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Bringing perspectives together.

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# Submission

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| **To:** | Queensland Law Reform Commission |
| **From:** | Parallax Legal Pty Ltd |
| **RE:** | Review of mining lease objections processes |
| **Date:** | 13 September 2024 |

## Contents



## 1. Abbreviations

For brevity, abbreviations which are frequently used in this submission are:

| Short-form term | Long-form term |
|---|---|
| **Cultural Heritage Acts** | The *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) |
| **FPIC** | Free, prior and informed consent |
| **HRA** | *Human Rights Act 2019* (Qld) |
| **MRA** | *Mineral Resources Act 1989* (Qld) |
| **NTA** | *Native Title Act 1993* (Cth) |
| **QLRC** | Queensland Law Reform Commission |
| **RDA** | *Racial Discrimination Act 1975* (Cth) |

| Short-form term | Long-form term |
|---|---|
| **RNTBC** | Registered native title body corporate |
| **State** | State of Queensland |
| **UNDRIP** | United Nations Declaration on the Rights of Indigenous Peoples |

## 2. About us

2.1 Parallax Legal was co-founded in early 2022 by Cassie Lang, a Bundjalung woman, and Stephanie Parkin, a Quandamooka woman. Our primary focus is working with Aboriginal and Torres Strait Islander people, communities, and those wishing to do business with such communities.

2.2 Parallax Legal provides both legal and consultancy services. Our areas of expertise include Indigenous Cultural and Intellectual Property, intellectual property, Aboriginal and Torres Strait Islander cultural heritage, native title and other Indigenous land titles, Indigenous corporations, and engagement with First Nations communities.

2.3 In this submission, we have focussed on issues related to decision-making about mining leases, and the rights and interests of Aboriginal and Torres Strait Islander people, communities and nations. We appreciate the opportunity to contribute to the proposed reform of Queensland laws.

## 3. Contextual observations

3.1 As supplementary to the context described in the Queensland Law Reform Commission (**QLRC**) consultation paper titled *Valuing the perspectives of Aboriginal Peoples and Torres Strait Islander Peoples*,[1] we make the following observations about the operational landscape surrounding objections to the grant of a mining lease.

### Legal frameworks

3.2 Subsection 9(1), the *Racial Discrimination Act 1975* (Cth) (**RDA**) broadly establishes the unlawfulness of racial discrimination.[2] The RDA's prohibition of racial discrimination does not apply to 'special measures' taken for 'the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms' (**special measures**).[3] In other words, temporary[4] forms of racial discrimination that are intended to be protective or

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1 Queensland Law Reform Commission, *Valuing the perspectives of Aboriginal peoples and Torres Strait Islander peoples* (15 July 2024), 14-30 <https://www.qlrc.qld.gov.au/reviews/mining-lease-objections-processes-review/review-publications>.

2 *Racial Discrimination Act 1975* (Cth) pt 2 s 9(1) <https://www.legislation.gov.au/C2004A00274/latest/text>.

3 Ibid pt 2 s 8(1); Schedule - International Convention on the elimination of all forms of racial discrimination, pt 1 art 1(4).

4 Ibid: 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that

redressive are permitted by the RDA.

3.3 However, the prohibition of racial discrimination does apply to special measures that would allow for the non-consensual management of property owned by Aboriginal or Torres Strait Islander persons, where the law would otherwise operate differently for non-Indigenous persons.[5] The RDA sections 8-10 reflect complexities within the law regarding the extent to which discrimination involving the rights or freedoms of Aboriginal and Torres Strait Islander persons may be permissible.

3.4 Relevantly, the *Native Title Act 1993* (Cth) (**NTA**) is a special measure as permitted by the RDA.[6] The NTA is expressly intended to be read and construed subject to the provisions of the RDA.[7]

3.5 The *Mineral Resources Act 1989* (Qld) (**MRA**) and the NTA operate concurrently.[8] In our experience, the intersections of legal frameworks at which persons who wish to participate in extractive industries engage with Aboriginal and Torres Strait Islander people and groups primarily occur through:

(a) the future acts regime provided by the NTA;[9] and

(b) the operation of the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (**Cultural Heritage Acts**).

## Native title and future acts

3.6 In our view, it is uncontroversial that native title rights and interests are proprietary in nature. Determinations of native title operate *in rem*, as distinct from *in personam* – they recognise pre-existing rights and interests in land and waters, as held by Aboriginal and Torres Strait Islander Persons, communities and nations. Notably, it was the view of the Full Court of the Federal Court of Australia in *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* that 'it is clear that native title rights and interests are proprietary and concern land and waters'.[10]

3.7 The State of Queensland (**State**) appears to hold disparate views on whether native title rights amount to property rights. The State's *Land Title Practice Manual* acknowledges that native title is not 'land rights', but rather a form of proprietary rights governed by the laws and customs of First Nations Peoples.[11] However, the State elsewhere

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such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that **they shall not be continued after the objectives for which they were taken have been achieved**' (emphasis added).

5 Ibid pt 2 s 8(1), s 10.

6 *Native Title Act 1993* (Cth) Preamble <https://www.legislation.gov.au/C2004A04665/latest/text>.

7 Ibid pt 1 s 7(1).

8 Ibid pt 1 s 8.

9 *Native Title Act 1993* (Cth) pt 2 div 3.

10 *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75 at [411] (CJ Mortimer, Moshinsky and Banks-Smith JJ) <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2023/2023fcafc0075>.

11 Queensland Government (Department of Resources), *Land Title Practice Manual* (2009-2021) 6 [0-0150] <https://www.titlesqld.com.au/manual-guides/land-title-practice-manual/>.

considers that even exclusive native title is not analogous to land ownership.[12]

3.8 The issue of whether native title should be considered equivalent to a freehold estate was among those considered in *Griffiths v Northern Territory of Australia (No 3)*, in which Justice Mansfield held that 'it would be erroneous to treat the nature of [Aboriginal peoples'] interests in land as other than the equivalent of freehold'.[13] In appeal proceedings, the High Court held that 'the objective economic value of exclusive native title rights to and interests in land, in general, equates to the objective economic value of an unencumbered freehold estate in that land'.[14]

3.9 In practice, the land tenure types upon which native title (whether exclusive or non-exclusive) can be recognised by Australian law are generally limited to 'Crown' tenures, such as unallocated state land and reserves. However, while native title can survive the Crown's assertion of sovereignty, no right of veto is afforded by the NTA framework to registered native title holders and claimants about any activities proposed to occur on lands or waters in which they hold rights and interests. In other words, the Crown exclusively holds decision-making rights that are denied to native title holders and claimants.

3.10 Although the NTA is a special measure, we consider the possibility that recourse could be pursued through provisions of the RDA in circumstances where lands, waters and resources in which (proprietary) native title rights and interests subsist, but are effectively managed by other persons without the native title holders' consent.

3.11 At the intersect of native title and extractive industries, we understand that the Crown (acting through the State) plays various roles – for example:

(a) the Crown asserts ownership of gold, coal and minerals in this jurisdiction, and the exclusive right to grant mining leases;[15]

(b) the State receives various royalties in connection with extractive industries;

(c) the State is the first (and often, most active) respondent to all native title claims lodged in this jurisdiction; and

(d) the State is liable to pay compensation to native title holders for compensable acts attributable to it (for example, the granting of a mining lease).

3.12 We anticipate potential conflicts between competing interests and duties in such circumstances. While we appreciate that amendment of the NTA is beyond the scope of this review, we consider in this submission that opportunities exist to address certain issues in the context of decision-making about mining leases.

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12 Queensland Government, *What native title means for Queensland - Exclusive and non-exclusive native title* (28 August 2023) <https://www.qld.gov.au/firstnations/environment-land-use-native-title/what-it-means-for-queensland>.

13 *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [214] <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca0900>.

14 *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples, Commonwealth of Australia v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples, Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* [2019] HCA 7 at [3(1)] <https://eresources.hcourt.gov.au/showCase/2019/HCA/7>.

15 *Mineral Resources Act 1989* (Qld) ch 1 pt 5 s 8-9 <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-1989-110>.

3.13 Although certain provisions of the MRA include registered native title claimants and bodies corporate in its use of the term 'the owner of land',[16] we understand that such provisions do not extend to *inter alia* the requirement that compensation payable to landholders is to be determined before the granting or renewal of a mining lease.[17] Conversely, the rights of registered native title claimants and RNTBCs under the NTA framework would be limited to the procedural rights to negotiate[18] (provided the State considers that such a right applies[19]) and to seek compensation, by way of application to the court.[20] This is just one example of how the MRA disparately treats First Nations and non-Indigenous landholders.

3.14 We encourage the QLRC to carefully consider whether any provisions of the MRA (and particularly, where the MRA extends certain rights to landholders) may give effect to or offend the RDA subsection 9(1), as discussed in paragraphs 3.2 and 3.3 above.

3.15 For completeness, we note that the *Human Rights Act 2019* (Qld) (**HRA**) prohibits the arbitrary deprivation of a person's property.[21] Although discussion of the human rights of Aboriginal and Torres Strait Islander Persons as protected by the HRA often centres around the section 28 suite of distinct cultural rights,[22] the proprietary nature of native title rights and interests (as discussed in paragraphs 3.6 to 3.8 above) bears repeating.

## Cultural heritage

3.16 The Cultural Heritage Acts impose a duty of care upon persons carrying out activities to 'take all reasonable and practicable measures' to avoid harm to Aboriginal cultural heritage and Torres Strait Islander cultural heritage.[23] Again, no right of veto is afforded by the Cultural Heritage Acts to Aboriginal and Torres Strait Islander Persons to any activities (such as mining) proposed to take place on lands or waters in which cultural heritage may be present, or which may comprise cultural heritage.[24]

3.17 Although the Cultural Heritage Acts establish various offences concerning Aboriginal and Torres Strait Islander cultural heritage, it is at the State's discretion to prosecute for such an offence. Assistance from the relevant Minister which may be sought by Aboriginal and Torres Strait Islander parties under the Cultural Heritage Acts is also discretionary.[25] By contrast, the HRA provides that Aboriginal and Torres Strait Islander

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16 Ibid ch 1 pt 5 s 10A.

17 Ibid ch 6 pt 1 s 279.

18 *Native Title Act 1993* (Cth) pt 2 div 3 subdiv P.

19 Ibid s 31(1); Queensland Government (Business Queensland), *Right to negotiate* (6 October 2022) <https://www.business.qld.gov.au/industries/mining-energy-water/resources/minerals-coal/authorities-permits/applying/native-title/right-to-negotiate>.

20 *Native Title Act 1993* (Cth) pt 2 div 5; pt 3 div 1 s 61(1).

21 *Human Rights Act 2019* (Qld) pt 2 div 2 s 24 <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2019-005>.

22 Ibid s 28.

23 *Aboriginal Cultural Heritage Act 2003* (Qld) pt 3 div 1 s 23(1) <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2003-079>; *Torres Strait Islander Cultural Heritage Act 2003* (Qld) pt 3 div 1 s 23(1) <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2003-080>.

24 *Aboriginal Cultural Heritage Act 2003* (Qld) pt 1 div 3 s 8; *Torres Strait Islander Cultural Heritage Act 2003* (Qld) pt 1 div 3 s 8.

25 *Aboriginal Cultural Heritage Act 2003* (Qld) pt 3 div 4 s 32-22; Torres Strait Islander Cultural Heritage Act 2003 (Qld) pt 3 div 4 s 32.

Peoples 'must not be denied the right' to enjoy, maintain, control, protect and develop their cultural heritage.[26] Unfortunately, the Cultural Heritage Acts do not give effect to human rights relevant to their subject matter.

3.18 As a measure of last resort, declarations for the protection of significant areas and objects may be sought from the relevant Minister under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).[27] As with the Cultural Heritage Acts, Ministerial assistance is discretionary.[28]

3.19 Again, while amendment of the Cultural Heritage Acts is beyond the scope of this review, we consider that the adequacy of measures for the protection of cultural heritage should be among the matters considered when a decision is made about the granting or renewal of a mining lease.

### Broader sector

3.20 Among other things, the *Path to Treaty Act 2023* (Qld) preamble recognises that Aboriginal and Torres Strait Islander Peoples have continuing responsibilities for their lands, seas, waters, air and resources under their laws, traditions and customs.[29] It is worth noting that, over thirty years prior, the Queensland Parliament acknowledged in preambles to the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) that Aboriginal and Torres Strait Islander Peoples' interests and responsibilities concerning land had not been adequately or appropriately recognised by the law, which contributed to a general failure of previous policies.[30]

3.21 With respect, we consider that systemic failures to adequately recognise and protect the rights, interests and responsibilities of Aboriginal and Torres Strait Islander Peoples in connection with lands, waters, resources and heritage remain embedded in Queensland laws. We would welcome the reform of laws the subject of this review to the extent that such laws may adequately recognise and protect the rights and interests of First Nations Peoples.

## 4. Consultation proposals and questions

For ease of reference, the balance of our submission responds sequentially to the questions, proposals and observations set out in the QLRC consultation paper titled *Reimagining decision-making processes for Queensland Mining - Review of mining lease objections processes*.[31]

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26 *Human Rights Act 2019* (Qld) pt 2 div 2 s 28(2)(a).

27 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) pt 2 div 1 <https://www.legislation.gov.au/C2004A02943/latest/text>.

28 Ibid.

29 *Path to Treaty Act 2023* (Qld) Preamble at [5] <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2023-012>.

30 *Aboriginal Land Act 1991* (Qld) Preamble at [8] <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-1991-032>; *Torres Strait Islander Land Act 1991* (Qld) Preamble at [7] <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-1991-033>.

31 Queensland Law Reform Commission, *Reimagining decision-making processes for Queensland Mining* (15 July 2024) <https://www.qlrc.qld.gov.au/reviews/mining-lease-objections-processes-review/review-publications>.

## Guiding principles

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

**Our perspective:** Yes, provided that these principles aim to ensure that the rights and interests of Aboriginal and Torres Strait Islander Peoples, communities and nations are treated no less favourably than those of non-Indigenous persons.

## The current processes

***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?*

**Our perspective:** We generally agree with the QLRC's assessment. However, while the Land Court has jurisdiction in some matters concerning land, there are relevant complexities in the native title framework that fall within the jurisdiction of other courts. In our view, the fragmentation of legal frameworks which deal with aspects of Aboriginal and Torres Strait Islander Peoples' rights and interests in connection with lands and waters operates at cross-purposes to achieving the adequate recognition, and protection, of such rights and interests.

As discussed in paragraph 3.13 above, we understand there to be disparities in the ways the MRA deals with landholders' rights and interests, as between Aboriginal and Torres Strait Islander landholders and other landholders (such as freehold title holders) in ways that are inconsistent with provisions of the RDA. In our view, a comprehensive assessment of the MRA should be undertaken for compliance with the RDA.

We particularly agree that a major issue in connection with the current objection processes is the lack of resourcing for Aboriginal and Torres Strait Islander Peoples, groups and bodies to participate.

## Participating in the Government's decision-making processes

***P1:*** *Participation in the current processes should be reframed by:*

*(a) removing the Land Court objections hearing pre-decision*

*(b) including an integrated, non-adversarial participation process*

*(c) establishing an Aboriginal and Torres Strait Islander Advisory Committee for relevant mining proposals to facilitate Aboriginal and Torres Strait Islander input as part of the new participation process.*

***Q3*** *What are your views on proposal 1?*

**Our perspective:** Concerning subparagraph (c), although we do not oppose the proposal in principle, we anticipate that determining an appropriate composition of the proposed Aboriginal and Torres Strait Islander Advisory Committee (**Committee**) would be challenging.

Existing legal frameworks for future acts and cultural heritage establish the standing of particular persons, entities or parties to deal with certain matters. In our view, input should be invited from the particular Aboriginal or Torres Strait Islander People or groups whose interests would be affected by the proposed mining lease.

It should be noted that the mining lease applicant may concurrently be negotiating agreements with particular Aboriginal and Torres Strait Islander parties, according to the NTA and/or the Cultural Heritage Acts. However, it would be impractical and undesirable to require the participation of (for example) a registered native title claimant or[32] RNTBC in a participation process that may not fall within the scope of their authority to act, and for which participation such parties are not resourced to engage.

If a new Committee were to be introduced, we consider that care should be taken to distinguish between:

(a) the role of the Committee, which is proposed to advise decision-makers; and

(b) the views, wishes and concerns of any native title, Aboriginal or Torres Strait Islander parties who hold relevant standing under separate legislation.

***Q4*** *What forms of participation should be included in the new participation process?*

**Our perspective:** For the participation of Aboriginal and Torres Strait Islander Persons, communities and nations, we consider Article 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) to be instructive:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[33]

Relevantly, the UNDRIP also provides at Article 18 that 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures'.[34] In our view, involvement in decision-making about whether a mining lease may be granted or renewed should provide more substantive rights than (for example) being notified of the

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32 *Native Title Act 1993* (Cth) pt 15 div 4 s 253 (definitions of 'registered native title body corporate' and 'registered native title claimant'); *Aboriginal Cultural Heritage Act 2003* (Qld) pt 4; *Torres Strait Islander Cultural Heritage Act 2003* (Qld) pt 4.

33 United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on Thursday, 13 September 2007 (A/RES/61/295), Article 32(2) <https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples>.

34 Ibid Article 18.

proposed grant,[35] making submissions about the proposed grant,[36] or negotiating conditions that would apply to the lease if granted.[37] The UNDRIP Article 32(2) provides that free, prior and informed consent (**FPIC**) is the appropriate standard to be sought by the State before deciding to grant or renew a mining lease.

Any re-designed models for the participation of First Nations Peoples in decision-making should be developed following relevant provisions of the UNDRIP, which reflects the 'minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.[38] In our view, the proposed models of participation do not reflect the standards set out in the UNDRIP.

***Q5*** *How would removing the objections hearing affect private interests?*

**Our perspective:** As discussed in question 4, we consider that neither the current nor proposed alternative participation models reflect international standards for the involvement of Aboriginal and Torres Strait Islander Peoples. Whether a process for Land Court objections hearings is retained or removed, we submit that meaningful participation of Aboriginal and Torres Strait Islander Peoples in decision-making and a requirement for FPIC are minimum standards that should be reflected in the MRA framework.

***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?*

**Our perspective:** In our view, comparable frameworks for 'sliding scale' participation methods exist within the native title and cultural heritage frameworks and pose various difficulties in practice.

With respect to native title, the State has discretion to consider that certain future acts attract the 'expedited procedure'.[39] In exercising this discretion, the State should consider *inter alia* the likely direct interference with the native title holders' community or social activities, areas or sites of particular significance, and disturbance to any land or waters concerned.[40] If the State considers that the expedited procedure applies, the relevant native title party does not obtain a right to negotiate by default.[41] Native title parties have a procedural right to object to the application of the expedited procedure, and the issue can be

35 *Native Title Act 1993* (Cth) pt 2 div 3 subdiv P s 29.

36 Ibid s 31(1)(a).

37 Ibid s 31(1)(b).

38 United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on Thursday, 13 September 2007 (A/RES/61/295), Article 43.

39 *Native Title Act 1993* (Cth) pt 2 div 3 subdiv P s 29(7), s 31(1), s 32; pt 15 div 2 s 237.

40 Ibid pt 15 div 2 s 237.

41 Ibid pt 2 div 3 subdiv P s 31(1).

determined by an arbitral body.[42]

At the time of writing, the National Native Title Tribunal (**NNTT**) website indicates that there are 1,010 current (active) future act objection applications,[43] and some 31,776 finalised applications.[44] NNTT data indicates that, of future act determinations made, the expedited procedure was determined to *not* apply in some 385 matters.[45] This data suggests that native title parties have infrequent success in pursuing the objections process. Given also that application fees apply to lodging an objection,[46] we consider that financial imposts and low success rates are likely deterrents to participation in the future acts objections framework.

With respect to cultural heritage, guidelines for compliance with the duty of care imposed by the *Aboriginal Cultural Heritage Act 2003* (Qld) subsection 23(1) (**DOC Guidelines**) have been gazetted pursuant to section 28 of that Act. No equivalent guidelines have been gazetted pursuant to the *Torres Strait Islander Cultural Heritage Act 2003* (Qld).[47] Among other things, the DOC Guidelines categorise activities on an increasing scale of surface disturbance and provide guidance as to how the cultural heritage duty of care can be discharged.[48] In practice, land users' interpretation of the DOC Guidelines varies enormously. For example, some land users consider that historical usage of a land parcel for agricultural purposes would preclude the need to consult with Aboriginal parties before undertaking cut-and-fill earthworks, regarding the 'Category 4' provisions.[49] In our view, such activities would more likely involve additional surface disturbance and would therefore align with 'Category 5' – in which case, the activity should not proceed without cultural heritage assessment.[50] The potential for harm being caused to surface, subsurface, inherent and intangible Aboriginal cultural heritage in the absence of engagement with Aboriginal parties is self-evident.

Given the difficulties faced in existing 'tailored participation processes' within the native title and cultural heritage frameworks, we anticipate that adopting such processes in the MRA framework would be similarly fraught with challenges.

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

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42 Ibid pt 2 div 3 subdiv P s 32(3)-(5).

43 National Native Title Tribunal, *Statistics - Current Applications - Future act applications - Future act objection* (accessed 29 August 2024) <https://www.nntt.gov.au/Pages/Statistics.aspx>.

44 National Native Title Tribunal, *Search Future Act Applications and Determinations [Search: Future act applications; Application type: FA Objection; Application status: Finalised]* <https://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx>.

45 Ibid *[Search: Future act determinations; Decision/determination type: Objection - Expedited Procedure Does Not Apply]* and *[Search: Future act determinations; Decision/determination type: - Expedited Procedure Applies AND Objection - Expedited Procedure Does Not Apply]*.

46 National Native Title Tribunal, *Expedited procedure objections - Application fees* <https://www.nntt.gov.au/futureacts/Pages/Expedited-procedure-objections.aspx>.

47 *Torres Strait Islander Cultural Heritage Act 2003* (Qld) pt 3 div 2 s 28; Queensland Government, *Cultural heritage duty of care - Duty of care guidelines* <https://www.qld.gov.au/firstnations/environment-land-use-native-title/cultural-heritage/cultural-heritage-duty-of-care>.

48 Queensland Government, *Aboriginal Cultural Heritage Act 2003 Duty of Care Guidelines* (2024) <https://www.qld.gov.au/firstnations/environment-land-use-native-title/cultural-heritage/cultural-heritage-duty-of-care>.

49 Ibid p 8 [Areas previously subject to Significant Ground Disturbance (Category 4)].

50 Ibid p 10 [Activities causing additional surface disturbance (Category 5)].

**Our perspective:** Financial resources and support should be made available to Aboriginal and Torres Strait Islander Persons and groups (including but not limited to native title parties,[51] Aboriginal parties[52] and Torres Strait Islander parties[53]) to participate in objection processes. In our experience, one of the biggest disadvantages faced by Aboriginal and Torres Strait Islander Peoples and groups is inadequate resourcing to avail themselves of opportunities to protect their rights and interests in a meaningful, equitable manner.

***P2:*** *A central online Government portal should be established to facilitate public notice and give up-to-date information about mining proposals. The Mineral Resources Act 1989 and the Environmental Protection Act 1994 should be amended 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.*

***Q8*** *What are your views on proposal 2?*

**Our perspective:** We support the proposal for an online portal in which various types of relevant information could be consolidated. Particularly, we support the proposed mechanisms for project and region-specific updates, interactive mapping, and the hosting of current and archived documentation.

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

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

*(a) mining leases?*

*(b) associated environmental authorities?*

***Q11*** *What else is required to notify Aboriginal peoples and Torres Strait Islander peoples who may have an interest in the mining proposal?*

**Our perspective:** We consider that notice should be given to any relevant registered native title claimants,[54] RNTBCs,[55] Aboriginal parties[56] and Torres Strait Islander parties.[57] For the purposes of the Cultural Heritage Acts, and if there are no known Aboriginal or Torres Strait

51 *Native Title Act 1993* (Cth) pt 15 div 4 s 253 (definition of 'native title party').

52 *Aboriginal Cultural Heritage Act 2003* (Qld) pt 4 s 35.

53 *Torres Strait Islander Cultural Heritage Act 2003* (Qld) pt 4 s 35.

54 *Native Title Act 1993* (Cth) pt 15 div 4 s 253 (definition of 'registered native title claimant').

55 Ibid (definition of 'registered native title body corporate').

56 *Aboriginal Cultural Heritage Act 2003* (Qld) pt 4 s 35.

57 *Torres Strait Islander Cultural Heritage Act 2003* (Qld) pt 4 s 35.

Islander parties for the area, notice could be given to any relevant cultural heritage bodies.[58] As a safeguard, notice could also be given to the relevant native title representative body or service provider.[59]

Information that should be made accessible to Aboriginal and Torres Strait Islander Peoples and groups, as early as possible in the process, should include (at a minimum) the nature, size, purpose, scope, pace, duration and reversibility of the proposed activities, the areas that will be affected (such as lot on plan details, and mapping), and a preliminary assessment of potential economic, social, cultural and environmental impacts, risks and benefits.[60] Such information should be made available both in written formats, in plain English as well as local languages (such as Yumplatok/Torres Strait Creole), and audiovisual formats.

## Deciding each application

***P3:*** *An Independent Expert Advisory Panel should be established 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.*

***Q12*** *What are your views on proposal 3?*

**Our perspective:** If an Independent Expert Advisory Panel is formed, we suggest that expertise in human rights should be among the disciplines represented. For example, the HRA recognises that Aboriginal and Torres Strait Islander Peoples hold a distinct cultural right 'to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources'.[61] Although various scientific and technical expertise is proposed to contribute to the expert analysis, we consider that the potential impacts of mining activities should be considered from a human rights perspective at all stages of decision-making.

***Q13*** *What should be the criteria to form an Independent Expert Advisory Committee for an environmental authority application?*

**Our perspective:** In addition to the potential criteria proposed, we suggest that considerations for the formation of a project-specific Independent Expert Advisory Panel should also include:

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58 *Aboriginal Cultural Heritage Act 2003* (Qld) pt 4 s 36-37; *Torres Strait Islander Cultural Heritage Act 2003* (Qld) pt 4 s 36-37.

59 *Native Title Act 1993* (Cth) pt 11.

60 Food and Agriculture Organization of the United Nations (2016), *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities*, 15-16 <https://www.fao.org/policy-support/tools-and-publications/resources-details/en/c/1410915/>.

61 *Human Rights Act 2019* (Qld) pt 2 div 2 s 28(2)(e).

(a) with reference to the Cultural Heritage Acts, whether any registered Aboriginal cultural heritage or Torres Strait Islander cultural heritage exists within, or in proximity to, the proposed mining lease area;

(b) whether any declarations have been made, or sought, under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)[62] within, or in proximity to, the proposed mining lease area; and

(c) whether a reasonable request has been made, by a person or group whose rights and interests may be affected by the proposed activities, for an Independent Expert Advisory Committee to be formed concerning the application.

We note that Aboriginal and Torres Strait Islander cultural heritage may be an area itself,[63] and that the *Environmental Protection Act 1994* (Qld) should be administered 'in consultation with and having regard to the views and interests of … Aboriginal peoples and Torres Strait Islander Peoples under Aboriginal tradition and Ailan Kastom'.[64]

***P4:*** *The statutory criteria in the Mineral Resources Act 1989 and the Environmental Protection Act 1994 should be amended to require the relevant decision-maker to consider:*

*(a) for decisions about mining lease and associated environmental authority applications – information generated through the new participation process*

*(b) for decisions about environmental authority applications – any advice of the Independent Expert Advisory Committee.*

***P5:*** *The statutory criteria in the Mineral Resources Act 1989 and the Environmental Protection Act 1994 for decisions about mining lease and associated environmental authority applications should be amended to require each decision-maker to consider the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage.*

***Q14*** *What are your views on proposal 4?*

**Our perspective:** We generally support the intention of proposal 4, as qualified by our:

(a) reservations about the proposed alternative participation models (questions 3-7 above);

(b) suggestions concerning the proposed Independent Expert Advisory Panel (questions 12-13 above); and

(c) feedback to questions 16-17 below.

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62 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) pt 2 <https://www.legislation.gov.au/C2004A02943/latest/text>.

63 *Aboriginal Cultural Heritage Act 2003* (Qld) pt 1 div 3 s 8-12; *Torres Strait Islander Cultural Heritage Act 2003* (Qld) pt 1 div 3 s 8-12; *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) pt 1 s 3(1) (definition of 'significant Aboriginal area').

64 *Environmental Protection Act 1994* (Qld) ch 1 pt 2 s 6 <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-1994-062>.

***Q15*** *What are your views on proposal 5?*

**Our perspective:** We support the proposal that the relevant statutory criteria for decision-making should expressly require decision-makers to adequately consider the rights and interests of Aboriginal and Torres Strait Islander Peoples in land, culture and cultural heritage.

***Q16*** *Should the decision-maker for the mining lease application be required to consider the decision (and reasons for decision) of the decision-maker for the environmental authority application in reaching their decision on the statutory criteria for:*

*(a) public interest?*

*(b) adverse environmental impacts?*

*(c) the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage (see proposal 5)?*

*(d) any other criteria?*

**Our perspective:** Yes, we agree that the mining lease application decision-maker should consider the matters described in subparagraphs (a)-(c). In relation to subparagraph (d), we suggest that consideration should also be given to matters such as:

- who is likely to benefit from the proposed activities permitted by the lease? To what extent (if any) will the anticipated benefits be shared, such as with the Aboriginal or Torres Strait Islander Peoples of the land upon which the activities will take place?
- whose rights and interests are likely to be impacted by the proposed activities? To what extent (if any) will such persons be compensated, and when?
- will there be any opportunities to give effect to certain human rights, such as to maintain and strengthen the distinctive spiritual, material and economic relationship that Aboriginal and Torres Strait Islander Peoples have with the land, territories, waters and resources with which they are connected?[65]
- how will the Aboriginal or Torres Strait Islander Peoples of the area be involved in decision-making processes?

***Q17*** *Are there additional reforms to the statutory criteria under the Mineral Resources Act 1989 and the Environmental Protection Act 1994 you would like us to consider?*

**Our perspective:** We submit that the decision-maker for mining lease applications should also consider:

(a) whether or not FPIC has been sought from, or given by, the Aboriginal or Torres Strait Islander Peoples of the land upon which the activities are proposed to take place;

(b) options to reduce the extent to which the proposed acts will affect native title rights

[65] *Human Rights Act 2019* (Qld) pt 2 div 2 s 28(2)(d).

and interests;[66] and

(c) with reference to the *Mineral Resources Act 1989* (Qld) subsection 269(4)(m),[67] whether the relevant land tenure type is amenable to transfer under provisions of the *Aboriginal Land Act 1991* (Qld) or the *Torres Strait Islander Land Act 1991* (Qld), and whether steps could be taken to facilitate the objectives of those Acts.[68]

## Reviewing the Government's decisions

***P6:*** *Review by the Land Court should be available after the Government has decided the mining lease and environmental authority applications. Decisions of the Land Court should be appealable to the Court of Appeal on the grounds of errors of law or jurisdictional error. The Land Court should:*

*(a) conduct proceedings after decisions on both applications are made*

*(b) conduct 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.*

***Q18*** *What are your views on proposal 6?*

**Our perspective:** We support in principle the proposal to streamline review pathways. In our view, the success of this model would best be supported by robust statutory criteria for decision-making and ensuring that comprehensive evidence is before the decision-makers in the first instance.

As it is not compulsory to record details of Aboriginal and Torres Strait Islander cultural heritage on the database established for the Cultural Heritage Acts,[69] we submit that the identification of cultural heritage within the relevant area should be admissible as new evidence in the review process, even if such information was not before the primary decision-maker. We anticipate that other circumstances in which it could be appropriate to consider new evidence may include the lodgment (or acceptance for registration) of a native title determination application,[70] or the joinder of an Indigenous respondent to a native title proceeding[71] - in which case, there may be materially relevant rights and interests that have not yet been taken into consideration.

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66 National Indigenous Australians Agency (2021), *National Guiding Principles for Native Title Compensation Agreement Making* <https://www.niaa.gov.au/resource-centre/national-guiding-principles-native-title-compensation-agreement-making>.

67 "The Land Court, when making a recommendation to the Minister that an application for a mining lease be granted in whole or in part, shall take into account and consider whether - taking into consideration the current and prospective uses of that land, the proposed mining operation is an appropriate land use."

68 Please refer also to the *Aboriginal Land Act 1991* (Qld) Part 18 and the *Torres Strait Islander Land Act 1991* (Qld) Part 13.

69 *Aboriginal Cultural Heritage Act 2003* (Qld) pt 5 div 1; Torres Strait Islander Cultural Heritage Act 2003 (Qld) pt 5 div 1.

70 *Native Title Act 1993* (Cth) pt 3 div 1 s 61(1), pt 7 s190A.

71 Ibid pt 4 div 1A s 84(3), s 84(5).

***Q19*** *What preconditions, if any, should there be to commence combined review?*

**Our perspective:** In our view, there should remain open standing to commence proceedings.

***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?*

**Our perspective:** We consider that the Land Court should be given full powers to make orders and give directions as are most appropriate in the circumstances. Taking into consideration the proposed approach towards streamlining generally, expansion of the Land Court's role, the Court's impartiality and the proposed appeal pathway, we see benefit in the Land Court having the full suite of powers in respect of reviews.

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

**Our perspective:** In circumstances where a review application is brought by an Aboriginal or Torres Strait Islander applicant, we consider that an 'asymmetrical' costs model would be appropriate. If upon review it is found that the decision was wrongly made, it would be unjust for the applicant to bear their own costs in seeking a remedy, particularly given the profound imbalances of power and resources by contrast with the State. In this regard, we note that no changes are proposed to the current decision-making framework.[72] If alternate decision-making models were considered, such as to reflect the UNDRIP standards, a different framework as to costs may be more appropriate.

## Interactions with other laws

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

**Our perspective:** As discussed in paragraph 3.13 and at question 2 above, we consider that provisions of the RDA are of central importance to aspects of the MRA framework which do not treat Aboriginal and Torres Strait Islander Persons on equal footing with other landholders.

As the QLRC has observed,[73] there is no accessible mechanism provided by the Cultural Heritage Acts through which to enforce compliance with an approved cultural heritage management plan (**CHMP**) or another agreement that deals with cultural heritage, notwithstanding that a CHMP may be required for the granting of an environmental

[72] Queensland Law Reform Commission, *Reimagining decision-making processes for Queensland Mining* (15 July 2024) 19 [87].

[73] Ibid 47 [254].

authority.[74] While an application could be brought to seek an injunction,[75] in which circumstances the alleged non-compliance with an approved CHMP or other agreement would be a relevant consideration,[76] the granting of an injunction for the prevention of a certain act is discretionary[77] and would not otherwise compel compliance with the agreement.

Similarly, under the NTA framework, the State may require an agreement to be entered into (such as according to section 31 of that Act, or an Indigenous land use agreement) before the granting of a mining lease. However, we understand that the State does not require compliance with such an agreement for the grant of the mining lease to remain effective. We appreciate that remedies may be pursued for breach of contract, but we are not aware of any exercise of Ministerial discretion to cancel a mining lease[78] as a result of failure to comply with a native title agreement.

In our view, grounds for the cancellation of a mining lease should be expanded to expressly include material non-compliance with any agreement reached under the NTA or the Cultural Heritage Acts that was required to be obtained before the lease being granted.

***Q23*** *What opportunities are there, if any, to integrate interacting Queensland Acts with the processes to decide mining lease and associated environmental authority applications?*

**Our perspective:** We consider that opportunities exist to give effect to certain provisions of the HRA in the course of decision-making processes. Where the HRA provides that 'Aboriginal peoples and Torres Strait Islander Peoples must not be denied' certain rights,[79] meaningful involvement in the relevant decision-making process should extend beyond a consideration of compatibility with such rights. Where Aboriginal and Torres Strait Islander Peoples have the right to maintain and strengthen their economic relationship with their land, waters and resources,[80] and to conserve and protect the productive capacity thereof,[81] provisions of the MRA with respect to decision-making about mining leases should give effect to these rights. Presently, we understand that the Crown exclusively holds decision-making rights for the grant of a mining lease.[82]

## Other matters

74 *Aboriginal Cultural Heritage Act 2003* (Qld) pt 7 div 2 s 87; Torres Strait Islander Cultural Heritage Act 2003 (Qld) pt 7 div 2 s 87.

75 *Land Court Act 2000* (Qld) pt 2 div 6B s 32H <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2000-001>.

76 *Aboriginal Cultural Heritage Act 2003* (Qld) pt 3 div 1 s 23(3)(a)(ii)-(iii), s 24(2)(a)(ii)-(iii), s 25(2)(a)(ii)-(iii), s 26(2)(a)(ii)-(iii); Torres Strait Islander Cultural Heritage Act 2003 (Qld) pt 3 div 1 s 23(3)(a)(ii)-(iii), s 24(2)(a)(ii)-(iii), s 25(2)(a)(ii)-(iii), s 26(2)(a)(ii)-(iii).

77 *Land Court Act 2000* (Qld) pt 2 div 6B s 32H(2).

78 *Mineral Resources Act 1989* (Qld) ch 6 pt 1 s 308(1).

79 *Human Rights Act 2019* (Qld) pt 2 div 2 s 28(2).

80 Ibid s 28(2)(d).

81 Ibid s 28(2)(e).

82 *Mineral Resources Act 1989* (Qld) ch 1 pt 5 s 9.

***Q24*** *Should there be a legislated pre-lodgement process?*

**Our perspective:** Yes, we consider that prospective miners should be required to participate in pre-lodgement processes. We submit that the provision of information about native title and cultural heritage considerations should form part of compulsory pre-lodgement processes.

In our experience, many prospective miners do not understand the native title and cultural heritage legal frameworks – and frequently do not wish to incur the costs of seeking specialist legal advice. Consequently, Aboriginal and Torres Strait Islander participants (and their legal representatives) incur a significant burden in:

(a) responding to engagement requests (such as seeking a consent, negotiating an agreement, or arranging a cultural heritage assessment) with persons who lack an understanding of the legal frameworks, objectives, limitations and costs associated;

(b) educating the persons who wish to engage with them on the relevant frameworks, so that the matter may progress;

(c) justifying the costs involved, such as seeking consent from the relevant native title holders (where required) following complex legal requirements; and

(d) advocating for their rights and interests, which are generally not well understood by the other party.

Suffice it to say, that a poor understanding of applicable frameworks on the part of the prospective miner is not conducive to productive or efficient dealings between the parties. Where the legal frameworks require engagement between prospective miners and Aboriginal and Torres Strait Islander parties, we consider that the State should have a role in making general information available to mining proponents, and to alleviate the burdens imposed upon Aboriginal and Torres Strait Islander participants in the process.

***Q25*** *Is there anything else you would like to tell us about the current processes?*

**Our perspective:** Further to other issues discussed in this submission, we consider that unrealistic timeframes and expectations on the part of prospective miners are a recurring issue in this sector. In practice, effective participation in matters concerning both extractive industries and the rights and interests of Aboriginal and Torres Strait Islander Peoples and communities in land, waters, resources and cultural heritage requires an understanding of complex, intersecting but disparate legal frameworks.

In addition to the parameters of the NTA and Cultural Heritage Acts as intersect with MRA processes, our clients variously operate within the parameters of (for example) conditions imposed upon their authority to act on behalf of a native title claimant group, pursuant to the NTA section 251BA; provisions of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and subordinate regulations; the constitution (or 'rule book') of an RNTBC; traditional laws, customs and cultural protocols which apply to certain dealings about lands and waters; and,

importantly, a lack of resourcing and support to engage with third parties in matters where competing rights and interests intersect. However, many prospective miners do not understand or appreciate the time and resources required for Aboriginal and Torres Strait Islander participants to discharge their roles, duties and obligations.

As the QLRC has observed, there are significant demands for engagement in this sector made upon overburdened Aboriginal and Torres Strait Islander Peoples, and communities[83] and, in our view, a low appetite for participation in the current objection processes is unsurprising. As discussed in relation to question 24, we consider that a requirement for the State to better inform prospective miners of native title and cultural heritage considerations would go some way towards alleviating the burdens and barriers imposed upon Aboriginal and Torres Strait Islander participants.

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

**Our perspective:** As discussed in relation to questions 4, 5 and 23, we do not consider that the current or proposed frameworks for decision-making or participation reflect the minimum standards provided by the UNDRIP. We also hold concerns as to whether provisions of the MRA accord with or contravene, provisions of the RDA (as discussed in paragraph 3.13 and in relation to questions 2 and 22). These are fundamental issues that will not be resolved through reform of objection processes alone; instead, reform is required in the decision-making process.

In its *Queensland resources industry development plan* (**QRIDP**), the State commits to ensuring that, by 2050, Aboriginal and Torres Strait Islander Peoples will be 'true decision-making partners in resource projects'.[84] This objective will not be realised through private arrangements between industry and Aboriginal and Torres Strait Islander Peoples, as the QRIDP appears to contemplate. Put simply, it is incumbent upon the State to uphold the commitments that it makes. To achieve genuine partnership in decision-making about land and resources, the State must be willing to share decision-making powers with Aboriginal and Torres Strait Islander People, communities and nations. Otherwise, we will continue to see failures in the laws and policies of the State to recognise, protect and uphold Aboriginal and Torres Strait Islander Peoples's rights and interests as concern their lands, waters, resources and heritage.

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83 Queensland Law Reform Commission, *Reimagining decision-making processes for Queensland Mining* (15 July 2024) 25 [123].

84 Queensland Government (Department of Resources), *Queensland resources industry development plan* (June 2022) 31 <https://www.resources.qld.gov.au/qridp>.