist.

In this submission, we make 8 overarching recommendations in response to terms of reference, along with a concise commentary on the processes in other jurisdictions which are summarised in the following section.

Summary of EDO Recommendations

1. **Independent court-based merits review must be retained**

    1.1. The Land Court merits review process must be retained to ensure the final determination on applications is made by an independent judiciary, free of political influence and based on robust scientific evidence tested by independent experts.

2. Land Court role should be post-government judicial decision, with an automatic stay on a proponent acting on the decision pre-court determination

2.1. The Land Court's role best enshrines the benefits of the separation of powers through undertaking merits assessment and final determination post-government decision.

2.2. To ensure procedural fairness and an effectual process, the decisions on the environmental authority and mining lease must be automatically stayed until the appeal period is exhausted or any appeal is decided by the Land Court.

3. Clear and centralised public notification through the government should be mandated

3.1. Public notification must be centralised through one Department to ensure that the community knows when public notification takes place for all processes, the deadline for submissions, and knows when rights to participate in any objection hearing are enlivened.

4. Open standing for community must be retained

4.1. At minimum, open standing for third party appeal rights must be retained.

4.2. Clarity is needed as to which submission processes give rise to the right to participate in merits assessment process.

4.3. Consideration should be given to any submission on the mining lease application, environmental authority application or environmental impact statement giving rise to standing to object to a mining lease application and/or the environmental authority application in the Land Court.

4.4. Land Court should have broad discretion to grant standing where an objector has not complied with the formal requirements.

4.5. Objectors should be able to fully participate in the process without being constrained by any previous submissions.

5. Repeal the extensive powers of the Coordinator-General to mandate conditions

5.1. Repeal the extensive powers of the Coordinator-General to overrule all other departments and the Land Court through providing mandated conditions – hindering decision making and wasting resources of all stakeholders.

6. Proactive disclosure of material should be required from the Applicant and the relevant Queensland government departments

6.1. Legislatively enshrine the requirement for the Applicant to proactively disclose all material relevant to its application and for the government to provide any material it relied on in making its decision to provide for fairness for all parties in the Land Court process.

7. Costs in the Land Court should generally be retained

7.1. The general rule that each party bears their own costs should be retained but enhanced by the inclusion of a requirement to consider the public interest in the exercise of the Courts discretion.

8. The reforms to the transcript process should be retained, however further reforms regarding timing of delivery of transcripts to all parties would improve procedural fairness

8.1. The reforms to the transcript process should be retained, although further reforms, particularly to remove discrepancies in the timing of delivery of transcripts to those on financial hardship fee waivers and all other parties, to improve procedural fairness.

9. Comparison with other jurisdictions

9.1. At minimum the current objection hearing process should be retained and should not be retrograded where other jurisdictions may not have the benefit of meaningful merits assessment for mining projects.

9.2. Alternatively, if considering moving to a post-government judicial decision process, the New South Wales Land and Environment Court class 1 merits review jurisdiction is analogous to other Queensland processes such planning appeals in the Queensland Planning and Environment Court and may be informative.

1. Independent court-based merits review must be retained

1.1 The Land Court merits review process must be retained to ensure the final determination on applications is made by an independent judiciary, free of political influence and based on robust scientific evidence tested by independent experts.

A formal court-based merits review process must be retained to ensure:

- decisions on mining lease applications and associated environmental authorities are based on robust scientific evidence that is rigorously tested by independent expert witnesses through the conclave process and cross-examination;
- merits review of the application is undertaken by an independent court, free of political influence, to ensure the most informed decision is made; and
- parties are on equal footing, where moving to a less formal process may disadvantage self-represented objectors.

However, measures should be introduced to reduce processes which drain community (and all party) resources, such as extensive court ordered mediation requirements where there is unlikely to be a negotiated outcome on the parties' positions. In our experience, excessive procedural steps can cause unnecessary delay in resolution, without improving the outcome; draining stakeholder and community resources.

2. The Land Court's role should be post-government judicial decision, with an automatic stay on a proponent acting on the decision pre-determination

2.1 The Land Court role best enshrines the benefits of the separation of powers through undertaking merits assessment and final determination post-government decision

The Land Court merits assessment process is most appropriately positioned *after* the government decisions on the environmental authority and mining lease. Amending the nature of the Land Court's role and bestowing on the Court the powers to make the final decision on the mining lease applications and associated environmental authority is appropriate and justified because it:

- Improves development assessment timelines and simplifies the process by removing unnecessary additional steps after the mining objection including further decisions by the Minister and Department of Environment, Science and Innovation (**DESI**).
- Achieves consistency with other development approval processes in the Land Court and Planning and Environment Court's jurisdictions. For example, water licence appeals under the *Water Act 2000* (Qld) (**Water Act**), or coal seam gas appeals under the *Environmental Protection Act 1994* (Qld) (**EPA**), are both conducted via merits review post-approval. In addition, development permits are also subject to a post-government decision merits appeal process under the *Planning Act 2016* (Qld) (**Planning Act**).
- Holding a hearing de novo on an original decision of government is the usual and proper role of merits review. Limiting the Land Court to undertaking a full merits review that only leads to the Court making recommendations to the final decision makers is an anomaly which complicates the process and allows for multiple review points, increasing the time, uncertainty, costs and resources for all parties involved.

- Amending the Land Court's role and functions streamlines and simplifies the appeal process to the Land Appeal Court. The current avenues of review to the Queensland Supreme Court increases the time, complexity and costs to all parties.
- In a post-government decision model, all parties would be able to fully participate and respond to the material before the final decision maker and court.
- Allows an appeal to be informed by the most up to date material regarding the application rather than constrained by objections that were made in response to material provided sometimes years in advance of the matter being referred to the Land Court. This is beneficial to all stakeholders because it means objections are relevant to the final application and materials provided in support.

Although, we flag that if the process is similar to the current appeals process under the EPA or Water Act, there are positive and negatives to the current 'two-step' appeal process whereby an internal review of the original decision is a pre-requisite to commencing any appeal.

The positives include that the internal review gives the decision-maker the opportunity to remake the decision in response to material provided in an application for internal review, either by refusing, approving or amended the conditioning which may resolve issues without the need for any appeal.

Conversely, in our experience the result of the internal review is that the reviewer generally upholds the original decision. As such, the internal review process often fails to result in the early resolution of the matter and can instead delay the resolution of any appeal.

Another approach would be to implement a process similar to the Planning Act, whereby there is no internal review process, rather an appeal is commenced within the appeal period after the decision is made.[1] Submitters are not limited to the contents of their original submission on the development application, they may appeal on the grounds that are relevant at the point of the appeal after the decision is made, with all information available to them that was before the decision maker.[2] We consider this is a more appropriate and fair procedure that does not unduly limit community members from full participation in the appeal of a development decision.

2.2 The decisions on the environmental authority and mining lease must be automatically stayed until the appeal period is exhausted or any appeal is decided by the Land Court.

If the QLRC recommends a shift from a non-binding recommendatory function to a binding judicial appeal process, this must be coupled with a recommendation that the original decision(s) subject to merits review should not take effect unless the statutory appeal period or appeal process is exhausted. If the original decision permits potential environmental damage to occur before objections are considered, the purpose and intent of the mining objection hearing process is undermined.

[1] *Planning Act 2016* (Qld) (**Planning Act**), s 229.
[2] Planning Act, s 230(1)(b).

For example, the stay provisions under the Water Act and EPA are not appropriate as they unduly place onus on community members to make a stay application to prevent the proponent from acting on a decision while an appeal is heard and determined. In our experience, community members then face the need to indemnify the proponent against any risk of financial loss while the appeal is heard and the activities are stayed. This either leaves the proponent able to act on their authority while the matter is being heard and determined, rendering the process nugatory, or forces community members utilising their appeal rights to discontinue the proceeding early.

Rather, the more efficient and appropriate way of ensuring the utility of the appeal process is for the statute to specifically state that the decision does not take effect until any appeal is decided by the Land Court.

3. Clear and certain public notification should be provided through the government in a centralised location, not via proponents

3.1 Public notification must be undertaken through one Department to ensure that the community has certainty as to when public notification takes place and the deadline for submissions, and ideally also have clarity as to when rights to participate in any objection hearing are enlivened

Currently there is significant confusion in the community as to where to find out if a project of interest is being notified, when notification will occur and what point of notification will actually give rise to the legal right to participate in the mining objection hearing process. In addition, simple matters such as putting the timeframe by which submissions must be provided to the mining lease application on the public notice are not always being undertaken.

The EDO has seen this failure to specify the deadline for submissions lead to many First Nations and other community members missing the cut off date and therefore losing their right to have their views heard on a development of concern to them. There are already sufficient impediments to First Nations and other community members with respect to having the time, capacity and resources to participate in the submission and objection hearing processes. The lack of clarity that exists around public notice currently is very easily rectified. Current processes are significantly hampering the community's ability to effectively use their legal rights to have their views heard on development of concern to them, meaning the legal process is not operating effectively.

We recommend the following simple changes that can greatly improve the effectiveness of the public notification processes:

- When an application or associated environmental material is publicly notified, all material should be collated in one spot on a government website along with the legislative deadlines.
- In addition to providing notification via a centralized government website, the materials should also be publicly notified on the applicant's website, social media, the property and a local newspaper, to ensure the various likely sources for the public to become aware of a project notice period are utilised. Understanding that regional and remote communities do not always have access to reliable internet, the department where present in regional centers should also have a notice board and application material available for inspection.

- The public should be able to sign up to receive email notifications from DESI to enable them to be automatically notified of proposed developments including when the public comment period opens and closes. DESI already includes this function in some areas, such as the public notices and consultations webpage.[3]
- The public notice must specify the deadline, with exact time, for submissions to be considered and whether participation gives rise to objection rights in the Land Court.
- If the current pre-government decision role is continued for the Land Court, the information stage of assessment must be required to conclude before the notification stage may commence. During the information stage, DESI is able to request further information to inform its decision.[4] Currently the notification stage may commence at any point after the application stage ends and potentially before this process has concluded.[5] This means submitters may need to make their submissions without having regard to any information yet to be received on request from the assessing agency.
- To improve transparency and build a culture that promotes human rights, the relevant decision-makers should be required to provide a statement of reasons for their decision including human rights impact assessment, and any material that they relied on in making the decision in relation to the following:

  (a) to recommend the application be approved or approving the application; or
  (b) not to require an environmental impact statement (**EIS**).

The above material should be publicly available as soon as the decision is made.

Noting that if an application proceeds to an objection hearing, the current Practice Direction does not require the department to provide reasons rather, they just need to "explain by reference to each ground in the objection notice where and how the draft environmental authority addresses that ground of objection."[6]

4. Open standing and community participation must be maintained

4.1 At minimum, open standing for third party appeal rights should remain. This is consistent with the government election commitment to reinstate third party notification and objection rights and the terms of reference for the review.

4.2 To make it procedurally easier for community members to have the opportunity to participate in the process, any submission on the mining lease application, environmental authority application or environmental impact statement should give rise to standing to object to a mining lease application and/or the environmental authority application in the Land Court.

[3] Department of Environment, Science and Innovation, 'Public notices and consultations', *Our department* (Web Page, 2 April 2024) <https://www.des.qld.gov.au/our-department/public-notices>.
[4] *Environmental Protection Act 1994* (Qld) (**EPA**) s 140.
[5] EPA, s 151.
[6] Land Court Practice Direction 6 of 2018, (**LC Practice Direction**) p 7 at [34].
https://www.courts.qld.gov.au/__data/assets/pdf_file/0007/565018/lc-pd-4of2018.pdf

4.3 The Land Court should also have the discretion to grant standing where an objector has not complied with the formal requirements.

Currently, there are different procedural requirements and separate processes under the *Mineral Resources Act 1989* (Qld) (**MRA**) and the EPA that give rise to a person's right to object to a mining lease application and/or an environmental authority application. This is further complicated by the different standing pre-requisites under the EPA where for some projects standing will arise if a person made a properly made submission on:

- the environmental authority application;[7] or
- the EIS, in circumstances where the public notification stage does not apply to an environmental authority application, in which case the submission on the EIS is treated as a submission about the application.[8]

The current framework has resulted in significant confusion as to which submission would give rise to standing to object to the application in the Land Court, particularly in circumstances where there has been an overlap in the public notification period for the EIS and the environmental authority application.

For example, in relation to the coordinated project, Winchester South, Whitehaven publicly notified the:

- original draft EIS between 4 August 2021 and 15 September 2021 (and then later the revised draft EIS between 21 November 2022 and 19 December 2022 at the request of the Coordinator-General);[9] and
- mining lease applications and associated environmental authority application together between 16 August and 24 September 2021 (at 4.30pm (AEST)).[10]

This is problematic for several reasons including:

- Some community members were not aware that there were three submissions that needed to be made in respect of the proposed project including a submission on the EIS, mining lease application and environmental authority application. A submission on the environmental authority application should occur after the EIS is accepted as final, although there is nothing in the EPA to that effect. As such, community members that only made a submission on the draft EIS lost their procedural rights to later object to the application in the Land Court, which cannot under the current framework be remedied by the Land Court.
- For community members who made submissions on the mining lease applications and the environmental authority application, they did not have the benefit of the final EIS on which to base their grounds of objection and facts and circumstances in support. This is a significant issue under the current framework as an objector is constrained by the content

[7] EPA, s 182.
[8] EPA, s 150(3).
[9] https://www.statedevelopment.qld.gov.au/coordinator-general/assessments-and-approvals/coordinated-projects/completed-projects/winchester-south-project
[10] https://whitehavencoal.com.au/wp-content/uploads/2021/08/Winchester-South-Project_Combined-Public-Notice.pdf

of their objection and may be precluded from agitating issues that might be identified in the final EIS as discussed in more depth below.

- For the community to be required to make three separate objections/submissions for a project around the same time is overly burdensome, particularly where there are different procedural requirements for each submission to be taken as properly made.
- Legislation should be clear and easy to understand. Unfortunately, the statute as drafted acts as a barrier to standing in certain circumstances.

Early consultation and meaningful community participation in projects should be promoted and encouraged particularly on any EIS to ensure that the best environmental outcomes are achieved.

Furthermore, the Land Court's discretion to allow community members to participate in the process where they have failed to make a properly made submission is constrained. Currently under the MRA, the substantial compliance discretion as drafted does not extend to the filing of an objection on the same day if it was filed after 4:30pm.[11] The Land Court should have the discretion to allow an objection to be heard from anyone whose interests are impacted by the applications, even if they did not put in a submission.

The process for having an objection to a mining lease application or submission on an environmental authority application referred to the Land Court could also be streamlined to remove any unnecessary administration on the part of all parties.

For example, if there is a shift to a post-government decision process and a person receives an information notice of that decision (because they made a submission when the mining lease or environmental authority applications or the EIS was publicly notified), then the grounds of any appeal filed in the Land Court could be in relation to the application for an environmental authority and/or mining lease rather than the current process of the mining lease objections and environmental authority objections being referred to the court separately by two different departments.

4.4 Objectors should be able to fully participate in the process without being constrained by any previous submissions on the EIS, environmental authority application or mining lease application, particularly if the applicant seeks to rely on new material or material that was not publicly available to support their application.

Currently objectors are unnecessarily limited to only raising the existing grounds raised in their original objection/ submission when their objection is referred to the Land Court to conduct the mining objection hearing. These grounds are drafted prior to the draft environmental authority conditions and any further updates to the application through the assessment process, and thus may be outdated.

In practice, these objections and submissions to applications can occur years in advance of the matter being referred to the Land Court. Despite this, objectors are currently constrained by the

[11] *McAvoy & Anor v Adani Mining Pty Ltd & Ors* [2014] QLC 32.

content of their objections under the MRA even in circumstances where the Applicant seeks to rely on new evidence in support of its applications.

Objectors should have the opportunity to base their objection on the latest material to ensure that the process is efficient and effective for the benefit of all parties. Currently, objectors often need to draft broad grounds of objection for fear of not being able to lead expert evidence later or not being heard on what later becomes a key issue. Particularly when the EIS is not finalised prior to the notification of the environmental authority application.

Objectors should not be constrained by the content of their objection to a mining lease application or submission on an environmental authority application. Some flexibility is necessary to allow issues that arise during the process to be fully ventilated before the Court, particularly in circumstances where the Applicant seeks to rely in new evidence that was not available during the public notification period.

If moving to a post-government decision model, then there should be an opportunity to set out the grounds of appeal and facts and issues in support without being constrained by any previous submissions or objections or internal review process, similar to the appeals process under the Planning Act as discussed above at recommendation 2. Noting that there should be sufficient time to lodge an appeal, particularly where there is material that has not been previously publicly notified.

5. Repeal the extensive powers of the Coordinator-General

5.1 Repeal the extensive powers of the Coordinator-General to overrule all other departments and the Land Court through providing mandated conditions – hindering decision making and wasting resources of all stakeholders

If the Project is declared a coordinated project under the *State Development and Public Works Organisation Act 1971* (Qld) requiring the preparation of an EIS under that framework, then the Coordinator-General in evaluating the EIS can mandate or recommended conditions for the project.[12] Under the EPA, the administering authority for the environmental authority or draft environmental authority must adopt the conditions proposed by the Coordinator-General, and cannot make any other conditions which are inconsistent with a Coordinator-General's condition.[13] Similarly, the Land Court also may not make recommendations which are inconsistent with a Coordinator-General's condition in its objection decision.[14]

The restrictions on inconsistency with Coordinator-General conditions means that there are significant limitations on the submissions that may be raised by the community. This is particularly problematic where new evidence arises during the hearing that the Coordinator-General did not consider as part of the evaluation report and for imposing conditions.

Often parties have to embark on complex legal arguments as to whether proposed conditioning is inconsistent with the Coordinator-General's conditions. Removing the prohibition on

[12] *State Development and Public Works Organisation Act 1971* (Qld)(**SDPWO Act**) ss 34D, 39, 45, 47C, 49B, 49E or 49G.
[13] *Environmental Protection Act 1994* (Qld), s.205.
[14] *Environmental Protection Act 1994* (Qld), s190.

inconsistency would reduce complexity for all parties and the considerable time and expense spent on legal battles over the extent of any inconsistency.

Furthermore, making the Land Court's recommendation subject to a change application is not the solution as the Land Court's recommendation is not currently binding on the Coordinator-General, nor do objectors have the automatic right to make submissions on the change application.

This could be remedied by moving to a post government decision appeal process, whereby the Land Court's decision is a final and binding judicial decision that is unfettered by executive decision-making.

6. Proactive disclosure of material should be required from the Applicant and Statutory party

6.1 Legislatively enshrine the requirement for the applicant to proactively disclose all material relevant to its application and for the government to provide any material it relied on in making its decision.

There should be a legislatively enshrined requirement for:

- the Applicant to proactively provide all material relevant to its application in advance of the first directions hearing; and
- the government to provide any additional material it relied on in making its determination along with an information notice that sets out any reasons for its decision including any human rights impact assessment.

Currently, the Court does not have the power to order disclosure of documents by any person, including an active party.[15] The Land Court and the parties should have access to all the material that were before the original decision-maker and material that is relevant to the application. It is procedurally unfair and puts objectors (and the statutory party) at an extreme disadvantage in reviewing the factual claims of the proponent.

To facilitate efficient operation of the hearing in support of the requirements of the Court role in mining objection hearings, the Land Court should have the power to order disclosure of other relevant information such as groundwater, noise and dust monitoring data. We note that this issue of the Land Court not being able to make an order for disclosure can be remedied if the Land Court is given the powers to make the final decision on the application if the process shifts to a post-government decision model. While the current mining objection hearing practice direction provides direction regarding an objector's access to application material, it allows the Applicant to apply to restrict access to documents without allowing the objectors the opportunity to respond to that request.[16] This is procedurally unfair. Furthermore, the practice direction is not sufficient to extend the Land Court's jurisdiction.[17]

[15] LC Practice Direction; *BHP Billiton Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107.
[16] LC Practice Direction, p 7 at [28]-[33].
[17] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection* [2016] QLC 29.

7. Rules as to costs in the Land Court

7.1 The General rule that each party bears their own costs should be retained but enhanced by the inclusion of a requirement to consider the public interest in the exercise of the Courts discretion.

Currently, the general rule for mining objection hearings is that each party bears their own costs.[18] EDO supports this as a key facet of ensuring public interest litigation is not hindered through a fear of an adverse costs order. EDO suggests that this could be enhanced by including the requirement to consider the public interest nature of the process in the exercise of the Court's discretion to award costs. This is necessary and appropriate because:

- often individual participants that are objecting to mining leases, environmental authorities and other relevant authorities are doing so on the basis of grounds that are in the public interest;
- often community participants do not have significant resources, either as self-represented litigants or where represented, particularly compared to resource proponents and government departments;
- specifically providing for a consideration of the public interest nature of the parties' grounds will assist in ensuring this is a facet that is considered with respect to any costs order considered, and any discretion with respect to a costs order that may turn on this fact may be enlivened.

8. Access to mining objection hearing transcripts

8.1 Reforms to the transcript process should be retained, although further reforms to the process of accessing transcripts could be implemented to ensure procedural fairness.

It is acknowledged that recent changes to the transcript process, though the introduction of QTranscripts as well as some other procedural changes, have led to improved transcripts outcomes. In particular, significant improvements have been made to transcript turnaround times and to fee-waiver approval times.

One necessary and fundamental change that is still required is that all parties to a dispute who have requested access to a transcript, whether by commercial or fee-waiving methods, are supplied with transcripts at the same time, to ensure procedural fairness.

9. Comparison with other jurisdictions

9.1 At minimum the current objection hearing process should be retained and should not be retrograded where other jurisdictions may not have the benefit of meaningful merits assessment for mining projects.

9.2 Alternatively, if considering moving to a post-government judicial decision process, the New South Wales Land and Environment Court class 1 merits review jurisdiction is

[18] *Land Court Act 2000* (Qld), s 52C.

analogous to other Queensland processes such planning appeals in the Queensland Planning and Environment Court and may be informative.

Queensland sets the benchmark for community participation in decisions regarding mining. This is a particular feature of decision making around mining where minerals are a public resource owned by the State, that should only be exploited for public good. Further, the significant impact mining can cause to the environment, First Nations interests, communities and local, regional and state economies means community participation is essential to ensure accountability of decision makers to fulsome consideration of these impacts in assessment. At minimum, it is important that the current model is retained to ensure that meaningful community participation in the process is maintained.

There are many benefits to Queensland's framework which are not enjoyed by other jurisdictions and which we encourage are retained. The hearing of objections to mining lease applications and associated environmental authorities is done so jointly. In other jurisdictions such as the Northern Territory, Western Australia (**WA**) and British Colombia there are separate and fractured approval process. The Queensland approach is more efficient as there is one process rather than many, which is particularly important where there are overlaps between the relevant statutory criteria.

Furthermore, in WA, while any person can object to an application for a mining tenure, including a mining lease application, on referral to the Wardens Court, the Warden has the discretion to refuse to hear the objection or to limit the scope of the objection. In the interests of procedural fairness, there should be no discretion to refuse to hear an objection to an application or to limit the scope of an objection. In matters of this nature, questions of fact are better address by evidence and the issues for hearing are often refined as part of the process, for example the court managed expert evidence process rather than requiring the merits of an objection to be established upfront.

Other key criticisms of other jurisdictions include:

- In NSW, the right to object to mining lease application is constrained to landholders and other tenement holders. Constraining the persons who can object to a mining lease application is inconsistent in the context of minerals being a public resource.
- In NSW, third party class 1 merits appeals to the NSW Land and Environment Court (**LEC**) have for the most part been extinguished because of:
  (a) a trigger inserted into the *Environmental Planning and Assessment Act 1979* (NSW) for state significant development, which automatically refers a matter to the NSW Independent Planning Commission (**IPC**) to hear and determine the application as the consent authority if a project receives over 50 public submissions on the application; and
  (b) otherwise, a power held by the Minister for Planning to delegate its powers as the consent authority to the IPC to hold a public hearing and determine the application.

- The EDO NSW Report on Merits Review highlights the importance of merits review (**attachment A**) and Briefing Note on improving the NSW Independent Planning Commission Public Hearing (**attachment B**) highlights the significant issues and

deficiencies with the IPC public hearing process. In summary, the current IPC public hearing process:

(a) lacks public involvement which has resulted in poorer environmental outcomes;
(b) is essentially a public meeting, which has removed the important role of the NSW LEC and the formal independent expert evidence process whereby evidence is given under oath or affirmation and can be rigorously tested through cross-examination;
(c) has no opportunity for community members to put questions to the Applicant and often due to time constraints a person only has the opportunity to speak for 10 minutes to air their concerns at the public hearing and a short window of time to make a make a written submission;
(d) has in practice, been routinely abused by Applicant's, who have put new material before the Commission after the public hearing and sometimes after the written submission period closes. This material is often highly technical in nature for example, on numerous occasions, Applicants have submitted climate change and market substitution legal and factual submissions that are hundreds of pages in length which only became available to the public during or after the public hearing;
(e) has not necessarily reduced the number of appeals by way of judicial review to NSW LEC and the decision timeframes often exceed the Queensland merits review timeframe guidelines;
(f) lacks transparency and accountability; and
(g) disregards the legal principles of natural justice and procedural fairness;

- As such, the NSW class 1 merits review in the LEC which is analogous to planning appeals in the Queensland Planning and Environment Court should be preferred over the IPC public hearing model which does allow for meaningful public participation in the process.

Conclusion

EDO's primary position is that the current objection hearing process must be maintained. EDO agrees that there are, however, opportunities to improve coherency and efficiency in the process for the benefit of all stakeholders, as outlined above.

Of paramount importance is the improvement of access to the process for First Nations peoples who have been historically underrepresented despite being most likely to be impacted by projects.

Thank you for the opportunity to make this submission.
Please do not hesitate to contact our office should you have further enquiries.