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

Briefing note 1 – Overarching reform options

Notes to Commission

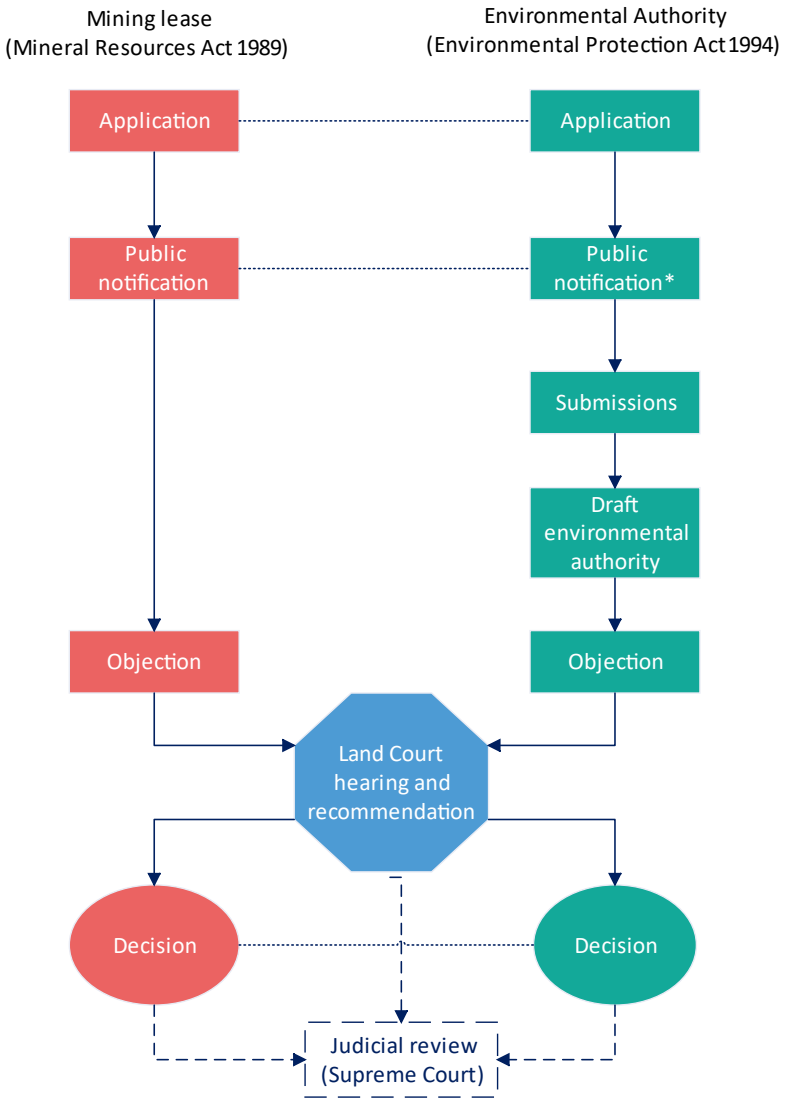
This briefing note sets out options for overarching reforms to the process to decide contested applications for mining leases (MLs) under the Mineral Resources Act 1989 (MR Act) and associated environmental authorities (EAs) under the Environmental Protection Act 1994 (EP Act). The options identified seek to address issues with the process through the lens of our guiding principles to ensure the process is fair, efficient, effective and contemporary.

The accompanying briefing notes (#2 – 7) outline the issues and options for reform for each element.

Key matters that have been identified as requiring further consideration include:

- whether the Government's role in the process should change (for example, in facilitating notification and information sharing, early participation and engagement, obtaining expert evidence, participating as a statutory party, convening public hearings, membership of advisory panels, etc) (we have included some options pertaining to this issue for consideration)
- how the process should consider and delineate private and public interests, including:
  - whether the statutory criteria for MLs and EAs should be amended to clearly demarcate interests and considerations and remove the potential for duplication between the authorities
  - when and how the public interest should be considered
  - who should hold responsibility for raising and proving public interest matters such as the environmental impacts of a proposed project
  - how broader public interest issues relevant to the grant of the ML, such as appropriate land use, should be considered
  - whether there should be a separate pathway for challenges to MLs based on the protection of private interests
- how to ensure credible and reliable information on the potential impacts of a mining project is developed and made publicly available earlier in the process to support appropriate participation and good administrative decision-making (we have included some options pertaining to this issue for consideration)
- how the process should apply to amendments to mining projects, including what threshold should apply to trigger participation rights (with associated notification requirements)
- how the process for deciding contested applications for EAs under the EP Act interacts with and is impacted by decisions made by the Coordinator-General (C-G) under the State Development and Public Works Organisation Act 1971 and the implications for our review
- whether the process should include differentiated pathways for resolving contested applications and, if so, whether thresholds should be based on size, risk or project type?
- the extent to which the process can incorporate considerations relevant to other approval processes (for example water, land use, cultural heritage) and if so, if this is appropriate and desirable.

Overview of current process



* The sequence and timing for notification will depend on the nature of the application and whether there is an environmental impact statement

- Applications for MLs and associated EAs can be contested through the objections processes established under the Mineral Resources Act 1989 and the Environmental Protection Act 1994.
- To machine-mine, a miner must have an ML, granted by the Minister for Resources.[1]
- An ML cannot be granted unless a valid EA has been granted by the chief executive of the Department of Environment and Science.[2] As part of the EA process, an environmental impact statement (EIS) (which provides detailed information about the current environment in the relevant area, the anticipated environmental, social and economic effects of the project and ways to avoid, minimise, mitigate or offset them) may be required.
- Any person can object to an application for a ML.[3] Any person can also make submissions on the application for the EA or on the EIS (if any) and then object.[4]

- If any person makes an objection to either or both applications, the relevant Department (the Department of Resources or the Department of Environment, Science and Innovation) must make a referral to the Land Court, which:
  - conducts a hearing into the merits of the application and objections
  - makes a recommendation to the relevant decision-maker.[5]
- Each party to the hearing is responsible for their own costs. The Land Court can make an order as to costs.[6]
- Applications for MLs and associated EAs are regulated by separate Acts and administered by different agencies, although they are connected at key points:
  - only the applicant for an ML can apply for the associated EA (the applications can be made at the same time or the ML application can be made first)
  - the miner must give public notice of the applications together (unless public notification has already been provided through an EIS that remains complete and current) and the processes for making objections are aligned
  - objections for ML applications and associated EAs are heard by the Land Court together, if practicable
  - the Land Court's recommendation is made to the relevant decision-maker on each application before the final decision is made
  - an ML cannot be granted unless a valid EA has been granted.
- Decisions by the Land Court and by the relevant decision-makers are judicially reviewable by the Supreme Court.[7]

Strengths identified with the current process

The following positive features of the current process have been identified from the terms of reference and previous relevant inquiries and align with the guiding principles for our review:

- independent merits assessment (currently through the Land Court process), including its rigour, impartiality, credibility, transparency, that it is open to hear objections from any party and that it leads to generation of quality, expert evidence to inform decision-making
- community participation available in all mining project applications
- systems within the Department of Resources and Critical Minerals that promote transparency and accountability and mitigate against corruption, including public information and access to certain documents
- clear statutory criteria for assessments, recommendations and decisions
- limited discretion by the Minister for Resources and Critical Minerals
- oversight by integrity systems and officers and codes of conduct.

Key issues raised about the current process

The following key issues have been identified from the terms of reference and previous relevant inquiries and align with the guiding principles for our review. Our understanding of the nature and scope of these issues is informed by our preliminary consultations, feedback and roundtables. We will develop and supplement our understanding of the issues through the consultation process.

1. **The process could be more efficient:**
    - aspects of the process can be protracted and costly (in terms of time and resources) for all parties. Stakeholders point to duplication in notification and objection requirements and statutory criteria, as well as process issues such as the need for the final decision-makers to issue information requests.
    - there are procedural redundancies:
        - between the processes for deciding contested ML and EA applications
        - within the process for deciding EAs (for example, within the EIS and substantive EA process)
        - between statutory criteria for decisions by the decision-makers for the ML and EA applications and between the criteria for these decisions and the Land Court's merits assessment
        - in standing to object on the same grounds or issues through multiple avenues and forums
        - in the issues that can be considered through separate judicial review applications
    - the process is comprised of administrative decisions which can be subject to multiple (and parallel) judicial review proceedings, which can protract resolution of contested applications
    - the process is complex and there is a lack of clarity as to the sequence, timing and procedure for various elements.
2. **The fairness of the process could be increased:**
    - aspects of the process are not transparent and clear and do not fully align with 'best practice' administrative decision-making principles and practice or with the requirements of natural justice. In particular:
        - there is limited public access to up-to-date information about applications
        - there can be inconsistencies in the information before the Land Court for merits assessment and before the final decision-makers
        - there is a high level of discretion for decision-makers
        - mining projects declared 'coordinated projects' are exempt from the requirement to undergo an environmental impact assessment process under the Environmental Protection Act 1994
        - conditions set by the C-G fetter the Minister's power in deciding the ML application and bind the chief executive of the Department of Environment, Science and Innovation in deciding the EA application
        - there is inconsistency in review rights associated with whether a project is designated a coordinated project, with decisions by the C-G protected from judicial review
    - the burden of raising public interest matters can fall to concerned individuals and environmental organisations in an adversarial court setting, notwithstanding that the public interest may reflect Government's policy commitments
    - there is a lack of certainty and consistency with aspects of the process, including:
        - the potential for a project's trajectory to be significantly altered by the making of one or more objections
        - the lack of timeframes for decisions within the process

- the lack of clarity about the grounds for objections
- the high degree of discretion for decision-makers at key points, including the C-G, with a decision to declare the project a coordinated or prescribed project or development significantly altering a project's trajectory

- there are concerns with access to justice for affected parties in the process, including landholders, community and First Nations Australians.

3. **The process could be more effective:**
   - the process could more effectively respond to the evolving nature of mining projects
   - the process can be misused to advance particular interests
   - the length, complexity and uncertainty that can be associated with the process can deter investment in mining
   - the process could more effectively manage the tensions between competing legislative objectives and stakeholder issues in a way that is collaborative rather than adversarial and at a time that is conducive to responsive project design and adaptation
   - matters that fall within the scope of the statutory criteria are also considered separately under different authorities and legislative frameworks, which not only creates inefficiencies and procedural redundancies but also gives rise to the potential for conflicting decisions and outcomes (for example, consideration of appropriate land use under both the MR Act for the ML and the Regional Planning Interests Act 2014, impacts of First Nations rights under both the EA and the native title processes)
   - key stakeholders can lack confidence in aspects of the process.
4. **The process could be more contemporary:**
   - the process must be able to manage the anticipated growth and diversity of the Queensland resources industry (and the changing nature and volume of applications). The process must address tensions where there are competing interests in relation to land use, with the potential for increasing tensions to arise in the context of the energy transition
   - the opportunities for community participation, including for First Nations communities, could better reflect contemporary expectations, commitments and standards. In the current process, community participation is limited to making an objection on the ML application or a submission or objection on the EA application and participating in any mining objections hearing (and restrictions apply). There is a growing imperative for governments and mining companies to engage meaningfully with different communities that may be impacted by mining projects. Consent from affected First Nations communities is currently considered as a 'one off' approval during the ML application process. This does not align with the increasing focus on the requirements of free, prior and informed consent (FPIC), which is increasingly recognised as the model for best practice engagement and participation by First Nations communities in decision-making processes
   - the process needs to develop to meet contemporary regulatory requirements and investment expectations. Key considerations include:
     - the regulatory landscape for environmental, social and governance (ESG) risk disclosure and reporting is rapidly evolving, creating an increasing need for independence, transparency and accountability in mining approval processes. New ESG reporting and disclosure requirements are developing and stronger ESG credentials are increasingly required, including as a specific criterion of mine tender applications
     - there are new regulatory issues associated with new methods of mining (such as

brownfield initiatives) and increased social and environmental risks

- developments in international law and the introduction of new global standards may impact the regulation of mining in the future.

Reform options

Overarching reforms to the process
Reframe the objections process as a contemporary participation process that includes early and ongoing non-adversarial ways for stakeholders to provide input into the processes to decide MLs and associated EAs
Align the process for deciding contested applications for MLs and associated EAs with 'best practice' administrative decision-making processes, replacing merits assessment by the Land Court before the decision with merits review by a court post-decision. If this option is proposed, key alternatives for the model are: (a) the decision on the EA is made first and can be subject to merits review and judicial review together, with any review to be determined before the decision on the ML is made or (b) both the decisions on the EA and the ML can be subject to merits review and judicial review, which can be heard and determined together. Key issues for consideration in relation to this reform option include: • the appropriate model and forum (current models that may be appropriate are considered in briefing note 6) • what is authorised by the ML and EA respectively? • what should the statutory criteria be for each authority? Is there any unnecessary duplication in the statutory criteria for decisions about MLs and associated EAs that can be removed? Is one way to do so by demarcating public and private interests
Modernise notification and information-sharing processes for MLs and associated EAs
Reforms to key elements

Reframe the objections process as a contemporary consultation and participation process:
• reframe the objections process as a contemporary consultation and participation process, including opportunities for early and ongoing engagement, including through:
  ○ enhanced forms of participation in ML applications (eg the opportunity to make public written submissions) (or alternatively, limit participation in the ML application process to people with private interests)
  ○ enhanced forms of participation in the EA application process, with a focus on early and ongoing engagement and co-design of consultation plans with First Nations communities. Potential options include advisory panels (including expert advisory panels), community reference groups and public hearings
• tailor opportunities and processes for participation for individual projects (a threshold test or risk-based model may be introduced to determine the appropriate pathway), with all projects open to some form of community participation
• remove the Land Court objections hearing before the final decisions

- introduce merits review by a court of the final Government decision on the EA application
- introduce measures to remove barriers and support access to justice for priority and impacted groups, including First Nations communities (including by community members other than recognised Native Title parties), as well as specific First Nations participation rights and processes

Modernise notification and information-sharing processes for mining projects:

- modernise notification requirements under MLs and associated EAs
- establish a live online portal
- require information sessions to be convened for projects that meet a designated threshold

Improve the quality, timeliness and efficiency of decision-making:

- remove unnecessary duplication from the statutory criteria for decisions about MLs and associated EAs, demarcating public and private interests
- introduce measures to promote the provision of complete, independent, contemporaneous information to Government decision-makers to inform their final decisions on MLs and associated EAs (including through increased engagement with relevant stakeholders)
- designate the Minister for the Environment, rather than the chief executive of the Department of Environment, Science and Innovation, as the decision-maker for EA applications
- impose a time limit for decisions by the Minister on the EA
- where an application for review of the EA application is made, suspend the power of the Minister for Resources and Critical Minerals to decide the ML application until the review of the decision on the EA is finally determined.

Change how the merits of mining projects are independently assessed:

- streamline and clarify court processes
- remove the Land Court mining objections hearing prior to the final decisions on MLs and associated EAs
- introduce merits review by a court of the final Government decision on the EA, requiring the merits review to be determined on the same material that was before the Minister

Ensure judicial review is available to support good decision-making in matters involving public interest considerations but is streamlined to minimise cost and delay and to maximise efficiency and fairness:

- streamline and clarify court processes
- extend standing for judicial review on EA applications, through either:
    - an expanded model that clarifies what groups of persons will have standing or
    - an open model that allows any person to institute proceedings.
- introduce costs protection provisions into the EP Act and MR Act for matters brought on public interest grounds
- vest responsibility in a Court or Tribunal with jurisdiction to conduct merits and judicial reviews, to case manage matters, streamline procedures, have discretion to award costs and reduce fragmented challenges to decision

Ensure our recommended process interacts as efficiently and effectively as possible with decisions

made under other relevant Acts:

- We recognise the importance of improving the interactions between the process for deciding contested applications for MLs and associated EAs and processes established under other state and federal legislation
- These interactions will be considered further once key reform options have been settled

Alternative reform options (not covered in the above options)

- Retain the current sequence of the process, with targeted reforms to specific elements
- Allow MLs to be granted before, and independently of, EAs (note that this will require consideration of whether an additional authority is required)
- Limit the basis of third party standing to challenge the ML (as distinct from reforming the statutory criteria to designate specific grounds for standing)

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1 Under Chapter 6 of the *Mineral Resources Act 1989* (Qld).
2 Under Chapter 5 of the *Environmental Protection Act 1994* (Qld).
3 *Mineral Resources Act 1989* (Qld) s 260.
4 *Environmental Protection Act 1994* (Qld) ss 54, 160, 182.
5 *Environmental Protection Act 1994* (Qld) ss 184, 185, 188 – 192; *Mineral Resources Act 1989* (Qld) ss 265, 269.
6 *Land Court Act 2000* (Qld) s 52C. See also Land Court of Queensland, 'Practice Direction No 6 of 2017: Costs in recommendatory matters', 28 August 2017.
7 See *Judicial Review Act 1991* (Qld).